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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

DAVID MELANCON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 06-1-04015-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. Procedure

On August 28, 2006, the Pierce County Prosecutor's Office filed an Information charging appellant. DAVID PAUL MELANCON ("defendant"), with one count of assault of a child in the second degree. CP 1, 2-3. The victim of this charge was identified as M.J. Id. The State filed a notice that it intended to admit child hearsay pursuant to RCW 9A.44.120. CP 17-18.

The case was assigned to the Honorable Vicki Hogan for trial. After a pretrial hearing to determine the admissibility of child hearsay statements, the court ruled that statements M.J. made to civilian witnesses were admissible in the State's case but reserved ruling on whether statements M.J. made to law enforcement personnel were admissible until after M.J. had testified at trial. CP 39-40; 2/13/07 p.m. RP 78-87.¹

After hearing the evidence presented at trial, the court instructed the jury on assault of a child in the second degree and assault of a child in the third degree, but refused to give defendant's proposed instructions on

¹ The verbatim report of proceedings is comprised of eleven volumes. The bulk of the trial proceedings are contained in five volumes that are labeled I through V and which are consecutively paginated. These will be referenced as "RP." The remainder of the volumes will be referenced by a hearing date preceding the letters "RP." For example, the sentencing hearing on March 23, 2007, would be referenced as "3/23/07 RP." Pretrial hearings held on February 13, 2007, are contained in two volumes; reference to these volumes will also include a designation of a.m. or p.m. to indicate whether it is the volume pertaining to the morning or afternoon session.

assault in the fourth degree for lack of a factual basis. CP 109-135; RP 399.

The jury found defendant guilty of the lesser degree offense of assault of a child in the third degree. CP 138. At a sentencing hearing held on March 23, 2007, the court imposed a high end standard range sentence of twelve months, based upon an offender score of "3," twelve months of community custody and \$800 in legal financial obligations. CP 142-153; 3/23/07 RP 12-13.

Defendant filed a timely notice of appeal from entry of this judgment. CP 158-169

2. Facts

Karen and David Hoyer lived in Bonney Lake with their daughter. RP 182-183. For about a month and a half in the summer of 2006, Heather Jamieson and her two daughters, M.J.² and L.J.³, lived with the Hoyers. RP 183. Ms. Jamieson was dating the defendant during this time. RP 184-185. Ms. Hoyer usually watched M.J. and L.J. during the day. RP 185. On July 26, 2006, Ms. Hoyer got a call from a neighbor regarding M.J.; Ms. Hoyer had M.J. come home so that she could look her over. RP 187. Ms. Hoyer saw that M.J. had a scratch on her thigh, just below her buttocks. RP 187. M.J. also had bruising on her buttocks. RP 190. She

² This stands for Megan Jamieson.

³ This stands for Lauren Jamieson.

asked M.J. how she had gotten injured and M.J. replied that the defendant or “Dave”⁴ had spanked her on the butt. RP 188. Ms. Hoye testified that M.J. said that this happened when her mom was cleaning out her ears; Dave got mad and struck her with a stick. RP 191. M.J. indicated that this happened at defendant’s house the day before. RP 191, 195. Ms. Hoye testified that M.J. looked very sad as she disclosed this information; M.J. said that her mom had told her not to tell anybody and that she was going to get in trouble. RP 193. M.J. wanted her uncle to be called. RP 188. Ms. Hoye called Shawn McMillan, M.J.’s uncle; he, in turn, called his brother Harold and they both went to Ms Hoye’s house to look at M.J.’s injuries. RP 193-194, 200-201.

Harold “Hap” McMillan is M.J.’s uncle and godfather; after he got to the Hoye’s he took a picture of the M.J.’s thigh and sent it to his mother. RP 194, 200, 204, 207-208. He spoke to M.J. about how she had been injured; she told him that she began to cry while her ears were being cleaned and that Dave “whooped” her with a “turny knob to the blinds.” RP 202. M.J. told her uncle that her mom was there but that she walked outside while M.J. was crying. RP 203. M.J. indicated that it hurt being

⁴ Defendant argued that “Dave” could have referred to Mr. Hoye. Ms. Hoye testified that her family was on a trip to Morton on July 23 or 24th and returned the next day. RP 186

spanked. RP 204. After talking with their mom, M.J.'s uncles took her to her father. RP 207-208.

