

65977-4

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NO. 65977-4-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

MARCIAL TENORIO-RAMOS,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable David R. Needy, Judge

RESPONDENT’S BRIEF

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

By: ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Office Identification #91059

Courthouse Annex
605 South Third
Mount Vernon, WA 98273
Ph: (360) 336-9460

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I. SUMMARY OF ARGUMENT

Marcial Tenorio was convicted by a jury of committing Child Molestation in the Second Degree by rubbing his penis up and down against the leg of his daughter while they were in bed.

Tenorio claims that the trial court erred in holding that there was insufficient connection between an alleged threat made by his ex-wife to admit the threat. Since the trial court had reserved ruling pending the testimony of the children and the defense never sought a final ruling, the issue was not preserved for review. In addition, the trial court would not have abused its discretion given the lack of connection between the threat and the allegations.

Tenorio also claims the trial court erred in ruling that a statement by the ex-wife that Tenorio was a child molestor was inadmissible because it was offered for the effect on the daughter and there was no evidence the daughter heard the statement. This was not an abuse of discretion.

Finally, Tenorio claims there was insufficient evidence of sexual gratification for child molestation. However, his daughter had testified she had felt his male organ moving up and down against her leg for a period of time. This was sufficient evidence to support a jury finding sexual gratification.

II. ISSUES

1. Where a trial court expresses a tentative ruling and then indicated it would reserve ruling pending hearing witnesses and defense counsel did not seek a ruling after the testimony, was the ruling preserved for appellate review?

2. Where a trial court held there was nothing connecting disclosure by child victim to an alleged threat was made by the mother, did the trial court abuse its discretion by suppressing the alleged threat?

3. Where there was no evidence a child had heard a statement from her mother about the defendant being a child molester, did the trial court abuse its discretion in denying admission for the effect on the child?

4. If there were errors by the trial court's rulings on motions in limine, are they harmless beyond a reasonable doubt?

5. Where a nine-year-old child testified that her father had gotten into bed and placed his male organ against the leg of a child and felt it moving up and down against her leg, was there sufficient evidence for a rational trier of fact to find child molestation?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On October 15, 2009, Marcial Tenorio-Ramos was charged with offenses against his children of Child Molestation in the First Degree and Second Degree in counts 1 and 2 of E.A.T. and Child Molestation in the Second Degree in count 3 of J.B.T. CP 1-2.

On October 15, 2009, the State filed an Amended Information correcting the charge as to J.B.T. to the initials J.G.T. and adding a count of Child Molestation in the Second Degree of M.R. CP 3-4.

On July 23, 2010, the State amended the information to specify two separate counts of Child Molestation in the First Degree against E.A.T.¹, his son, in counts 1 and 2, Child Molestation in the First Degree against J.G.T, his daughter, in count 3 and Child Molestation in the Second Degree against M.R., another daughter, in count 4. CP 25-7. Tenorio was tried on these counts.

On July 14, 2010, the trial court conducted a child hearsay hearing. 7/14/10 RP 3-107.²

¹ Given that the case involves minor child sexual offense victims, the State will refer to E.A.T. as S. and M.R.T. as R. consistent with the names they use. 7/27/10 RP 103, 121. J.G.T. will be referred to as J. during the course of this brief.

² The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

On July 26, 2010, the case proceeded to trial. 7/26/10 RP 1, 3. At the close of the State's evidence, the defense moved to dismiss counts 1 and 2 regarding Tenorio's son and count 4 regarding his daughter R. 7/28/10 RP 208-9.³ The trial court denied the motion as to the counts regarding the son. 7/28/10 RP 215-6. But the court dismissed count 4 involving R. finding that there was insufficient evidence that there had been sexual gratification when the father had hugged her and apparently placed his erection against her. 7/28/10 RP 216, 219. The trial court determined that since there wasn't testimony about the period of time, there was not evidence supporting that it was for sexual gratification. 7/28/10 RP 219.

On July 29, 2010, the jury returned a verdict finding Tenorio-Ramos guilty of Child Molestation in the First Degree as charged in Count 3. CP 92. The jury found him not guilty of Child Molestation in the First Degree in counts 1 and 2. CP 90, 91.

5/13/10 RP	Continuance Motion
7/14/10 RP	Motions in Limine (including child hearsay hearing)
7/22/10 RP	Trial Confirmation
7/26/10 RP	Trial – Day 1 Jury Selection and Motions (Volume 1)
7/27/10 RP	Trial – Day 1 Testimony (Volume 1)
7/28/10 RP	Trial – Day 2 Testimony (Volume 2)
7/29/10 RP	Trial – Day 3 Jury Instructions & Closing Argument (Volume 2)
9/1/10 RP	Sentencing.

³ Contary to the assertion in Appellant's Opening Brief at page 32, Tenorio had not sought to dismiss the count pertaining to R before the trial court.

