

66108-6

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NO. 66108-6-1

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

STATE OF WASHINGTON

Respondent

v.

LEWIS R. SOUTHARD,

Appellant

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. Was the defendant improperly denied discovery of the victim's counseling, DSHS, and medical records?

2. May the defendant contest admission of the victim's statements to other witnesses on the ground that they unfairly bolstered the victim's credibility for the first time on appeal?

3. When the defendant stipulated to admission of the victim's two forensic interviews after the prosecutor told the court he did not intend to offer those interviews into evidence, has the defendant invited any error regarding admission of those interviews?

4. If admission of some of the victim's out of court statements was error, was it harmless where many of the victim's out of court statements were admitted pursuant to the defendant's stipulation or were otherwise admissible as an exception to the hearsay rule or for non-hearsay purposes?

5. Has the defendant waived any issue of prosecutorial error in rebuttal closing argument when he failed to object to the argument and it was not so flagrant and ill-intentioned that an instruction could not have cured the alleged error?

6. Was it error for the prosecutor to use a puzzle analogy to discuss the relationship between circumstantial evidence and the burden of proof beyond a reasonable doubt?

7. Were certain community custody conditions not permitted by statute?

II. STATEMENT OF THE CASE

A. EVENTS WHICH LED TO THE CHARGES.

Lindsey C. has two children; M.C. born December 8, 1999 and K.S, born October 30, 2002. M.C.'s father is Justin Jury, and K.S.'s father is the defendant, Lewis Southard. M.C. was one and one-half years old when Lindsey C. met the defendant. 10 RP 65-66; 12 RP 67-68¹.

Lindsey C. and her children lived with the defendant at various locations on and off for several years. Before K.S. was born the defendant and Lindsey C. lived with Ms. C.'s parents and then the defendant's mother. The family eventually moved to Marysville. Ms. C broke up with the defendant while living there and moved in with her parents. In 2006 she reunited with the defendant. Ms. C and her children moved in with the defendant in

¹ The State adopts the defendant's numerical references to the record.

a home located in Glen Eagle. M.C. was 6 or 7 years old when they moved to that house. 12 RP 70-73.

Ms. C again left the defendant and moved with her children to her parents' home. She later reconciled with the defendant and moved back into the Glen Eagle home with him. M.C. was 7 years old at that time. 12 RP 74-75.

The family moved into the defendant's mother's home when the defendant lost his job in the summer of 2006. Ms. C and the children stayed there until February 14, 2007. At that time Ms. C and the defendant broke up again. Ms. C and the two children did not move back in again with the defendant until August of 2008. At that time Ms. C and the children moved in with the defendant into a house located in Granite Falls. 12 RP 120-121, 124-125.

In March 2009 the couple split up again. The defendant moved into a 5th-wheel trailer parked on his mother's property. MC. and K.S. visited the defendant at his trailer every Wednesday night, and K.S. visited him every other weekend. Ms. C started to see the defendant again in June 2009. Ms. C did not move back in with the defendant, but he did come to see her. 12 RP 127-127-129.

One day when M.C. was 7 and living at the Glen Eagle house she stayed home with the defendant while her mother and

sister went to the store. The defendant asked M.C. to go upstairs to get his inhaler. The defendant followed M.C. upstairs and went into his closet where he took off his clothes. He then took off M.C.'s clothes and had her lie on the bed. The defendant then touched the outside of her vagina with his hand. The defendant stopped when they heard Ms. C and K.S. return from the store. The defendant told M.C. to get dressed. He then threatened to kill her if she told anyone what happened. The defendant touched M.C. more than once like that at the Glen Eagle house. 10 RP 75-84; Ex. 11 page 15-19; Ex. 12 page 9-13.

On another occasion when they were living at the Granite Falls house M.C. went into her mother and the defendant's bedroom one morning after her mother had gone to work. The defendant was in bed but got up when M.C. went in the room. The defendant was naked. The defendant again touched M.C.'s vagina with his hand for a short period of time. When he stopped M.C. got dressed and her father picked her up for a visit. 10 RP 87-93.

The defendant touched M.C.'s vagina more than one time at the Granite Falls house. On one occasion he touched her vagina with his penis. The defendant was naked at the time. He took off M.C.'s clothes in order to touch her. The defendant stopped when

her brother called for the defendant to help him. Ex. 11, page 20-24, 30; Ex. 12, page 22-27.

After the defendant moved to the trailer on his mother's property he continued to sexually abuse M.C. during her Wednesday visits. On at least one occasion the defendant held his penis and shook it while touching the outside of M.C.'s vagina. On several occasions the defendant rubbed his penis on the outside and inside of M.C.'s vagina. He also digitally penetrated M.C. 10 RP 101-105; Ex. 12 page 29-30.

On other occasions the defendant showed M.C. sexually explicit videos depicting adults engaged in fondling and oral sex. After watching the movie the defendant directed M.C. to do the things shown in the movie. The defendant had M.C. rub his penis until he got an erection. He then had her suck on his penis. The defendant also performed oral sex on M.C. He sucked on her vagina, going inside it. The defendant had oral sex with M.C. more than one time. 10 RP 105-114; Ex. 12 page 27-38.

The last time the defendant sexually assaulted M.C. was the night before she went to a family reunion with her maternal grandparents. The defendant picked up M.C. and K.S. from their grandparents and took them out to eat. They then returned to his

trailer. When K.S. went outside to play the defendant had M.C. again suck on his private. 10 RP 115-118; Ex. 11, page 32; Ex. 12 page 39-40.