Albert Ernest testified that he is M.J.'s father⁵ and that on July 26, 2006 he got a call from M.J.'s grandmother, Patricia McMillan and that a short time later, around 3:00 or 4:00 p.m., Harold McMillan showed up at his house with M.J. RP 219, 221-222. Mr. Ernest testified that his daughter told him that David gave her the bruises on her leg when he spanked her with a stick while they were trying to clean her ears. RP 223-224. M.J. showed her father the type of stick that defendant had used and it was a control rod from window blinds. RP 227. M.J. indicated that it had happened a few days before, at Dave's house. RP 224-225. M.J. was reluctant to talk about it and seemed upset that she had been hit. RP 227. Mr. Ernest took pictures of the bruising as it appeared the day she was dropped off at his house; these were admitted into evidence. RP 225-226. He called CPS who directed him to take M.J. to the hospital. RP 226. Mr. Ernest took his daughter to the hospital for an examination; the hospital contacted law enforcement. RP 227-228. M.J. stayed with her father for a week before going to live with her grandmother. RP 230-231. M.J.'s bruising was visible the entire week. RP 231-232.

Dr. Michael Beins examined M.J. when she was brought to the Auburn Regional Medical Center on July 26, 2006. RP 74-78. M.J. reported that she had been hit by her mother's boyfriend with a stick from

the blind control. RP 79-80. M.J. indicated that her mom was present but did not intervene. RP 80. The doctor's examination revealed that M.J. had bruising on both buttocks with more severe bruising on the right; she also had a bruise and a skin break or abrasion over the bruised area on the back of her left thigh. RP 79. The doctor indicated that he would classify the bruising as moderate to severe. RP 83. There was blanching in the middle of the bruise which was consistent with being hit with an object. RP 83-84. It would take a significant amount of force to cause the abrasion with a blunt object. RP 84-85, 86. The bruising was not consistent with a hand spanking or with a fall. RP 85. Dr. Beins reported this abuse to law enforcement. RP 86-87. Dr. Beins advised using ice for the swelling and Motrin or Tylenol for pain relief. RP 87.

Deputy Cline was dispatched to speak to M.J.'s father and Dr. Beins about M.J.'s injuries. RP 281. Deputy Cline contacted Mr. Ernest by phone and arranged to meet with him at his house that night. RP 281-282. Later that night, Deputy Cline spoke with M.J. about what had happened. RP 283-285. He testified that M.J. told him that her mother was cleaning her ears after a bath and that she did not like having her ears cleaned; she said that she was spanked with a stick by her mother's boyfriend. RP 286. When Deputy Cline asked what kind of stick she told him that it was "the long stick that moves the window shades." RP 286-

⁵ He is not the father of M.J.'s sister, L.J. RP 219.

287. M.J. told him that she was struck on “the butt, butt and legs, and it hurt badly.” RP 287. M.J. told the deputy that all her injuries were caused by the defendant. RP 290. When Deputy Cline interviewed M.J.’s mother on July 31, 2006, she told him that she has swatted M.J. once on the butt but did not say that she had used any sort of instrument to do so. RP 292-294. Ms. Jamieson told Deputy Cline that she was not aware that M.J. was injured until her father called from the emergency room. RP 298.

Patricia McMillan testified that she was first made aware of M.J. injuries when her son sent her pictures of them on her cell phone. RP 61-62. She saw M.J. and her injuries a few days later when M.J. moved in with her. RP 62, 66. The bruises lasted another week. RP 66. M.J. told her grandmother that the defendant had caused the bruises when he hit her. RP 62-63. M.J. said he hit her because she got upset when her mother tried to clean her ears. RP 63. M.J. described how defendant grabbed her by the arm and hit her on the thigh and buttocks with the wand from the blinds. RP 64. M.J. said that it hurt but that he kept hitting her. RP 65. M.J. told her grandmother that her mom was in the bathroom when it happened. Mrs. McMillan testified that M.J. was reluctant to talk about what happened. RP 65, 69. Mrs. McMillan testified that M.J. hates to have her ears cleaned. RP 66-67. Mrs. McMillan later brought M.J. to the Child Advocacy Center for an interview. RP 68.