On September 1, 2010, Tenorio-Ramos was sentenced by the trial court to 51 months in prison to the statutory maximum pursuant to RCW 9.94A.507. CP 98, 9/1/10 RP 29.

On September 1, 2010, Tenio-Ramos timely filed a notice of appeal. CP 111.

On September 1, 2010, the State filed a notice of cross-appeal of the trial court's dismissal of count 4. CP 112. After review of the transcripts, the State has withdrawn the cross-appeal.⁴

2. Statement of Facts

i. Court's rulings on motions in limine:

Prior to testimony commencing, the State moved to exclude an allegation by Tenioro that his ex-wife had made a threat towards him. 7/26/10 RP 4. The State pointed out that there was no evidence connecting the alleged threat and the disclosures by the children or that supported the argument the mother had told, asked or coerced the children into making the allegation. 7/26/10 RP 4-5. The State also asserted that there was no threat

⁴ The State had intended to argue that the trial court had failed to weigh the evidence supporting sexual gratification. See State v. McPhee, 156 Wn. App 44, 65-6, 230 P.3d 284 (2010). However, a careful review of the record shows that the trial court did actually find that given the lack of evidence to establish sexual gratification since there was no evidence beyond the daughter feeling her father's penis against her leg and no evidence about duration of the contact. 7/28/10 RP 219-20.

made as Tenorio alleged. 7/26/10 RP 4. The State had a police officer as a rebuttal witness who would have established that there was no threat made at the time alleged by Tenorio. 7/26/10 RP 6-7. The officer had been present because there had been miscommunication in the pick up of the kids after which Tenorio had involved police because his son's hand had been slapped and cut. 7/26/10 RP 9.

Defense counsel asserted that the threat was made on Friday and the allegations arose after the visitation for the weekend. 7/26/10 RP 7-8. The threat was "something along the lines of: You will pay for this. I will hurt you in a way that you will - - that you won't be able to recover, something like that." 7/26/10 RP 8. It was communicated in Spanish and defense counsel did not have the exact quote from the client. 7/26/10 RP 8. From the transcript apparently counsel then asked the client and counsel then stated: "is that I'm gonna make you pay for this." 7/26/10 RP 8.

The trial court questioned defense if any of the children had said whether the mother or aunt had put the idea in their head to point the finger at Tenorio. 7/26/10 RP 11. Defense counsel acknowledged there was no such evidence. 7/26/10 RP 11-2. The trial court indicated that if defense counsel could "establish a nexus" between the disclosures by the kids and

the alleged threat, it would become relevant. 7/26/10 RP 12-3. The trial court indicated

So Ms. Riquelme can certainly inquire of the kids on cross-examination whether or not they were prompted or told what to say or instructed to do something or not do something by a mother, an aunt, or another relative.

And if it becomes, I guess for lack of a better word, suspicious that that occurred, then maybe this little scenario about Friday night and the alleged threat would become relevant. Without that, they're probably isn't a nexus. So we'll reserve on that and see what happens when the kids are questioned.

7/26/10 RP 13. The trial court also said "Just some evidence, some indecision, some adult prompted these kids to say something as far as the story. Then I think it would probably dovetail into --." Defense counsel never asked the children if they had been prompted or sought determination on the court's ruling which was reserved.

Prior to Tenioro's oldest daughter, R., testifying, the State moved to exclude statements by Tenorio's ex-wife made which were not established to have been heard by the youngest daughter, J. 7/28/10 RP 95. Defense counsel asserted that the statement she was offering was that Cuevas had told J. that her dad is a child molester. 7/28/10 RP 99.⁵ The judge questioned

⁵ A review of the transcript of the two interviews of R.T. revealed that R.T. gave conflicting statements. In the first statement to the child interview specialist, R.T. had told J. that her father was a child molester. However, in the second interview by defense counsel shortly

defense counsel whether J. would say she had heard the statements. 7/28/10 RP 100.

The trial court granted the motion finding that since there was nothing showing that J. had overheard the statements and the purpose sought was to show the effect on J., there was insufficient connection to admit the statements. 7/28/10 RP 102

ii. Summary of trial testimony

Gabriela Cuevas testified. 7/27/10 RP 26-48. Cuevas had three children with Marial Tenorio two whom she had been married for ten years. 7/27/10 RP 26-7. They divorced in 2005. 7/27/10 RP 28. Cuevas testified that he oldest was a daughter, R. with a date of birth of February 18, 1993. 7/27/10 RP 27. The middle child was a son, S., with a date of birth of July 9, 1997. 7/27/10 RP 27. The youngest was a daughter, J. with a date of birth of March 13, 2001. 7/27/10 RP 27. Cuevas had primary custody and Tenorio had visitation every other weekend. 7/27/10 RP 28-9. The last visitaiton was in the fall of 2009. 7/27/10 RP 29. S. and J. went to that visitation. 7/27/10 RP 29.

before trial she did not remember her mother telling J. that her father was a child molester. It is unknown how R.T. would have testified at trial.