M.C. earlier told her cousin K.B. that the defendant had been sexually abusing M.C. K.B. recalled that M.C. told her that the defendant had raped her, explaining that meant someone forces a person to have sex with them. M.C. told K.B. not to tell anyone. 10 RP 53-55, 85-86.

M.C. and her sister went to a family reunion in Oregon on July 10, 2009 with her grandparents Mary and Dennis C. M.C. spent time with her cousin P.G. while she was there. At one point M.C., P.G., and several other children were talking while sitting on a trampoline. While the children were telling stories about their lives M.C. offered that the defendant had been raping her. No one pursued that subject until later when P.G. took M.C. for a walk. M.C. confirmed that the defendant had been raping her, and gave P.G. a few details about when it started and how long it had been going on for. The next day M.C. gave P.G. a few more details, revealing that he used a pornographic video while raping her. 9 RP 47-51; 10 RP 6-8; 11 RP 34, 63.

M.C. told P.G. not to tell anyone what she had told P.G. M.C. feared she would not be believed or liked by family members. She was also afraid because of the defendant's threats to kill her. P.G. ignored M.C.'s request and told her father Derwin G. what M.C. had told her. Mr. G. then asked M.C. if what P.G. said was true. M.C. confirmed that what P.G. said was true. 10 RP 9-13, 24-25.

Mr. G. then told M.C.'s grandparents. The grandparents then left the reunion early and went home. When they arrived home they told their daughter, Ms. C. what they had learned. The next morning Mr. C. and Ms. C. reported what M.C. had said to the police. 10 RP 25; 11 RP 35-38, 64-66.

After Ms. C learned about the abuse she confronted the defendant. The defendant turned white but did not respond. Ms. C demanded that he say something. The defendant then said "wow, I'm surprised that [M.C.] is coming forward with these allegations. 13 RP 51-52.

On July 24 Detective Ferreira and Detective Jensen met the defendant at the Sheriff's Office. The defendant was not in custody. He was told that he need not answer any questions and he was free to leave any time. The defendant agreed to talk to the

police. He denied having any sexual contact with M.C. However, he said on one occasion when he was coming out of the shower M.C. came into the bathroom and poked his penis. The defendant said he told M.C. that was not appropriate conduct. On a second incident M.C. complained about her private area burning and itching. The defendant looked at M.C.'s vagina and confirmed that she had a rash. The defendant said he told M.C.'s mother about the rash. Ms. C did not confirm that the defendant had ever told her that he had looked at a rash on M.C. vagina. 14 RP 52-58.

M.C. was examined by nurse practitioner Caryn Young on August 3. As part of the examination Ms. Young took a history from M.C. M.C. related that the defendant had touched her on her private under her clothes with both his hand and is private. She said he did that more than one time. 13 RP 115, 122-25.

M.C. also met with Stacy Ahrens, a social worker at a child advocacy center. M.C. told Ms. Ahrens that the first time the defendant touched her was when she was 7 and her mother and sister were at the store. M.C. said he put his hands down her pants and touched her private. M.C. said he did that many times. M.C. told Ms. Ahrens that the last time the defendant touched her private to private. 14 RP 23, 27-34.

M.C. met with forensic interview specialist Ashley Wilske on July 17, 2009. She met with Ms. Wilske again on April 19, 2010 when she made additional disclosures regarding the abuse. Ex. 6, 7, 11, 12.

B. DEFENDANT'S PRETRIAL DISCOVERY MOTIONS.

The defendant was charged with two counts of first degree child molestation and two counts of first degree child rape.² Pre-trial he made numerous motions for discovery.

1. December 2009.

The defendant filed a motion in December 2009 for discovery of M.C.'s counseling records held by the Everett Clinic or Everett Clinic Center for Behavioral Health, counseling records for M.C. held by Compass Health, and all other records from the Everett Clinic regarding M.C. 3 CP 449-450. In support of his motion he asserted M.C.'s mother, Ms. C., had reported to police that (1) M.C. had been diagnosed as "gifted bipolar" and had lied in the past, and (2) M.C. had falsely accused Ms. C. of being a drug addict and abandoning M.C. 3 CP 450-51; 1 RP 6.

² The defendant was originally charged with one count of first degree child molestation. The charges were amended three times to ultimately charge the defendant with four counts. 2 CP 356-58, 359-60, 361-62, 365-66.

Defense counsel acknowledged that he had received all of the medical and counseling reports that Ms. C. had provided to the detective. Counsel argued that Ms. C. was screening the records, and the defense should not have to rely on her judgment that all relevant records had been provided. 1 RP 6, 19. Counsel represented that Ms. C. admitted that medical records unrelated to the allegations of sexual abuse had not been provided, but was unable to state that any relevant information had been excluded from those records already provided. 1 RP 11.

The State responded that it had already provided all of M.C.'s medical and counseling records in its possession. Additionally, Ms. C. had repeatedly told defense counsel that she had provided him with all of M.C.'s relevant counseling and medical records. The State argued that any additional records were privileged, and the defendant had failed to make a showing that the records would contain anything material to the defense. 4 CP 483-484; 1 RP 15.

Judge Linda C. Krese denied the motion. The Court found that the defendant had failed to show that all relevant Everett Clinic records had been not provided. Further, it had not been shown that a diagnosis of "gifted bipolar" had been made by a qualified

therapist or that it was a recognized diagnosis. Finally, there had been no showing that there was reason to believe the records sought would contain inconsistent information already provided. 1 RP 30.