L.J., who was seven at the time she testified at trial, is M.J.’s younger sister. RP 98-102. She testified that she now lives with her

grandmother, uncles, and sister. RP 102. L.J. testified that when she lived with her mom, M.J. and the defendant that the defendant would spank M.J. a lot. RP 106. L.J. testified that she did not see the defendant spank M.J. but that she could hear her sister crying. RP 107. Her sister told her that her finger got smashed and that she had bruises on her bottom from the spanking. RP 107. A couple of days later L.J. saw the bruises on M.J.'s bottom when she was changing. RP 107-108. L.J. said that M.J. got spanked because she wouldn't let mommy clean her ears. RP 108-109. L.J. said her mom was in the bathroom when M.J. got spanked and that she was in the living room watching television. RP 110 -111. L.J. said that M.J. was in the room where the defendant exercises when she got spanked. RP 111.

M.J. had just turned nine at the time of trial. RP 33. She testified that she now lives with her grandmother and her uncles Hap, Shawn, and James. RP 33. She does not live with her mom right now. RP 38. She testified that last summer her mom spent a lot of time with Dave and identified the defendant as Dave. RP 38-39. She testified that she went to the defendant's house a couple of times and spent the night there a couple of times. RP 40. M.J. testified that one time the defendant spanked her with the "thing that you open the blinds with." RP 40. M.J. testified that Exhibit 14 looked like what the defendant had used except that the one he used was clear. RP 42. M.J. testified that she was at his house when she got spanked and that her mom and sister were in the bathroom. RP 43.

M.J. testified that it hurt when she was spanked and that she cried; she testified that she was about to scream. RP 44. She testified that he spanked her more than once with the wand. Id. When shown photographs of her injuries, she testified that defendant had caused them. RP 45-48, M.J. testified that she doesn't like to have her ears cleaned because it hurts. RP 49. She testified that the defendant got the wand from a window in his house. RP 50. M.J. thought the defendant's face looked mad when he was spanking her. RP 50. M.J. testified that no one else spanked her that day. RP 51. M.J. testified that Karen had seen the bruises and called her uncles, who came over and took pictures. RP 52-53. She testified that her uncles called her dad. RP 53. Her dad took pictures of the bruises, too. RP 53.

Heather Jamieson testified that she is the mother of M.J., born February 9, 1998, and L.J., born January 19, 2000. RP 131-132. At the time of trial, the girls were living with her mother, Patricia McMillan, who now has custody. RP 132-133. Ms. Jamieson testified that in the summer of 2006, she and her daughters were living with Karen Hoyer. RP 132-133. At that time, the defendant was her boyfriend. RP 133-134. While they were living with Ms. Hoyer, she would take the girls to the defendant's apartment, which was in Lakewood, Washington, and they would sometimes spend the night. RP 134-135. Ms. Jamieson moved out of Ms. Hoyer's house after M.J. got hurt because Ms. Hoyer did not want the defendant around her house. RP 136. Ms. Jamieson moved in with the

defendant and lived there for four to five months before they broke up.

RP 136-137.

Ms. Jamieson testified that on the night that M.J. got hurt that she tried to clean M.J.'s ears after giving both girls a bath. RP 141. She described M.J. as going "ballistic" on her, screaming and running from the bathroom. RP 141-143. Ms. Jamieson testified that she got M.J. back into the bathroom, but M.J. still wouldn't let her clean her ears. RP 143. Ms. Jamieson testified that she then spanked M.J. two to four times with a curtain rod. RP 143. Ms. Jamieson was not sure how she got the rod from the dining room and thought that she might have asked L.J. to get it for her. RP 144. She then went outside to have a cigarette; while she was outside, the defendant spanked M.J. some more. RP 144-145. Ms. Jamieson testified that she could see defendant and M.J. standing in the doorway to the bedroom, which is where defendant keeps his exercise equipment. RP 138,144-145. She testified that he used the same thing to spank M.J. that she had. RP 145. Ms. Jamieson testified that she checked M.J. after the defendant's spanking to see if she was injured; she was red on her bottom. RP 146-147. Ms. Jamieson was interviewed by Deputy Cline on July 31, 2006; at trial, she denied telling him that she only hit M.J. once. RP 149, 292. She acknowledged that she was unwilling to provide Deputy Cline with the defendant's full name and address; ultimately she did provide his last name. RP 150-151, 297. She just told him that defendant lived "somewhere in Lakewood." RP 151. When Ms.