Upon returning from the visitation, Cuevas noticed that her eight year old daughter J. was dressed nicely in a dress, but was acting quiet and looking down. 7/27/10 RP 30. Cuevas asked J. if anything was bothering her, if her father had done anything to her or touched her in her private area. 7/27/10 RP 31, 40, 44. J. said no, but her eyes were big and watery. 7/27/10 RP 31. Cuevas called for her oldest daughter, R. and had a conversation with her. 7/27/10 RP 32. J.'s eyes started to water and she was shaking her head and wouldn't make eye contact with Cuevas. 7/27/10 RP 33. Cuevas had the girls go to bed thinking that J. had a bad day or had misbehaved and didn't want to tell. 7/27/10 RP 33.

The next day Cuevas's sister, Sylvia, came over and talked to the children after school. 7/27/10 RP 34-5. Sylvia told Cuevas what the children were saying and Cuevas was in shock. 7/27/10 RP 36. Cuevas asked her son S. if what was said was true. 7/27/10 RP 36. Beyond that, Cuevas did not question the children. 7/27/10 RP 36-7. Cuevas heard Sylvia talk about a case where a pastor had inappropriately touched young kids and that the pastor had carried a brush in his pocket. 7/27/10 RP 46-7. When the pastor bounced the kids on his lap and they would say there's something there, he would pull out a brush and show them. 7/27/10 RP 47.

Sylvia was explaining to the children that if they every feel anything like that, it is not okay, and it is a male organ. 7/27/10 RP 47-8.

Cuevas called the school counselor, Ann Eilers. 7/27/10 RP 37-8. Cuevas passed the phone to Sylvia who talked to Eilers. 7/27/10 RP 38-9. Cuevas was aware that an incident had happened when Tenorio was inappropriate with her oldest daughter, R., when she was in 7th or 8th grade. 7/27/10 RP 39. After that visitation was reduced. 7/27/10 RP 39.

Sylvia Cuevas testified. 7/27/10 RP 57-75. Sylvia was spending a fair amount of time with her sister in September of 2009. 7/27/10 RP 58-9. Cuevas's daughter, J., made a disclosure to Sylvia in September, 2009. 7/27/10 RP 59. Sylvia was talking to Cuevas's children J. and S. about how things were going. 7/27/10 RP 60. S. told Sylvia he couldn't sleep and went into some details that led Sylvia to believe there had been something inappropriate. 7/27/10 RP 60, 68. Sylvia had a close relationship with S. and J. 7/27/10 RP 68. Based upon what was said, Sylvia had red flags raised, and took a wooden spoon and had conversation with the children comparing it to a male organ. 7/27/10 RP 63-4. Sylvia asked J. about kicking in bed and found out that J. had to sleep in the middle and that they shared the same blanket. 7/27/10 RP 64. J. freaked out when Sylvia was talking and Sylvia asked J. to let her know if she ever felt that. 7/27/10 RP

65. J. told Sylvia that she had felt that. 7/27/10 RP 65. Sylvia also said that she told the children to tell if they were touched in the bikini area. 7/27/10 RP 66. Sylvia had also told them about a pastor who would play horse with a hairbrush in his private area. 7/27/10 RP 66.

J. told Sylvia that she had been touched by her father. 7/27/10 RP 67, 76. Sylvia told Cuevas. 7/27/10 RP 67. Sylvia asked S. why he hadn't been protecting his sister, and he said because he was afraid his dad would hit him with the belt. 7/27/10 RP 74.

Ben Hagglund, a detective with the Skagit County Sheriff's Office, testified. 7/27/10 RP 76-102. Hagglund was assigned to investigate the case on October 2, 2009. 7/27/10 RP 77. Hagglund spoke to Gabriella Cuevas, Sylvia Cuevas and Ann Eilers and set up interviews of the children with specialist Nicol Flacco. 7/27/10 RP 78. Hagglund was present for interviews of all three children. 7/27/10 RP 79. After the interviews on October 12, 2009, Hagglund contacted Marcial Tenorio at his home on Prairie Road near Sedro Woolley and placed him under arrest. 7/27/10 RP 80-1. Tenorio's date of birth was established by his driver's license. 7/27/10 RP 81. Hagglund served a search warrant on the residence on October 22, 2009, taking photographs which were admitted and described. 7/27/10 RP 82-90.

R. testified. 7/27/10 RP 103-113. R.'s full initials are M.R. but she uses her middle name. 7/27/10 RP 103. R. testified that her date of birth is January 28, 1993. 7/27/10 RP 103. R. testified that her parents are divorced and she used to visit her father every other weekend. 7/27/10 RP 105. When visiting her father, they all slept in the same bed together, except that sometimes, her father and brother would sleep on the floor. 7/27/10 RP 106.