2. April 2010.

The defendant moved for discovery of “complete Counseling records, notes, psychotherapy records, psychotherapy notes at Compass Health for M.C. on April 8, 2010. Alternatively he asked for an in camera review of those records. 3 CP 401-02. The defense asserted it had made a sufficient showing that those records were material by providing the affidavit of Dr. John Yuille. Dr. Yuille had reviewed M.C.’s first forensic interview and opined that her recall of events lacked the level of detail he would expect to see if the allegations had actually occurred. 3 CP 390, 406.

The defense asserted that it was entitled to the records because they would likely contain discussions about the alleged abuse that could be compared against M.C.’s earlier statements. 3 CP 407. Counsel argued that the records were material either because they would corroborate what M.C. had already said, or would include additional details which would provide impeachment material. 2 RP 40.

Judge Kenneth L. Cowser found Dr. Yuille's declaration did not establish a likelihood or probability that the Compass Health records were going to contain anything material or relevant to the case. The judge therefore denied the motion. 2 RP 51, 3 CP 386-88.

The defendant renewed his motion for the Compass Health records on April 23, 2010. The motion was based on the assertion that the State at some point had listed personnel from Compass Health on its witness list. The defense asked the Court to either bar the State from producing any evidence from Compass Health, even if it became relevant rebuttal evidence as the trial progressed, or to require the State to cooperate with providing discovery of Compass Health records. The defense acknowledged that the State was not in possession of the Compass Health records and the privilege to keep those records confidential had not been waived. However, the defense argued the State has an obligation to make a reasonable effort to obtain a release so those records could be turned over to the defense. 2 RP 57-59.

The prosecutor confirmed the State did not have any Compass Health records. In addition the State had turned over all information in its possession to the defense except a new forensic

interview that had been conducted a few days earlier which the prosecutor had not yet received. 2 RP 62.

Judge Michael T. Downes denied the motion for an order prohibiting the State from calling a Compass Health witness under any circumstances. The judge reasoned that the State did not have the records to turn over and did not plan on calling any Compass Health witnesses. However, the court could envision that there may be a circumstance that would unexpectedly arise in which evidence from Compass Health would become relevant. 2 RP 65-67.

3. May And July 2010 Motions For DSHS Records.

On May 7, 2010 the defendant made a motion for discovery of the DSHS records related to Ms. C. and M.C. 4 CP 476-482 DSHS, represented by the Attorney General's Office, opposed the motion on the basis that the records were privileged and the defendant had failed to make an adequate showing the records were material to his defense. 4 CP 467-475. Although the Court had reservations that the defendant had made an adequate showing of materiality, it nonetheless granted an in camera review of the documents. The Court then entered an order granting discovery of some of the DSHS records, but denying the motion as

to the rest of the records. 4 CP 463-466. Included in the records was a copy of both DSHS safety plans created for Ms. C. and M.C. Ex. C.

At trial defense counsel questioned the CPS social worker about the safety plan. Counsel later alerted the court that his investigator brought to his attention that the defense had not received a copy of the safety plan. Defense counsel asked for a copy of the plan from Ms. C. as he believed she was the only one with a copy of that plan. Ms. C. confirmed that she had a copy of the safety plan but she was unable to provide that to the prosecutor or defense counsel because it was in her storage unit. The trial judge denied the motion finding under CrR 4.7(d)(2) the resulting annoyance to Ms. C. resulting from an order to retrieve the safety plans was not outweighed by any identified usefulness that plan may have had. 8 RP 21-22, 111-12. 160-61; 9 RP 10-12.

4. June And July 2010 Motions For Everett Clinic And Compass Health Records.

Prior to trial the defendant issued several subpoenas to the Everett Clinic for records involving M.C. The Everett Clinic responded by moving to quash the subpoenas or in the alternative to issue a protective order. 4 CP 458-462. On June 16 the court

held a hearing on the motion. The defendant agreed to permit Ms. C. to address the court and request the records be subject to a protective order. Ms. C. asked the court to deny the defendant's request for M.C.'s medical and counseling records on the basis that release of those records would be detrimental to M.C.'s recovery. 4 RP 66-71.

At a subsequent hearing defense counsel clarified that he sought disclosure of M.C.'s Compass Health records which he thought might be included in the Everett Clinic records which had been subpoenaed and were provided to the court under seal. Counsel asserted that he sought to ascertain what effect if any counseling had on M.C.'s new disclosures. 5 RP 4-10. The court denied the motion for an in camera review of those records, finding the defense had failed to establish either that the records sought to be reviewed would be in the Everett Clinic records, or that there was anything material to the defense in those records. 5 RP 13-14.

III. ARGUMENT

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

Prior to trial the defense sought either discovery of or an in camera review of four categories of privileged records; (1) M.C.'s Everett Clinic medical records, (2) M.C.'s Everett Clinic counseling records, (3) M.C.'s Compass Health counseling records, and (4) DSHS records from a CPS referral after M.C.'s disclosures. The defendant was provided some of M.C.'s medical, counseling, and DSHS records. The court ruled that he failed to make an adequate showing to justify either an in camera review or discovery of the other records.

The defendant argues that his access to pre-trial discovery of M.C.'s medical, counseling and DSHS records was erroneously restricted when the court denied his motion to review M.C.'s records in camera, or provide discovery of those records. His argument is based on CrR 4.7 and his constitutional right to Due Process.

CrR 4.7(a) sets out the prosecutor's obligation to provide discovery. It is limited to "materials and information within the knowledge, possession or control of members of the prosecuting

attorney's staff." CrR 4.7(a)(4). The prosecutor provided all of M.C.'s medical and counseling records within its possession. 4 CP 483. Defense counsel acknowledged that the defense had received medical and counseling records from the State. 1 RP 6-7, 11. The defense did not claim the State had not fulfilled its obligation under CrR 4.7(a).