Jamieson was re-interviewed by Detective Shaviri on August 2, 2006, she told him that she had swatted M.J. twice and gave inconsistent statements as to whether L.J. or the defendant had brought her the rod. RP 153-154, 240, 248-251. At trial, Ms. Jamieson acknowledged that she had hoped to marry the defendant and that she maintained this hope after the incident. RP 166. Ms. Jamieson acknowledged that she told M.J. not to say anything because she did not want her taken away. RP 166. She acknowledged that she did not do anything to stop defendant from striking M.J. RP 166. Ms. Jamieson acknowledged that when she was interviewed by Detective Shaviri that she lied to him about the status of her relationship with the defendant and how long it had been since she had seen him last. RP 167. She had seen defendant the day of the interview although she said that it had been a few days and she told the detective that they had broken up when that was not true. RP 167. Ms. Jamieson acknowledged that she still has contact with defendant. RP 167.

Heidi Walker, a Child Protective Services worker assigned to the case testified that after the assault on M.J., that M.J. and L.J. were not left in the care of their mother because of concerns that she would fail to protect them. RP 314-316. Ms. Walker testified regarding her interview of M.J. RP 325-331. M.J. told her that "Dave," her brother's boyfriend had hit her with the thing you use to close the blinds. RP 326. M.J. indicated that she had been hit on her butt. RP 328-329.

Kimberly Brune is employed as a child forensic interviewer with the Pierce County Prosecutor's Office. RP 333. She interviewed M.J. on August 2, 2006. RP 339. Ms. Brune's interview with M.J. was video recorded and audio taped. RP 340-341. The video was shown to the jury and admitted as Exhibit 5. RP 346-347, 351. In the interview, M.J. consistently reported that "Dave" had caused her injuries. RP 356.

The defendant called his mother to the stand; she testified that on July 23, 2006, M.J. came over to her house with her sister, her mother and the defendant and that they spent the night. RP 366-367. On the morning of the 24th M.J. had breakfast then went outside to play. RP 368-369. Mrs. Melancon testified that she had the opportunity to view the back of M.J.'s legs and she did not see any injuries. RP 369-371. She testified that Ms. Jamieson went to work then picked the girls up between 3:00 and 4:00 and that she has not seen the girls since. RP 372-373. She testified that her son went to work around 4-4:30 and that he must have returned home sometime later that night because his car was parked outside when she got up the next day between 5:30-6:00 a.m. RP 373-374. Ms. Melancon learned of the allegations on July 26, but never made any effort to contact law enforcement. RP 377.

Defendant also called his sister to the stand who testified that on July 26, 2006, Ms. Jamieson came over to her house between 8:00 and

10:00 p.m. RP 381-382 She described Ms. Jamieson as “real frantic and screaming and hollering” something about M.J. RP 382.

The defendant did not testify.

C. ARGUMENT.

1. THIS COURT SHOULD REFUSE TO REVIEW DEFENDANT’S CLAIM REGARDING THE SUFFICIENCY OF THE COURT’S WRITTEN FINDINGS IN ITS ORDER ADMITTING CHILD HEARSAY AS THIS WAS NOT PROPERLY PRESERVED BELOW; DEFENDANT DOES NOT PRESENT AN ISSUE OF CONSTITUTIONAL MAGNITUDE THAT MAY BE RAISED FOR THE FIRST TIME ON APPEAL.

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); State v. Rehak, 67 Wn. App. 157, 162, review denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. Guloy, 104 Wn.2d at 421. A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. State v. Thetford, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); State v. Hettich, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). The trial court’s decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable

person would have taken the position adopted by the trial court. Rehak,
67 Wn. App. at 162.

The Washington Legislature enacted a statute commonly referred to as the “Child Hearsay Statute.” RCW 9A.44.120. This statute provides for the admission of out-of-court statements of a child victim of sexual abuse under certain circumstances. The statute provides, in the relevant part that:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120. Basically, the child hearsay statute requires a trial court to answer three questions in making its determination of the admissibility

of child hearsay statements: (1) is the child victim's statement reliable; (2) is the child available to testify; and (3) if the child is unavailable, is there corroborative evidence of the act.

The child hearsay statute requires the court to hold a pre-trial hearing in which it determines the admissibility of a child victim's statements. During that hearing, the court must first determine if the statement being offered is reliable. That determination is based on a set of reliability factors⁶ approved by the Washington Supreme Court in State v. Ryan, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

While the statute directs the trial court to make findings regarding certain aspects of the statements, there is nothing in the statute that requires entry of findings of fact or even entry of a written order. RCW 9A.44.120.