R. testified that when visiting her father while she was in middle school, there was an occasion when she and her brother were playing video games while on the bed and her father came out of the shower in his pajamas. 7/27/10 RP 108. Tenorio laid down beside her and had given her a hug and felt her father's hardish penis against the back of her leg. 7/27/10 RP 108-9, 112. R. felt uncomfortable so she got up and sat on the floor by her brother. 7/27/10 RP 108-9. R. was embarrassed to go back. 7/27/10 RP 110. R. said she talked to her mother and brother about it the weekend after it happened. 7/27/10 RP 113.

Shea Hopfauf, a CPS social worker, testified about the intake of the case. 7/27/10 RP 114-117. Hopfauf spoke with Marcial Tenorio on October 6, 2006, regarding an allegation of inappropriate contact between Tenorio and R.. 7/27/10 RP 116.

S. testified. 7/27/10 RP 121-148. His date of birth is July 9, 1997. 7/27/10 RP 121. S. testified that he visited his father every other week after his parents divorced. 7/27/10 RP 123. S. testified that he, his two sisters and his father would sleep in the same bed together. 7/27/10 RP 123-4. S. said that sometimes when his sister R. slept at the house, he would sleep on the floor with Tenorio because there was not enough room on the bed for all four. 7/27/10 RP 138-9. S. testified that his sister J. would always sleep in the middle. 7/27/10 RP 124. Once when S. tried to switch with J. and sleep in the middle, his father got mad at him and tried to spank him. 7/27/10 RP 126. S. testified that sometimes when the when he was sleeping in bed with J., the bed would shake. 7/27/10 RP 135. J. would ask his dad why the bed was moving and Tenorio would say it was because of J. 7/27/10 RP 136.

S. also testified that about two or three years earlier, his father had touched him in his private area, while S. had been watching television. 7/27/10 RP 127-9. S. was clothed and Tenorio had touched him on top of the clothing. 7/27/10 RP 130. Tenorio had left his hand on S. for about ten seconds. 7/27/10 RP 130.

S. said that his father had touched him a second time in the bedroom while S. was lying in the middle of the bed watching television. 7/27/10 RP 132-4. Tenorio had placed his hand on S.'s private area over the clothing.

7/27/10 RP 134. S. did not tell anyone right away. 7/27/10 RP 135. The first person he told was his aunt Sylvia. 7/27/10 RP 135.

Ann Eilers, a school counselor at Central Elementary, testified about knowing J. 7/27/10 RP 149-156. Eilers had received a call on Monday from J.'s mother about something inappropriate with J.T's father over the weekend of September 26th. 7/27/10 RP 150. Eilers interviewed J. on Tuesday, October 1st. 7/27/10 RP 151. Eilers' job was to find out if something had occurred that needed to be reported to CPS. 7/27/10 RP 151. J. gave a narrative statement about what happened. 7/27/10 RP 152. J. told Eilers that S. didn't want to sleep in the middle of the bed, so she moved to the outside. 7/27/10 RP 152. S. said her father told her she had to sleep in the middle of the bed. 7/27/10 RP 152. During the night, J. felt her father touch her between her private parts between her legs and then started moving against her and it felt like a spoon handle against her. 7/27/10 RP 152-3. J. said her father was moving a lot. 7/27/10 RP 153. Eilers noted that J. who was normally a very bubbly cheerful child was sad and came in with her head stooped and hands folded. 7/27/10 RP 155-6.

J., Tenorio's youngest daughter, testified. 7/28/10 RP 168-192. J. was nine years old at the time of trial. 7/28/10 RP 168. Her birthday is March 13, 2001. 7/28/10 RP 168. J. testified that she used to visit her dads

on the weekends at his trailer. 7/28/10 RP 171-1. Her brother and her father would sleep in the bed together when she visited. 7/28/10 RP 174. J. would sleep in the middle with her brother on one side and her father on the other. 7/28/10 RP 174. J. normally slept lying on her back with her father's arm kind of like a pillow. 7/28/10 RP 188. Her father normally slept in pajamas or his boxers. 7/28/10 RP 188. When her sister R. slept over, J.'s father and brother would sleep on the floor. 7/28/10 RP 174. One time when J. wanted to switch places, her father got made and pulled down the belt, so they switched spots back again. 7/28/10 RP 175.

J. said she was aware she was there to testify about her father touching her in spots he was not supposed to. 7/28/10 RP 175. J. was sleeping at his house in bed with S. when she felt that she was touched by her father's private part like the wooden spoon. 7/28/10 RP 176. J. felt it on her upper leg. 7/28/10 RP 177. J. had been sleeping on her back and her father was turned to her facing her. 7/28/10 RP 177. Her brother was turned away facing the wall. 7/28/10 RP 177-8. J. felt the private part moving up and down against her leg. 7/28/10 RP 178. J. remembered her father turning away from her. 7/28/10 RP 179. J. knew that boys and girls had different parts. 7/28/10 RP 179-80.