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

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

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

Speculation that requested records may contain information that is material and favorable to the defense is not sufficient to meet this standard. State v. Diemel, 81 Wn. App. 464, 469, 914 P.2d 779, review denied, 130 Wn.2d 1008, 928 P.2d 413 (1996).

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

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

A less stringent requirement on records which are confidential would ultimately be counterproductive to the defense. A victim who is not assured that her communication with a medical or counseling professional will be confidential is not as likely to be forthcoming with her concerns to that professional, if she seeks the assistance of that professional at all. It is even less likely that a victim seeking assistance from a doctor or counselor would be willing to admit making a false allegation. In these circumstances a defendant seeking records in the hopes of discovering statements which contradict the victim's allegations would never obtain information helpful to him.

M.C.'s counseling and medical record were made confidential by statute. RCW 18.19.180 (counseling records), RCW 70.02.020 (medical records). Likewise the DSHS records involving M.C. and her family were protected by statute. RCW 74.04.070 in general protects DSHS records. Title 74 includes children's services programs of DSHS including Child Protective Services. See Ch. 74.13 , 74.14A. and 74.15 RCW. A child is considered an "applicant and recipient" of services provided under Title 74. Thus any record pertaining to an investigation is privileged.

A defendant made an insufficient showing to justify discovery of privileged records in State v. Kalakosky, 121 Wn.2d 525, 852 P.2d 1064 (1993). There the defendant was charged with a series of rapes. Pre-trial he moved for an in camera review of one of the victim's counseling records from a rape crisis center. Defense counsel filed an affidavit in support of the motion asserting that he believed such "notes may contain details which may exculpate the accused or otherwise be helpful to the defense." The Court held this was insufficient to sustain his burden to justify the need for in camera review of those records. Id. at 548-49.

Similarly this Court found the trial court acted within its discretion when it denied a motion for in camera inspection of a rape victim's counseling records in Diemel. There the victim denied having been intoxicated at the time of the rape, contrary to the defendant's version of events. The defense argued that because there was evidence the victim had been drinking after the fact she may have told her therapist something different about her drinking than she had previously stated. Additionally, the defense argued she may have told her therapist about consenting to sexual intercourse. The defense also asserted that the victim had admitted she had once been in an abusive relationship. The

defense argued this fact might explain her behavior when she was contacted by police. Defense counsel supported this last argument by stating that he had contacted a therapist who said that post-traumatic stress disorder resulting from some kinds of abuse in conjunction with alcohol abuse could have explained the victim's behavior. Diemel, 81 Wn. App. at 466. This Court agreed with the trial court that the affidavit in support of the in camera review was speculative. "A claim that privileged files might lead to other evidence or may contain information critical to the defense is not sufficient to compel a court to make an in camera inspection." Id. at 469.

In contrast, the Court found the defendant had made a "more concrete" showing that evidence relevant to his theory of the case would likely be found in a rape victim's dependency files in Gregory, 158 Wn.2d at 795 n. 15. There the defendant was charged with three rapes of R.S.. The defendant sought an in camera review of the victim's dependency files on the basis that they might contain evidence of recent prostitution, a fact that was relevant to his consent defense. At least one dependency action was active at the time R.S. was raped. The Court believed that if DSHS was aware of any recent prostitution activity it would be

documented in the dependency records. Thus an in camera review of could confirm or refute R.S.'s statement that she ceased street walking three years earlier. Thus the trial court erred when it refused to conduct an in camera review. Id. at 794-95.

Although the defendant cites some authority regarding the prosecution's discovery obligations, he does not argue that the State failed to fulfill that obligation. The only issue regarding the defendant's right to discovery then relates to whether the defendant made an adequate showing that there was information in M.C.'s medical, counseling and DSHS records that was material and favorable to the defense.

Defense counsel did not provide the trial court with any reason to believe that he had not already been provided all of the relevant Everett Clinic records. Counsel specifically told the court he could not say if the records were complete or not, other than Ms. C. stated the records not provided related to colds and seasonal flu. 1 RP 11. He could point to nothing in the records that suggested there were gaps or that the relevant records were incomplete. Instead he relied on statements Ms. C. made that M.C. had lied in the past and she had been diagnosed as "gifted bipolar". He

sought additional records to determine whether M.C. had a pattern of lying. 1 RP 7.

He did not provide any expert affidavit that M.C. had a psychological disorder, or that such a disorder would have any impact on her ability to recall and relate past events. Like the showing made in Diemel and Kalakosky the bare assertions from counsel here regarding Ms. C.'s assertions about her daughter were insufficient to establish there was anything more in the records which had not already been provided to counsel that would be material to the defense.

It is also not likely that even had there been evidence M.C. routinely lied that would be considered material so as to justify an in camera hearing. Whether evidence is material is dependent in part on whether it would be admissible or likely to lead to admissible evidence. State v. Knutson, 121 Wn.2d 766, 773, 854 P.2d 617 (1993). A party may not introduce specific instances of a witnesses conduct to attack her credibility through extrinsic evidence. ER 608(b). A party may not cross examine a witness regarding prior conduct if it relates to a matter which does not directly bear on the defendant's guilt or innocence. State v. Griswold, 98 Wn. App. 817, 831, 99 P.2d 657 (2000), abrogated on other grounds, State v.

DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003). Thus the claim from M.C.'s mother that M.C. had told lies about her mother failed to justify inquiry into other records. Whether or not M.C. lied about her mother says nothing about her lying about the defendant. M.C. lying about her mother was a collateral issue, and would not have been admissible anyway.