⁶ Those factors are: 1. Whether the child has an apparent motive to lie; 2. The general character of the declarant, including veracity; 3. Whether more than one person heard the statements; 4. Whether the statements were made spontaneously; 5. Timing of declaration and relationship between declarant and witness; 6. Whether the statement contains express assertions about past facts; 7. Whether cross-examination could show the declarant's lack of knowledge; 8. Is there only a remote possibility the declarant's recollection is faulty; and, 9. The overall circumstances surrounding the statement. See Ryan, 103 Wn.2d at 175-76 (taking the first five of those factors from State v. Parris, 98 Wn.2d 140, 654 P.2d 77 (1982) and the last four from Dutton v. Evans, 400 U.S. 74, 91 S. Ct. 210, 27 L. Ed. 2d 213 (1970)). In the years since the Ryan case was decided, two of the factors have been eliminated from consideration in the context of child hearsay. Factor six about assertions of past facts does not apply to child hearsay statements and because every statement a child makes concerning sexual abuse will be a statement relating a past fact and factor seven about cross-examination also does not apply to child hearsay statements because "cross-examination could in every case possibly show error in the child hearsay statement. See State v. Leavitt, 111 Wn.2d 66, 75, 758 P.2d 982 (1988); State v. Stange, 53 Wn. App. 638, 769 P.2d 873, review denied, 113 Wn.2d 1007 (1989).

In State v. Stevens, 58 Wn. App. 478, 794 P.2d 38 (1990), a defendant challenged the trial court's ruling admitting the child victim's statements to several different people. Stevens argued that the trial court abused its discretion by applying the Ryan factors to the out of court statements collectively, rather than individually to each statement. Before reaching the merits of this argument, the appellate court noted that Stevens had failed to object to the trial court's method of analysis and that objections to "the admission of evidence would not be considered for the first time on appeal unless based upon the same ground asserted at trial." Stevens, 58 Wn. App. at 485-86. The court went on to examine whether Stevens could raise this as an issue of constitutional magnitude based upon a violation of his right to confrontation; it noted that if the declarant and the hearsay recipient witnesses are available to testify and subject to cross-examination then the confrontation and due process clauses are satisfied. Id. at 486.

Thus, admission of child hearsay statements where the declarant and the recipient witness both testify at trial does not present an issue of constitutional magnitude that may be raised for the first time on appeal under RAP 2.5. Only those claims that were preserved for review by a specific objection in the trial court are properly before the appellate court.

In this case after a pretrial hearing, the trial court ruled admissible statements that M.J. had made to civilian witnesses Patricia McMillan, Harold McMillan, Albert Ernest, Karen Hoye, and her sister, L.J. CP 39-

40; 2/13/07 p.m. RP 78-87. The court reserved ruling on testimonial statements that M.J. had made to Deputy Bryan Cline, Kim Brune, Heidi Walker until after M.J. testified at trial. Id. Defendant contends that the written order the court entered regarding this ruling was insufficient as the findings made regarding the various statements to civilian witnesses discussed them collectively rather than individually. See Appellant's Opening brief at pp 1, 22-25. Defendant did not assign error to the admissibility of the hearsay statements, only to the sufficiency of the court's written order. Id. at p.1. Defendant fails to identify where this claim was preserved in the trial court. There was no objection on this basis at the time the court delivered its oral ruling. 2/13/07 p.m. RP 78-87. Nor did defendant interpose any objection when the court signed the written order on its ruling. RP 3-4; CP 39-40. Just as in Stevens, this claim was not preserved in the trial court.

The victim, M.J., and all of the hearsay recipients testified at trial. See RP 33-57 (M.J.), 58-73 (Patricia McMillan), 199-208 (Harold McMillan), 218-232(Albert Ernest), 182-197(Karen Hoye), 277-300 (Deputy Bryan Cline), 333-342, 346-357(Kim Brune), 305-332 (Heidi Walker), 100-113(L.J.). There is no constitutional issue that may be raised for the first time on appeal with respect to the introduction of the child hearsay statements.

This court should decline to review defendant claim regarding the sufficiency of the court's findings on its order admitting the child hearsay statements as it was not properly preserved for review.