J. returned home and remembered talking to her mother. 7/28/10 RP 181. Her mother asked her some questions including about her father. 7/28/10 RP 181. J. said her mother asked her if her father had ever touched her and J. said she didn't remember. 7/28/10 RP 182. J. went to bed shortly afterwards. 7/28/10 RP 182. J. talked with her Aunt Sylvia to whom she was close. 7/28/10 RP 182, 186. Sylvia asked J. if her father had touched her. 7/28/10 RP 182-3. At first, J. didn't tell Sylvia because she was scared about what would happen to her father. 7/28/10 RP 183. J. told Sylvia what had happened because "it was hard to keep it in." 7/28/10 RP 183. Sylvia had asked questions and showed her a wooden spoon to show what a man's body part felt like. 7/28/10 RP 183-4. Before that, J. didn't know what a man's body part would feel like. 7/28/10 RP 183-4. When J. saw Sylvia with the spoon, J. thought it was the same thing she had felt. 7/28/10 RP 184. J. did not recall Sylvia touching her with the spoon. 7/28/10 RP 191. J. recalled telling her mother, her sister, her grandmother, a child interview specialist and possibly a school counselor. 7/28/10 RP 184-5.

Nicol Flacco, a child interview specialist with Skagit County, testified. 7/28/10 RP 193-208. Flacco testified about her training and experience as a child interview specialist. 7/28/10 RP 194-5. Flacco testified that she asked questions in a way that wouldn't influence how they would

say what occurred. 7/28/10 RP 195, 204. Flacco was aware that studies showed that three and four year old preschoolers were most suggestible and five and six year olds were less suggestible. 7/28/10 RP 207.

Flacco conducted an interview of J. on October 8, 2009. 7/28/10 RP 196. Flacco went through the process of establishing that J. knew the difference between the truth and a lie. 7/28/10 RP 197-9.

Flacco then asked J. why she was there and J. said because her father had touched her. 7/28/10 RP 199. Flacco described that J. began by talking about an incident where her brother had asked why the bed was shaking and Tenorio had said that S. was the one doing it. 7/28/10 RP 199-200.

J. went on to describe that her father had touched her private part and what felt like a hard stick on her private. 7/28/10 RP 201. J. described that her private is where she goes pee. 7/28/10 RP 201. J. didn't know how it stopped but the next thing that happened was her father turned around in bed. 7/28/10 RP 201. S. had been on one side of the bed facing the wall and J.T was in between S. and her father. 7/28/10 RP 201. Flacco asked J. if anyone had told her to tell her that and J. said no one had. 7/28/10 RP 202.

Tenorio recalled Flacco to testify that S. was able to tell her the television shows he had been watching on the two occasions he had been touched. 7/28/10 RP 223.

Marcial Tenorio testified on his behalf. 7/28/10 RP 225-240. Tenorio acknowledged that the three children in the charged offenses were his children. 7/28/10 RP 226. Tenorio testified to their ages and that he was forty years old. 7/28/10 RP 237-8. Tenorio saw his children on Friday through Sunday every other weekend. 7/28/10 RP 228, 238. There were only two bedrooms in the house he lived in and one bedroom was used for storage by his brother. 7/28/10 RP 229. His brother slept on the floor. 7/28/10 RP 237. When the children spent the night, they would sleep with Tenorio in the same full-size bed. 7/28/10 RP 228-9, 236. When all three children were there, his son would sleep on the floor. 7/28/10 RP 229.

Tenorio testified that on one occasion J. fell off the bed and landed on him while he slept on the floor. 7/28/10 RP 230. J. got back up to bed with her sister R. 7/28/10 RP 231.

On cross-examination, Tenorio acknowledged that R. had not come over to the house very much. 7/28/10 RP 238-9. Tenorio also said when just J. and S. slept at the house they all slept in the bed together. 7/28/10 RP 239. And, when just the three of them were at the house he had his daughter, J. sleep in the middle. 7/28/10 RP 239. Tenorio denied ever having an erection while in bed with J. 7/28/10 RP 240.

Brandi Bowers an investigator with the Skagit County Public Defender's office testified. 7/28/10 RP 243-8. Bowers testified about statements made by Sylvia Cuevas during a defense interview prior to trial. 7/28/10 RP 244. Bowers testified that during a defense interview, Sylvia Cuevas had stated that she had compared the feeling of the dad's organ to the feeling of a wooden spoon. 7/28/10 RP 245. The prosecutor and defense brought out that the terms "man's organ" and "dad's organ" had been used during the interview. 7/28/10 RP 246-8.