Likewise the defendant failed to provide the court with anything more than speculation that M.C.'s Compass Health counseling records would be material to his defense. To support his motion for those records the defendant offered Dr. John Yuille's affidavit. 3 CP 389-391. Dr. Yuille's opinion gave the court no reason to believe that there would be evidence which bore on the reliability of M.C.'s disclosures in the Compass Health records. Although he opined that questions posed by the interview specialist were suggestive he observed M.C. failed to disclose details he thought were significant. Dr. Yuille asserted this lack of detail raised questions regarding whether M.C.'s memory could have been changed by leading questions. His affidavit provides no more concrete link between what was known about M.C.'s disclosures and whether there was likely any material information in the Compass Health records. Dr. Yuille does not explain why a "lack of

detail” shows her memory was altered by so called suggestive questions posed by the interview specialist. Nor does it provide any basis to conclude suggestive questions were posed in counseling, or that M.C. said anything different in counseling than she did in any of the pre-trial interview she participated in.

The defendant also argues that he was erroneously denied access to the DSHS safety plan. However, the court did conduct an in camera review of the records provided by DSHS. After conducting that review the court did release some documents to the parties, including the safety plans counsel believed he had not been provided. 4 CP 464 ¶2, EX C.

The defendant continues to speculate that the Compass Health records and the DSHS safety plan may show that M.C. statements were influenced somehow. The safety plans did nothing more than prohibit contact between M.C. and the defendant, and limit contact between M.C.’s sister and the defendant. The defendant did not make a plausible showing that the Compass Health records contained any information material and favorable to the defense.

Not only did the defendant fail to produce any reason to believe that there was evidence material to the defense in any

records not disclosed to him, there was affirmative information that showed there was likely nothing material to the defense in those records. The court and the parties already knew why M.C. made additional disclosures nine months after her original disclosures. M.C. erroneously understood the interview specialist to say that she need not discuss things she did not want to talk about. M.C. explained that she was nervous when she first talked to the interview specialist, and did not want to discuss everything. It was only when M.C.'s mother sought to reassure her about the defense interview that M.C. stated she had not disclosed everything. 10 RP 124-25, Ex 12, page 7, 61. M.C.'s nervousness about discussing the defendant's sexual abuse of her is consistent with her prior behavior. Although she was willing to give a few details to a few select peer aged children, she was very reluctant to have any adults know about the abuse.

The defendant argues that the records would have been material if M.C. did not fully reveal all the allegations in counseling because it may reflect poorly on her credibility. BOA at 22. This argument is based on the unsupported supposition that the therapeutic counseling sessions would be conducted exactly like the forensic interviews. The defendant cannot say that M.C. would

have been “urged to reveal everything” in a counseling session. Thus, he failed to make the threshold showing of materiality to justify invasion of M.C. Compass Health records.

Many of the cases cited by the defendant to support his argument that the court should have conducted an in camera review of records do not consider the preliminary question regarding the showing a defendant must make to justify that hearing. The defendant quotes Boehme to support the argument that when weighing the defendant and victim’s competing interest the balance should favor an in camera hearing to promote the interest in seeking the truth through the adversarial process. State v. Boehme, 71 Wn.2d 621, 637, 430 P.2d 527 (1967), cert. denied, 390 U.S. 1013, 88 S.Ct. 1259, 20 L.Ed.2d 164 (1968). Boehme involved an attempt by the victim through the aid of defense counsel to assert the physician patient privilege in order to eliminate from the prosecution’s case evidence that the defendant had poisoned the victim. Boehme has nothing to do with the issue presented here.

Gregory is the only case cited by the defendant wherein the Court even considered what circumstances would justify an in camera review of confidential records. Gregory applied the

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

Finally the defendant asks this Court to review the DSHS files which the trial court did review in camera to determine whether the trial court abused its discretion in determining which documents should be disclosed and which should remain confidential. Although the defendant has not designated the exhibits which constitute the file which the court reviewed and the file of copies sent to the parties, the State has done so. The State does not object to this Court conducting that examination.

B. WHETHER M.C.'S HEARSAY STATEMENTS SHOULD HAVE BEEN EXCLUDED AT TRIAL HAS NOT BEEN PRESERVED FOR REVIEW. THE TRIAL COURT'S ADMISSION OF M.C.'S HEARSAY STATEMENTS AT THE CHILD HEARSAY HEARING WAS A PROPER EXERCISE OF DISCRETION.

During the child hearsay hearing defense counsel objected to the court considering M.C.'s hearsay statements "for the purpose of the Ryan factors." 8 RP 85. The court overruled the objection stating that absent a stipulation it believed it was necessary to hear what statements were made in order to evaluate the Ryan³ factors.

The rules of evidence need not be applied when the court makes preliminary determinations in a criminal case. ER 1101(c)(3), State v. Jones, 112 Wn.2d 488, 493, 772 P.2d 496 (1989). Whether to admit child hearsay falls within that category of hearings. RCW 9A.44.120(1). The admission of evidence at the hearing was within the trial court's discretion. State v. Sammons, 47 Wn. App. 762, 764, 737 P.2d 684 (1987). The court abuses its discretion only when its decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State v. Cunningham, 96 Wn.2d 31, 34, 633 P.2d 886 (1981) quoting State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977).

³State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984).

Ryan set out a list of nine factors for the court to consider prior to admission of a child's hearsay statement. Ryan, 103 Wn.2d at 175-76. The actual statements made by the child are relevant to several of those factors, including whether the statements were spontaneous, whether the statements contain no express assertion about a past fact, and whether cross examination could not show the declarant's lack of knowledge. The trial court did not abuse its discretion when it concluded that absent a stipulation regarding what the child said, the court needed to hear those statements.