2. DEFENDANT FAILED TO PRESERVE HIS CLAIM THAT THE COURT IMPROPERLY LIMITED HIS RIGHT TO PRESENT A DEFENSE BY FAILING TO MAKE AN OFFER OF PROOF AS TO THE EXCLUDED EVIDENCE WHEN THE COURT SUSTAINED AN OBJECTION ON HEARSAY GROUNDS.

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. State v. Rehak, 67 Wn. App. 157, 162, review denied, 120 Wn.2d 1022 (1992); In re Twining, 77 Wn. App. 882, 893, 894 P.2d 1331, review denied, 127 Wn.2d 1018 (1995). The right to present evidence is not absolute, however, and must yield to a state's legitimate interest in excluding inherently unreliable testimony. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Baird, 83 Wn. App. 477, 482, 922 P.2d 157 (1996), review denied, 131 Wn.2d 1012 (1997). Limitations on the right to introduce evidence are not unconstitutional unless they affect fundamental principles of justice. Montana v. Engelhoff, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L. Ed. 2d 361 (1996) (stating that the "accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence" (quoting Taylor v. Illinois, 484 U.S. 400, 410,

108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988)). Similarly, the Washington Supreme Court has stated that the defendant's right to present relevant evidence may be limited by compelling government purposes. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983) (discussing Washington's rape shield law).

The confrontation clause in the Sixth Amendment protects a defendant's right to cross-examine witnesses. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). Generally, a defendant is allowed great latitude in cross-examination to expose a witness's bias, prejudice, or interest. State v. Knapp, 14 Wn. App. 101, 107-08, 540 P.2d 898, review denied, 86 Wn.2d 1005 (1975). Nevertheless, the trial court still has discretion to control the scope of cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice, or where the evidence is vague or merely speculative or argumentative. State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); State v. Kilgore, 107 Wn. App. 160, 184-185, 26 P.3d 308 (2001).

Under ER 103(a)(2), error may not be asserted based upon a ruling that excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made know to the court by offer or was apparent from the context of the record. "An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it

creates a record adequate for review.” State v. Ray, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). The party offering the evidence has the duty to make clear to the trial court: 1) what it is that he offers in proof; and, 2) the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. Ray, 116 Wn.2d at 539, citing Mad River Orchard Co. v. Krack Corp., 89 Wn.2d 535, 537, 573 P.2d 796 (1978).

Defendant asserts that he was deprived of his right to present a defense when the court sustained an objection to the testimony of a defense witness on the grounds of hearsay. See Appellant’s brief at pp.1, 31-36. The essence of defendant’s claim is that he was wrongly precluded from adducing certain evidence in front of the jury during his direct examination of Paula Curle, the defendant’s sister. In order for the trial and appellate courts to properly assess this claim, it would need to know the substance of what defendant hoped to adduce. Defendant fails to identify where he preserved this claim in the trial court by making an offer of proof. There was no offer of proof done while the witness was on the stand. RP 380-383.

Nor can the court ascertain anything about the nature of the excluded evidence from the trial record. Ms. Curle testified that on July 26th,⁷ sometime between 8:00 and 10:00 at night, Heather Jamieson came to her house; she was “real frantic and screaming and hollering”

something about Megan. RP 381-382. When counsel tried to adduce what Ms. Jamieson said about Meagan, the prosecutor objected on hearsay grounds; the court sustained the objection. RP 382. Defense counsel indicated that he was adducing this evidence for impeachment purposes, but the court did not change its ruling. RP 382-383. It is impossible to know how this evidence was impeaching or even who counsel was trying to impeach from the record before this court.

The most reasonable interpretation would be that counsel was trying to impeach Ms. Jamieson with inconsistent statements. But when Ms. Jamieson was on the stand, defense counsel did not cross examine her about any statements she made to Ms. Curle thereby giving her the opportunity to admit or deny making the statements and provide an opportunity to explain any inconsistencies. Under ER 613, “extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon.” If defendant was attempting to impeach Ms. Jamieson with inconsistent statements, he did not lay the necessary foundation before attempting to admit the extrinsic evidence of such statement and the court properly did not allow the evidence to be adduced.

⁷ This was two days after the assault on M.J.