IV. ARGUMENT

1. Where the trial court had reserved ruling pending testimony and no ruling was sought after testimony, the tentative ruling was not preserved for appellate review.

Tenorio claims that the trial court erred in ruling that the defense could not admit alleged threats made from the mother of the victims. Although the trial court had initially indicated how it would rule, the trial court had specifically indicated it would reserve ruling until the court heard from the children. The trial court indicated:

So Ms. Riquelme can certainly inquire of the kids on cross-examination whether or not they were prompted or told what to say or instructed to do something or not do something by a mother, an aunt, or another relative.

And if it becomes, I guess for lack of a better word, suspicious that that occurred, then maybe this little scenario about Friday night and the alleged threat would become

relevant. Without that, they're probably isn't a nexus. So we'll reserve on that and see what happens when the kids are questioned.

7/26/10 RP 13. The trial court also said “Just some evidence, some indecision, some adult prompted these kids to say something as far as the store. Then I think it would probably dovetail into –.” Defense counsel never asked the children if they had been prompted or sought determination on the ruling the court reserved.

A defendant who does not seek a final ruling on a motion in limine after a court issues a tentative ruling waives any objection to the exclusion of the evidence. State v. Carlson, 61 Wn. App. 865, 875, 812 P.2d 536 (1991).⁶

State v. Riker, 123 Wn. 2d 351, 369, 869 P.2d 43 (1994) (after an offer of proof was made, defense did not call a proposed witness and defense did not request a final ruling on admissibility of testimony the objection to exclusion was waived).

Tenorio did not note that the trial court’s ruling was tentative because the trial court indicated it was reserved. Instead, Tenorio ignores the failure to have a final ruling that allows him to raise the claim on appeal. It is possible that he chose not to pursue the issue because of the nature of the

⁶ State v. Carlson, 61 Wn. App. 865, 875, 812 P.2d 536 (1991), *review denied*, 120 Wn.2d 1022, 844 P.2d 1017 (1993).

evidence being simply his own testimony which was apparently going to be contradicted by both his ex-wife and an officer. Or he may have chosen not to assert that evidence because it was too speculative, especially since one of the allegations of his children had occurred years prior to the date of the alleged threat. Regardless of the reason or possible oversight, defense never sought a final ruling which would have preserved the issue for appeal.

2. The trial court did not abuse its discretion in tentatively ruling that there was insufficient evidence connecting an alleged threat to the disclosures by the children.

A decision involving the admission of evidence lies within the sound discretion of the trial court and will not be reversed unless abuse of discretion can be shown. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)

The cross-examination of a witness to elicit facts which tend to show bias, prejudice or interest is generally a matter of right, but the scope or extent of such cross-examination is within the discretion of the trial court. State v. Robbins, 35 Wn.2d 389, 213 P.2d 310 (1950); State v. Wills, 3 Wash.App. 643, 476 P.2d 711 (1970); 5 R. Meisenholder, Washington Practice ss 264, 265, 299 (1965); see also ER 607, 611(b). **A trial court may, in its discretion, reject cross-examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative.** State v. Jones, supra; State v. Knapp, 14 Wn. App. 101, 540 P.2d 898 (1975).

State v. Roberts, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980) (emphasis added).

The right to cross-examine adverse witnesses is not absolute. Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). A trial court may, in its discretion, reject cross-examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative. State v. Knapp, 14 Wn. App. 101, 107-08, 540 P.2d 898 (1975); *see also* State v. Roberts, 25 Wn. App. 830, 611 P.2d 1297 (1980). We review a trial court's limitation of cross examination for manifest abuse of discretion. State v. Campbell, 103 Wn.2d 1, 20, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985). We find no such abuse here.

State v. Classen, 143 Wn. App. 45, 58-9, 176 P.3d 582 (2008) (finding no abuse of discretion for denial of defense proposed cross-examination of a State's rebuttal expert that second degree murder was the more appropriate charge, rather than first degree murder).

Discretion is abused if it is exercised on untenable grounds or for untenable reasons. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

In the present case, the defense sought to admit the alleged threat by the mother of the victims in order to show that the children had been encouraged to make the allegations. The prosecutor contended the alleged threat was being offered to show that the mother had told, asked or coerced

the children into making the allegations. 7/26/10 RP 4-5. Defense counsel did not contradict that, contending the alleged threat was “relevant because this is something, this is a chain of events that lead up to these disclosures.” 7/26/10 RP 7. Defense counsel asserted that the threat was made on Friday and the allegations arose after the visitation for the weekend. 7/26/10 RP 7-8. Defense counsel said the threat was “something along the lines of: You will pay for this. I will hurt you in a way that you will - - that you won’t be able to recover, something like that.” 7/26/10 RP 8. Defense counsel then stated they did not have the exact quote from the client. 7/26/10 RP 8. From the transcript apparently counsel then asked the client and counsel then stated: “is that I’m gonna make you pay for this.” 7/26/10 RP 8.