The defendant argues that admission of the various hearsay statements made by M.C. to K.B., P.G., Derwin G., M.C.'s grandparents, nurse practitioner Caryn Young, social worker Stacy Ahrens, and the interview specialist Ashley Wilske was prejudicial error. At trial the defendant objected to admission of the hearsay statements on the basis that they were not reliable. However he did not object on the basis that repetition of her statements to the several witnesses unfairly bolstered her credibility as he does on appeal. 8 RP 162-63, 176-77. An objection to the admission of evidence on one ground does not preserve the issue for appeal on another ground if that ground could have but was not argued at

trial. State v. Ferguson, 100 Wn.2d 131, 138, 667 P.2d 68 (1983),
State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

A claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3), Kirkman, 159 Wn.2d at 926. The issue raised must not only affect a constitutional right, but the defendant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). If the defendant satisfies his burden to prove the error was manifest, then the court must address the merits of the constitutional issue. If constitutional error occurred, then the court must address whether the error was harmless. Id.

Here the defendant's argument rests not on a claim that any constitutional right was violated. Rather he argues under ER 403 the probative value of statements M.C. made to others was outweighed by the unfair prejudice resulting from bolstering the credibility of her testimony. BOA at 31. Alternatively he argues the statements were not admissible for the purpose of rebutting a charge of recent fabrication under ER 801(d)(1)(ii). BOA at 34. Whether an evidence rule has been violated is a different question

than whether his constitutional rights have been respected. California v. Green, 399 U.S. 149, 155-56, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). The Court has underscored this distinction by holding testimonial statements are regulated by the Confrontation clause, while non-testimonial statements are regulated by hearsay rules and laws. Crawford v. Washington, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The issue raised by the defendant here does not suggest a constitutional question. The Court should decline to consider it.

Even if a constitutional issue had been raised, the defendant fails to show how that alleged error was manifest. The defendant primarily argues that evidence M.C. told various people about the sexual abuse was a repetitive presentation that improperly bolstered her testimony. Where M.C. was able to testify to the facts supporting the charge he argues the purpose of the child hearsay statute was not met and the hearsay statements should not have been introduced. Under the circumstances of this case these arguments do not satisfy the requirement to show manifest error.

The defendant stipulated to admission of M.C.'s recorded interviews with the interview specialist, Ms. Wilske. 9 RP 21, 2 CP 351-352. Any claim that admission of that evidence was error

should be rejected on the basis that if it was error, it was invited. State v. Heddrick, 166 Wn.2d 898, 909, 215 P.3d 201 (2009). The doctrine of invited error applies even if the Court finds admission of M.C.'s out of court statements can be raised for the first time on appeal. Id.

The defendant asserts the invited error doctrine does not apply in this case because he stipulated to introduction of the two interviews with Ms. Wilske because the court erroneously overruled his objection to admission of the substance of all of the hearsay statements. He relies on State v. Watkins, 61 Wn. App. 552, 811 P.2d 953 (1991). In Watkins this Court held the invited error doctrine did not apply where a party introduces evidence in an effort to mitigate prejudice resulting from an adverse evidentiary ruling. Id. at 558.

Here the record does not support the defendant's assertion that he stipulated to the two interviews in an effort to mitigate the damage from an allegedly erroneous ruling. The prosecutor acknowledged in the child hearsay hearing that the second interview with Ms. Wilske occurred when M.C. was over 10 years old so it would not be admissible under the child hearsay statute. Because it was the more detailed interview the prosecutor opted to

rely on the child's testimony alone at trial. 8 RP 175. Defense counsel thereafter told the court that it wanted to introduce those statements. 8 RP 189; 9 RP 21-22. Clearly this was a tactical decision unrelated to the trial court's earlier rulings.

The statements made to Ms. Wilske were by far the most extensive and detailed hearsay statements. Ex. 6, 7, 11, 12. The remaining statements contained not much more than the assertion that the defendant had raped or molested M.C. In addition several of the statement would have been admissible on alternative theories.

The statements to Ms. Young, the nurse, could have been introduced as an exception to the hearsay rule under ER 803(a)(4) Statements are admissible when offered under the medical diagnosis exception when the proponent of the statements demonstrates (1) the declarant's motive in making the statement is to promote treatment, and (2) the medical professional reasonably relied on the statement for purposes of treatment. State v. Williams, 137 Wn. App. 736, 746, 154 P.3d 322 (2007). The rationale for this exception is that the court presumes that a medical patient has a strong motive to be truthful and accurate. State v. Perez, 137 Wn. App. 97, 106, 151 P.3d 249 (2007). Ms. Young

stated that she obtained a history from the victim because it was necessary for a treatment plan. M.C. said she came to see Ms. Young for a medical exam, "to make sure she's healthy and safe." 8 RP 83-84. Clearly M.C. understood that what she told Ms. Young would promote whatever treatment Ms. Young prescribed and Ms. Young relied on those statements for treatment purposes.

Other statements were admissible because they were relevant to explain why the witnesses acted as they did, and therefore were not hearsay. Hearsay is an out of court statement offered in evidence to prove the truth of the matter asserted. ER 801(c). "The 'matter asserted' is the matter set forth in the writing or speech on its face." In re Theders, 130 Wn. App. 422, 432, 123 P.3d 489 (2005), review denied, 156 Wn.2d 1031, 173 P.3d 7, 137 P.3d 864 (2006). P.G. and Mr. Gray's testimony was relevant to show why Mr. Gray reported that information to M.C.'s grandparents. In turn evidence that the grandparents learned about that information was relevant to show why they left the reunion early and reported the offense to the police within the day after coming home.