On appeal, defendant argues that he was trying to impeach Ms. Jamison's version of events by suggesting that Ms. Curle's testimony would have shown that Ms. Jamieson was at Ms. Curle's house while M.J. was being assaulted rather than smoking a cigarette on her patio as Ms. Jamison testified to at trial. This argument simply does not make sense. To begin with, Ms. Curle testified that Ms. Jamison came to her house on July 26, 2006; this was the day that Ms. Hoye saw the bruising on M.J. and alerted M.J.'s uncles to the situation. RP 186-194. M.J. was taken by her uncles to her father and would not have been accessible to Ms. Jamieson on July 26, 2006. RP 207-208, 230-231. The assault had to have occurred before that date or Ms. Hoye could not have seen the bruising. The State alleged the assault occurred on July 24, 2006. CP 109-135, Instruction Nos. 14, 19. Secondly, in order to accomplish this type of impeachment, it would not be necessary to adduce the content of what Ms. Jamieson said about Meagan while at Ms. Curle's house. Evidence that Ms. Jamieson was at Ms. Curle's house at the relevant time would provide the necessary basis for impeachment on this theory. Defense counsel did not ask any questions of Ms. Jamison while she was on the stand about whether she went over to Ms. Curle's house. RP 169-175, 180-181. Thus, the record does not suggest that proving Ms. Jamison's location during the assault was the focus of the excluded evidence.

Without an offer of proof, the State and appellate court would merely be guessing at the nature of this claim as well as the impact the exclusion of the evidence might have had on the trial below. The failure to make an offer of proof regarding the excluded evidence precludes review. From the record before this court, it appears that the trial court properly excluded hearsay evidence.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GIVE DEFENDANT'S PROPOSED INSTRUCTIONS ON ASSAULT IN THE FOURTH DEGREE WHEN THERE WAS NO FACTUAL BASIS TO SUPPORT THEM.

The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing Herring v. Department of Social and Health Servs., 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. State v. Colwash, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. State v. Rahier, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing State v. Jackson, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. State v. Harris, 62 Wn.2d 858, 385 P.2d 18 (1963). A challenge to a jury instruction may not be raised for the first time on appeal unless the instructional error is of constitutional magnitude. State v. Dent, 123 Wn.2d 467, 478, 869 P.2d 392 (1994).

The standard for review applied to a trial court's failure to give jury instructions depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. State v. Walker, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by State v. Berlin, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo.

A defendant is entitled to an instruction on a lesser included offense if (1) each element of the lesser crime is a necessary element of the charged crime and (2) the evidence supports an inference that the lesser crime--and only the lesser crime--was committed. State v. Hurchalla, 75 Wn. App. 417, 421-23, 877 P.2d 1293 (1994); State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978). As to this second prong, there must be some affirmative evidence from which the jury could conclude that the defendant committed the lesser included crime. State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), disapproved on other grounds, State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

In this case defendant was charged with assault of a child in the second degree. CP 1. The court instructed the jury on this charge and the lesser degree offense of assault of a child in the third degree. CP 109-135. The trial court refused to give defendant's proposed instructions on assault in the fourth degree. CP 44-57; RP 399, 407-409. Defendant now asserts that this was error.

Under the court's instruction's, to convict defendant of assault of a child in the second degree, the State had to prove that defendant intentionally assaulted M.J. and thereby recklessly inflicted substantial bodily harm.⁸ CP 109-135, Instruction Nos. 7, 8, 14. Under the court's

⁸ The jury was instructed that substantial bodily harm means "bodily injury that involves a temporary but substantial disfigurement" and that disfigurement means "that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner." CP 109-135, Instruction Nos. 12, 13.

instructions, to convict defendant of assault of a child in the third degree, the State had to prove that defendant, acting with criminal negligence, caused bodily harm to M.J. by means of a weapon or other instrument or thing likely to produce bodily harm.⁹ CP 109-135, Instruction Nos. 15, 16, 19. Under the defendant's proposed instructions, assault in the fourth degree requires proof only of an assault on M.J. CP 44-57. That means for there to be a factual basis for these instructions there had to be affirmative evidence from which the jury could conclude that the defendant assaulted M.J. *without* a weapon or other instrument or thing likely to produce bodily harm **or** that he assaulted her *without* causing bodily harm.