The trial court did not abuse its discretion since there was only speculation that there was this connection. The trial court questioned defense if any of the children had said whether the mother or aunt had put the idea in their head to point the finger at Tenorio. 7/26/10 RP 11. Defense counsel acknowledged there was no such evidence. 7/26/10 RP 11-2. The trial court indicated that if defense counsel could “establish a nexus” between the disclosures by the kids and the alleged threat, it would become relevant. 7/26/10 RP 12-3. The trial court indicated:

So Ms. Riquelme can certainly inquire of the kids on cross-examination whether or not they were prompted or told

what to say or instructed to do something or not do something by a mother, an aunt, or another relative.

7/26/10 RP 13.

Tenorio states that the trial court failed to consider that Cueva's credibility was important. But Tenorio's trial counsel never asserted that was the purpose of the admission of the threat. Tenorio argues on appeal, that the purpose of the admission of the alleged threat would have been to attack the credibility of his ex-wife and suggest that she had "the effect of repeatedly coaching J.[] to accuse her father of improper touching." Appellant's Opening Brief at page 24. The State contends that the allegation of repeated coaching is an over-statement of the fact that Cuevas had asked J. some questions based upon the way she was acting. 7/27/10 RP 30-3. She had even thought that when J. went to bed that J. had been misbehaving. 7/27/10 RP 33.

Given the speculative nature of the alleged threat, the trial court did not abuse its discretion in tentatively denying admission of the alleged threat.

As opposed to the speculative nature of the alleged threat made here, State v. Roberts, 25 Wn. App. 830, 611 P.2d 1297 (1980), relied upon by Tenorio involved a case where parental discipline of a child victim had been excluded. After the child witness had failed to appear at an interview at the prosecutor's office a few days prior to trial, the child had been disciplined by

the parents for doing so and admitted that during the subsequent interview. State v. Roberts, 25 Wn. App. at 833, 611 P.2d 1297 (1980). The trial court excluded the evidence of the discipline. The appellate court held that the child victim's credibility was key noting that she had given three significant statements to law enforcement that were untrue.

We conclude that the failure to permit the defendant to pursue a theory that Ms. A's testimony was motivated by compulsion to cooperate with the prosecutor constitutes a denial of the defendant's right to effective cross-examination.

State v. Roberts, 25 Wn. App. 830, 836, 611 P.2d 1297 (1980) (citations omitted).

As opposed to the situation in Roberts, the alleged impeaching evidence was not of the victim, but rather of her parent. As the trial court noted, there was insufficient "nexus" showing that the children had given statements because of the motives of the mother evidenced by threats. The present case differs distinctly from Roberts.

- 3. The trial court did not abuse its discretion where evidence was sought to be admitted for the effect on the child, but the child was not established to have heard the statement.**

The same standard of abuse of discretion noted in the previous argument section applies in this subsection.

The trial court did not abuse its discretion in denying admission of the statement made by Cuevas offered as evidence as to the state of mind of J., when there was no evidence that J. ever heard the statement.⁷

The State moved to exclude statements by Cuevas made to R. which were not established to have been heard by J. 7/27/10 RP 95. Tenorio had already asked Cuevas during cross-examination if she had told J. that her father was a child molester. 7/27/10 RP 43. She denied saying that. 7/27/10 RP 43. Defense counsel asserted that contrary to the State's assertion that the statement she was offering was that Cuevas had told J. that her dad is a child molester. 7/27/10 RP 99. The judge questioned defense counsel whether J. would say she had heard the statement. 7/27/10 RP 100. Tenorio did not assert that J. would say she recalled the statement. The trial court granted the motion finding that since there was nothing showing that J. had heard the statements ruling: "There has got to be connective tissue there, and the connective tissue is J.[] heard the statements. You can ask her about that." 7/27/10 RP 102.

As stated in Tenorio's brief, the purpose of the evidence was for the effect on J. to influence her that her father was a child molester. Appellant's

⁷ The statement by Cuevas that Tenorio was a child molestor would not have been relevant as to R.T. since the statement was referencing to the fact of the allegation made by R.T. in 2006.

Opening Brief at page 30. The State agrees that had there been evidence that the child had heard the statement it would have been marginally relevant to establish that the mother was trying to effect the child. See State v. Smith, 56 Wn. App. 909, 911, 786 P.2d 320 (1990)⁸ (child sex offense victim's cousin's statements to child's grandmother were not hearsay when they were offered to show how she reacted in response to the statements).

Given the lack of evidence available that J. would have heard the statements, the trial court did not abuse its discretion in denying admission of the statement.

4. If the trial court's rulings were error, they were harmless beyond a reasonable doubt.

Without conceding that the trial court committed any errors, the State contends that the evidence which was not admitted at trial was so marginally relevant any failure to admit the evidence was harmless error.