The only remaining testimony regarding M.C.'s statements came from her cousin K.B. and from Ms. Ahrens. The only

statements K.B. testified to regarding M.C.'s hearsay statements were that the defendant had raped her, and that M.C. explained that rape meant forced sex. 10 RP 54. The only statement Ms. Ahrens testified to was that M.C. reported the defendant touched her privates one time when she was 7 years old, when her mom and sister were at the store. 14 RP 32-33. In light of all the other testimony that was admitted either by stipulation or because it was otherwise admissible, K.B.'s and Ms. Ahrens' testimony alone was not likely to have affected the outcome of the case.

For the forgoing reasons the Court should decline to review the claim that the number of M.C.'s statements was unfairly prejudicial. Even if the Court should review the matter, the Court should find the statements did not unfairly bolster M.C.'s credibility. The defendant wanted her statements from the two forensic interviews in evidence because it supported his theory of the case. The defendant argued that M.C. embellished an innocent incident in which the defendant checked her vaginal rash in order to fit in with her peer group. When it got out of hand M.C. could not back down, and continued to embellish the story resulting in the second more detailed interview. 18 RP 54-62. Thus the jury had already seen M.C. actually make the prior statements. What other

witnesses said M.C. revealed had negligible effect in terms of reinforcing her veracity.

C. THE DEFENDANT FAILED TO PRESERVE ANY ISSUE OF PROSECUTORIAL ERROR IN CLOSING ARGUMENTS. THE PROSECUTOR'S ARGUMENT WAS NOT SO FLAGRENT AND ILL INTENTIONED THAT NO INSTRUCTION COULD CURE ANY ERROR IN THE ARGUMENT.

At the conclusion of the State's rebuttal closing argument the prosecutor stated:

You are convinced, I submit to you, beyond a reasonable doubt. The circumstantial evidence is strong, it's very strong. You know what happened here. You can be given a puzzle and someone can tell you that this puzzle is of any city in the world. You start to put the pieces together, and you can't figure it out, so you get some pieces, you see a mountain range. But it could be any city in the world. You start putting some pieces together, and you see a high rise downtown with apartment buildings and tall buildings but can't still figure it out. It could be any city in the world. But someone throws in there, you turn this piece, and you look at it and you see the Space Needle. And without seeing any other piece there, you're convinced beyond a reasonable doubt that that's Seattle.

[M.C.] has given you a Space Needle in this case. It's left for you to figure the rest out. You have enough to convict. Find him guilty of all counts. Thank you.

18 RP 81-82.

The defendant argues that he is entitled to a new trial because this argument trivialized the burden of proof which

constituted prosecutorial error. BOA at 36. A defendant who seeks a new trial on the basis of prosecutorial error must show that the conduct complained of was both improper and prejudicial. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), cert denied, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). Prejudice is established only where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict.” State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1206, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996). Allegedly improper remarks are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). A defense attorney’s decision not to object to the alleged misconduct strongly suggests that it had little impact at trial. State v. Curtiss, ___ Wn. App. ___, 250 P.3d 496, 508 (2011).

The failure to object to an allegedly improper remark waives the error unless the remark is determined to be so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105, cert. denied, 516

U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995). “In other words, a conviction must be reversed only if there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict.” Russell, 125 Wn.2d at 85.

Here the defendant did not object to the argument. He argues the issue was not waived relying on the reasoning in State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011). In Johnson the defendant made two arguments which the Court held was improper. The prosecutor made the “puzzle” argument when discussing the abiding belief language in the reasonable doubt instruction. Id. at 682. The prosecutor made an additional argument in connection with that instruction:

What that says is ‘a doubt for which a reason exists.’ In order to find the defendant not guilty, you have to say, ‘I doubt the defendant is guilty and my reason is I believed his testimony that he just borrowed that...sweatshirt... and he didn’t know that the cocaine was in there, and he didn’t know what cocaine was.’ And then you have to also believe that either he really didn’t hear the lights and sirens or that Officer Thiry really forgot to turn them on and that a lot of those events didn’t really happen or more events that didn’t.

To be able to find reason to doubt, you have to fill in the blank, that’s your job.

Johnson, 158 Wn. App. at 682.

The defendant argued the forgoing argument and the “puzzle” argument misstated the law in part because (1) that the jury had to ‘fill in the blank’ to find reasonable doubt; and (2) that arriving at an abiding belief that satisfied the reasonable doubt standard was the same as intuiting the subject of a partially completed puzzle. Id. at 683. The Court found the first argument had been previously held improper in State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010) and State v. Venegas, 155 Wn. App. 507, 524 n. 16, 228 P.3d 813, review denied, 170 Wn.2d 1003, 245 P.3d 226 (2010). It held the second argument was improper relying on the reasoning in Anderson. Id. at 685. The Court then held the error was not waived even though the defendant did not object because the arguments were a misstatement about the presumption of innocence which reduced the State’s burden of proof. Id. at 685-86.

In Anderson the prosecutor argued the reasonable doubt standard by comparing it to every day decisions, such as choosing what cereal to eat in the morning. Anderson, 153 Wn. App. at 425. The Court found this argument improper because “they minimized the importance of the reasonable doubt standard and of the jury’s

role in determining whether the State has met its burden.” Id. at 431.