At trial defendant argued that assault in the fourth degree was a lesser included crime and that the instruction should be given because, in defense counsel's opinion, "there's been evidence presented to the jury that this could have been merely a simple assault." RP 389. The prosecutor conceded that the legal prong was met, but argued:

Prosecutor: I believe it still has to have a factual basis for it, and there is no factual basis, or at least [opposing counsel] hasn't articulated one to my understanding.
Defense...is basically claiming that the defendant never struck the child and injured the child and didn't have anything to do with the injuries that were involved.

RP 398. Defense counsel made the following response:

Defense Counsel: Well,...even though that's the theory

⁹ The jury was instructed that "[b]odily injury, physical injury or bodily harm means physical pain or injury, illness or an impairment of a physical condition. CP 109-135, Instruction No. 18.

RP 398. Defense counsel made the following response:

Defense Counsel: Well,...even though that's the theory that we're implying or articulating, there still are issues about reasonable doubt on the --on the general charges, and so I would think what --it's really a question of degree. if the defendant did not -- I think what the State's concerned about is the evidence of substantial bodily harm, and I think that's just something the jury should decide, all the way through all the degrees. And so I think fourth degree should be included.

RP 399. After hearing these arguments, the court agreed that defendant had failed to satisfy both the factual and legal prongs and that "on the factual basis, fourth degree assault is not included." RP 399. At the taking of formal exceptions to the court instructions, defense counsel stated:

Defense Counsel: And I would note briefly, for the record, that the thrust of my argument was that there is evidence the defendant committed only the fourth degree assault, and so the jury should have been able to consider it. I'll cite a case for that proposition, State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d 381 (1997).

RP 408-409. The Peterson case cited by counsel discusses the law on lesser degree crimes and whether a defendant is on notice that the court may instruct on lesser degree offenses when he is charged with a greater degree offense; the case does not discuss the additional requirement of the factual basis or prong. The trial court refused defendant's proposed instruction in this case for lack of a factual basis, and Peterson provides no guidance on this topic.

As set forth above, a trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. State v. Lucky, 128 Wn.2d at 731.

Defendant's argument regarding factual basis is equally vague on appeal. At one point defendant acknowledges that the "evidence at trial clearly established that M.J. had been injured." Appellant's Brief at p 29. He then argues, however, that "jury could have decided that [her] injuries....did not constitute bodily harm." Id. He fails to explain how M.J.'s bruising and scrape could fail to meet the court's definition of "[b]odily injury, physical injury or bodily harm" as meaning "physical pain or injury, illness or an impairment of a physical condition." CP 109-135, Instruction No. 18. There was no evidence adduced at trial that M.J. was uninjured; moreover, all the evidence indicated that her injuries were caused either by a control wand from a set of blinds. There was no affirmative evidence that M.J. was uninjured or that she was assaulted without use of a weapon or instrument likely to cause bodily harm. The trial court correctly denied defendant's request for instructions on assault in the fourth degree for lack of a factual basis. Defendant has failed to demonstrate an abuse of discretion on this ruling.

4. DEFENDANT HAS FAILED TO ESTABLISH THAT THERE WAS AN ACCUMULATION OF PREJUDICIAL ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. Id. “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” Neder v. United States, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” Brown v. United States, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. Rose, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. Id. at 578; see also, State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error

rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); State v. Coe, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); see also, State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. See Id. Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. Id. Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. See, e.g., Johnson, 90 Wn. App. at 74. Conversely, errors that individually are not

prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. See, e.g., State v. Stevens, 58 Wn. App. 478, 498, 795 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970)(holding that three errors amounted to cumulative error and required reversal), with State v. Wall, 52 Wn. App. 665, 679, 763 P.2d 462 (1988)(holding that three errors did not amount to cumulative error), and State v. Kinard, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979)(holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, see, e.g., State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963)(holding that failure to instruct the jury (1) not to use codefendant’s confession against Badda, (2) to disregard the prosecutor’s statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State’s sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, see,

e.g., State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984)(holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992)(holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, see, e.g., State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976)(holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. See Stevens, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief. Defendant has failed to show that there were any errors in the trial. He has failed to show that there was any prejudicial error much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the conviction entered below.

DATED: MARCH 3, 2008

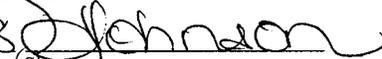
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/3/08 
Date Signature

FILED
COURT OF APPEALS
DIVISION II
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BY _____
DEPUTY