An error is harmless if we are convinced beyond a reasonable doubt that any reasonable jury would have convicted Smith, despite the error. State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995); State v. Rice, 120 Wn.2d 549, 569, 844 P.2d 416 (1993).

⁸ Abrogated by State v. Thomas, 98 Wash. App. 422, 989 P.2d 612 (1999).

State v. Smith, 130 Wn. 2d 215, 227, 922 P.2d 811 (1996) (holding that an abuse of discretion in the trial court's denial of cross-examination of an officer about his recollection about a portable breath test reading resulted in error which was harmless).

Here, the two items of evidence sought to be admitted were offered in an attempt to show that Cuevas had caused her daughter to report the incident. The alleged threat was speculative in nature and the alleged statement by the mother to J. was not recalled by J. and denied by the mother. These items of evidence had minimal evidentiary value. In contrast, J. had testified as corroborated by the child hearsay statements given shortly after the incident as to Tenorio's act of placing his male organ against her leg and moving up and down.

5. Where the daughter testified that she felt her father's organ moving up and down against her leg for a period of time, there was sufficient evidence before the jury to find child molestation.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d 201. Circumstantial evidence and direct evidence

are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

State v. McNeal, 98 Wn. App. 585, 592, 991 P.2d 649 (1999).

In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000), *rev. denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). In finding substantial evidence, we cannot rely upon guess, speculation, or conjecture. Hutton, 7 Wn. App. at 728, 502 P.2d 1037.

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). **We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.** State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *rev. denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992). **The trier of fact is free to reject even uncontested testimony as not credible as long as it does not do so arbitrarily.** State v. Tocki, 32 Wn. App. 457, 462, 648 P.2d 99, *rev. denied*, 98 Wn.2d 1004 (1982).

State v. Prestegard, 108 Wn. App. 14, 22-3, 28 P.2d 817 (2001)

Tenorio asserts on appeal that he moved to dismiss all counts. Appellant's Opening Brief at page 32. In fact, he moved to dismiss counts 1, 2 and 4, but did not move to dismiss count 3 related to J. 7/28/10 RP 208-10. The trial court granted the motion as to count 4 involving R. Since the appeal does not involve count 4, Tenorio's analysis of that count is not

relevant to the determination. In addition, this Court is not reviewing the trial court's decision regarding count 3, but instead is called upon to decide whether there was sufficient evidence for a rational trier of fact to support the conviction.

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.44.030.

Sexual contact is defined by RCW 9A.44.010(2) as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."

"Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification. However, in those cases in which the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification." State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991), *rev. denied*, 118 Wn.2d 1013, 824 P.2d 491 (1992).

Tenorio relies upon State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1992) to assert that the touch here was too fleeting to amount to child molestation. In Powell, the defendant hugged the victim around the chest while she was seated in his lap and later touched her front and bottom on her underpants under her skirt when he lifted her off of his lap. On another occasion, he touched both of her thighs on the outside of her clothing. Both times the contact was fleeting. State v. Powell, 62 Wn. App. at 918, 816 P.2d 86. The court held the evidence was insufficient to support the inference the defendant touched the victim for sexual gratification. Id. It reasoned that the evidence of the defendant's purpose in touching the victim was open to innocent explanation.

In contrast in State v. Whisenhunt, the location and manner of touching supported a different outcome.

Here, M.L. testified unequivocally that Mr. Whisenhunt touched her privates indicating her genital area, a primary erogenous zone, under her skirt but over her body suit. **Unlike in Powell, this touching was not equivocal or fleeting in the sense the purpose of the contact was not open to innocent explanation.** M.L. testified Mr. Whisenhunt, a person with no caretaking function, sat in the seat ahead of her on the school bus and reached his arm over the seat to touch her in the vaginal area. M.L. testified Mr. Whisenhunt touched her on three separate occasions. In view of these facts, Judge Tompkins could reasonably infer from evidence in this record that Mr. Whisenhunt acted for the purpose of sexual gratification. We conclude the evidence is sufficient to support a conviction.

State v. Whisenhunt, 96 Wn. App. 18, 22-24, 980 P.2d 232 (1999).

Tenorio's actions in laying against his daughter, placing his male organ against her and moving up and down was not a fleeting touch open to an innocent explanation. Thus, there was sufficient evidence to support the charge.

V. CONCLUSION

For the foregoing reasons, Tenori's appeal must be denied and his conviction affirmed

DATED this 9th day of August, 2011.

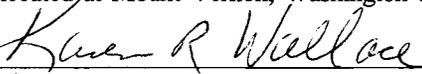
SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Richard Hansen addressed as 600 University Street, Suite 3020, Seattle, WA 98101. . I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 9th day of August, 2011.


KAREN R. WALLACE, DECLARANT