Recently the Court has revisited the propriety of the “puzzle” argument in Curtiss. There the prosecutor argued:

[R]easonable doubt is not magic. This is not an impossible standard. Imagine, if you will, a giant jigsaw puzzle of the Tacoma Dome. there will come a time when you’re putting that puzzle together, and even with pieces missing, you’ll be able to say, with some certainty, beyond a reasonable doubt what that puzzle is; The Tacoma Dome.

Id. at 509.

The Court found this argument was not improper in the context of the case because it was used to describe the relationship between circumstantial evidence, direct evidence, and the beyond-a-reasonable-doubt burden of proof. Id. at 509. The Court reasoned the difference between the argument in Curtiss and that in Anderson was that there the State’s comments about identifying the puzzle with certainty before it is complete was not the same as “the weighing of competing interests inherent in a choice that individuals make in their everyday lives.” Id. at 510 (emphasis in the original).

The analysis employed by the Court in Curtiss applies to the challenged argument in this case. The prosecutor’s reference to

the strength of the circumstantial evidence in the case was part of the “puzzle” argument. Like the argument in Curtiss the argument here addressed the relationship between circumstantial and direct evidence and the State’s burden of proof.

This Court has held a prosecutor’s argument is flagrant and ill-intentioned when the exact same argument had been held improper in an opinion published before the argument had been made. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997). Here, even if the Court finds the reasoning in Johnson more persuasive than the reasoning in Curtiss the Court should still find the challenged to the argument has been waived. The prosecutor made the argument in July 2010. 18 RP 81-82. Johnson was decided in November 2010. The prosecutor was certainly not on the same kind of notice that the prosecutor in Fleming was that the argument even might be considered objectionable. In addition, unlike the argument in Curtiss and the one made here, the argument in Johnson did not clearly draw an analogy between circumstantial and direct evidence and the burden of proof. In the context of this case had the defense objected the court could have give a curative instruction.

In addition the challenged argument here was not accompanied by the additional argument that in order to find a reasonable doubt the jury must “fill in the blank” as to what constituted that doubt. That argument more clearly undercut the State’s burden of proof. In the context of this case, where no other argument was made that even arguably undercut the reasonable doubt standard, any error in the argument analogizing circumstantial evidence to a puzzle piece could have been cured with an instruction.

Finally, the defense made skilled use of the evidence regarding the manner in which M.C.’s disclosures came about and the inconsistencies in the testimony in order to raise reasonable doubt regarding her credibility. The prosecutor’s argument did no more than to counter that attack by arguing M.C.’s testimony was a piece of evidence which established a crime had been committed. Even if the remarks were improper, they were not grounds for reversal because they were in reply to the arguments of counsel. Russell, 125 Wn.2d at 85.

D. COMMUNITY CUSTODY CONDITIONS.

The defendant’s sentence included the following conditions of community custody:

9. Do not possess or control any item designated or used to entertain, attract or lure children...

14. Do not access the Internet on any computer in any location, unless such access is approved in advance by the supervising Community Corrections Officer and your treatment provider...

18. You may not possess or maintain access to a computer, unless specifically authorized by your supervising Community Corrections Officer. You may not possess any computer parts or peripherals, including but not limited to hard drives, storage devices, digital cameras, web cams, wireless video devices or receivers, CD/DVD burners, or any device to store or reproduce digital media or images...

21. Participate in substance abuse treatment as directed by the supervising Community Corrections Officer...

1 CP 33-34.

The defendant argues these conditions were erroneously imposed because they are not “crime related prohibitions” as authorized under RCW 9.94A.703(3)(f).

A “crime related prohibition” is an order of a court prohibiting conduct that directly relates to circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10). It does not mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. Id. The crime related prohibition need

not be causally related to the crime. State v. Autrey, 136 Wn. App. 460, 467, 150 P.3d 580 (2006).

This Court has found a prohibition on access to the internet was improperly imposed after the defendant was convicted of rape where there was no evidence that the defendant accessed the internet before the crime was committed or that the internet contributed in any way to the crime. State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008). While this Court struck the provision it stated that it's holding did not preclude control over internet access as a part of sex offender treatment or if it was recommended after a sexual deviancy evaluation. Id.

Like the offense in O'Cain there is nothing in the record to suggest that computers or internet access was used to facilitate the rape and molestation charges here. The conditions should be struck with the understanding that those conditions may be imposed as part of sex offender treatment if recommended by a sexual deviancy evaluation.

The prohibition against possession of items designated or used to attract, entertain, or lure children was imposed because the victim of this offense was a child. The prohibition was directed at ensuring the defendant did not have future child victims in which he

used those items to groom children in order to gain their trust before engaging them in sexual misconduct. Because M.C. was like a daughter to the defendant and he already had her trust, there was no evidence that he needed to use any item to gain her trust as part of the grooming process. Although the threat is real that the defendant may have future child victims, it cannot be said that the condition is "crime related" within the meaning of the statute. This condition, like the conditions relating to internet use and computers should be a part of sex offender treatment if recommended in a sexual deviancy evaluation.

The requirement that the defendant participate in substance abuse treatment as directed by the Community Corrections Officer in an affirmative act, and does not fall within the definition of a crime related prohibition. RCW 9.94A.704(4) provides that the Department of Corrections may require the defendant to participate in rehabilitative programs, or otherwise perform affirmative conduct, and to obey all laws. The substance abuse treatment requirement does no more than recognize what RCW 9.94A.704(4) permits, and is therefore not improper.

IV. CONCLUSION

For the forgoing reasons the State asks the Court to affirm the defendant's convictions for first degree child rape and first degree child molestation. The Court should remand the case to the trial court to strike certain conditions which are not related to the crime.

Respectfully submitted on June 16, 2011.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent