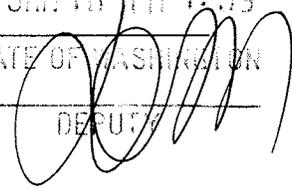


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DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

TIMOTHY EDWARD HAGER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 06-1-05509-0

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

 1. Did the trial court abuse its discretion in denying defendant’s motion for a mistrial where a witness made a single, isolated reference to defendant’s demeanor and the court promptly instructed the jury to disregard this comment? 1

 2. May a defendant raise a sentencing issue in the “Conclusion” portion of its opening brief where there is no assignment of error, briefing, or argument with respect to this issue? 1

B. STATEMENT OF THE CASE..... 1

 1. Procedure..... 1

 2. Facts 3

C. ARGUMENT..... 11

 1. A WITNESS’S ISOLATED, SINGLE REMARK REGARDING DEFENDANT’S DEemeanor DOES NOT WARRANT THE GRANTING OF A MISTRIAL WHERE THE COURT IMMEDIATELY GAVE AN INSTRUCTION TO THE JURY TO DISREGARD THE COMMENT. 11

 2. DEFENDANT MAY NOT RAISE A SENTENCING ISSUE WHERE DEFENDANT DID NOT ASSIGN ERROR TO THIS ISSUE, OR BRIEF THE ISSUE. 15

D. CONCLUSION..... 17

Table of Authorities

State Cases

<i>State v. Bahl</i> , 164 Wn.2d 739, - P.2d – (2008)	16
<i>State v. Demery</i> , 144 Wn.2d 753, 30 P.3d 1278 (2001).....	12
<i>State v. Easter</i> , 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).....	13, 14
<i>State v. Escalona</i> , 49 Wn. App. 251, 254, 742 P.2d 190 (1987)	11
<i>State v. Lewis</i> , 130 Wn.2d 700, 707, 927 P.2d 235 (1996).....	13, 14
<i>State v. Romero</i> , 113 Wn.App. 779, 54 P.3d 1255 (2002).....	13
<i>State v. Sweet</i> , 138 Wn.2d 466, 480, 481, 980 P.2d 1223 (1999).....	13
<i>State v. Thomas</i> , 150 Wn.2d 821 at 868-69, 83 P.3d 970 (2004).....	15
<i>State v. Weber</i> , 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).....	11, 12

Constitutional Provisions

Article I, Section 9 of the Washington Constitution	13
Fifth Amendment of the United States Constitution	12

Statutes

RCW 10.99.020	1
RCW 9.68.130	16
RCW 9.68.130(2)	16
RCW 9A.44.073	1

Rules and Regulations

ER 404(b) 1
RAP 10.3 (a)(4) 12, 15
RAP 10.3(a)(6) 15

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

1. Did the trial court abuse its discretion in denying defendant's motion for a mistrial where a witness made a single, isolated reference to defendant's demeanor and the court promptly instructed the jury to disregard this comment?
2. May a defendant raise a sentencing issue in the "Conclusion" portion of its opening brief where there is no assignment of error, briefing, or argument with respect to this issue?

B. STATEMENT OF THE CASE.

1. Procedure
 - a. General procedure.

On November 22, 2006, the State charged TIMOTHY EDWARD HAGER, hereinafter defendant, with one count of rape of a child in the first degree, contrary to RCW 9A.44.073, with a domestic violence allegation contrary to RCW 10.99.020. CP 1.

On January 8, 2008, the matter came before the Honorable John Hickman for retrial.

On January 14, 2008, the court heard argument regarding the admission of evidence under ER 404(b) for the defendant alleged similar

acts against minors on two other occasions. 114, 150, 151.¹ The court concluded that the State met its burden of establishing that the prior sexual misconduct occurred with respect to his sister and daughter, but the State had failed to prove a common scheme or plan as to the abuse, and therefore the evidence was inadmissible under ER 404(b). RP 151-52.

Defendant was convicted as charged and received a standard range sentence of one hundred and eight months. CP 59, 62.

This timely appeal follows. CP 74.

b. Motion in limine/motion for mistrial.

On January 14, 2008, the defendant also motioned the court to prevent any testimony from the detective regarding defendant's deceptive or evasive behavior. RP 155. The court granted the motion. RP 158, Pl. Ex.4

During Detective Callas's testimony, the prosecutor asked him: "What was Mr. Hager's demeanor like during the time you had contact with him that day?" and Callas answered, "He appeared to be angry. He was evasive." RP 432.

¹ A total of eleven volumes of verbatim report of proceedings were filed in this matter. Vol. 1 thru Vol. IX are numerically paginated and these are the only volumes the State will cite to in its brief. The two other volumes: 1/22/07 and 3/28/08, are paginated independently of the first eight volumes and the State does not cite to these volumes.

Counsel objected and a hearing was had outside the presence of the jury. RP 432. The prosecutor explained that he had warned the witness not to refer to any criminal history but forgot to advise him to avoid use of the word evasive. RP 432. Defense counsel explained “I am torn in this case. I don’t really want to make a motion for mistrial. I’m happy the way the testimony went so far, but I don’t know any other way to cure this at this point.” RP 434. The court denied the motion for mistrial because (1) he did not believe the officer was acting in bad faith in violating the pretrial order, and (2) the court felt it was caught in terms of “nothing else being said after that, and I intend to advise the jury that they are to disregard that answer and they will not and should not consider it . . . as evidence.” RP 434.

The court then called the jury back into the courtroom and advised that he sustained the objection with regards to the use of the words “angry” and “evasive” and that the jury was to “disregard that answer in its entirety and you are not to consider that testimony as part of any of your deliberations in this case.” RP 437.

2. Facts

In the fall of 2006, Andrea Lane found a note in her 15 year old stepson’s room. RP 202, 205. Ms. Lane examined the note and was

startled by its contents. RP 203. The note was written by a girl named P.B. and stated that the reason she did not have sex with S.L. was because in the “third grade I was raped by my step dad which is still my step dad today.” RP 204. P.B. also talked of suicide in the note. RP 210. Ms. Lane recalled meeting P.B. at S.L.’s birthday that year. RP 205. Ms. Lane remembered her as nice and felt that she had to do something with the letter, so she contacted the principal at the high school. RP 205. She immediately took the note down to the high school and met with the school counselor, Mr. Daniels, and S.L. RP 206, 354. S.L. confirmed the note was from P.B. RP 206. The school counselor read the note and broke down in tears; he informed Lane that he would contact CPS. RP 207-08, 359.

On November 9, 2006, CPS investigator Roni Jensen was contacted regarding the referral of P.B. for possible sexual abuse between P.B. and her stepfather. RP 238. Ms. Jensen and Detective Callas went to school to discuss the allegations with P.B. RP 239. As part of the normal protocol, the importance of truth telling was emphasized to P.B. during this interview. RP 240. Detective Callas, along with Ms. Jensen and Mr. Daniels, conducted a taped interview with P.B. regarding the abuse. RP 423-24. During the interview, P.B. appeared to be nervous and scared. RP 421. After she spoke briefly about the details of the incident, Detective Callas asked her if anything else like this had ever happened and she said, “no” even though that was not the truth because she was scared

to tell him more. RP 279. However, later when she was asked to testify under oath she revealed more details because she knew she had to say everything. RP 280.

A decision was made not to have P.B. submit to a physical examination for signs of potential sexual abuse due to the length of time that had elapsed between report of the abuse and date that abuse occurred. RP 249-50. Ms. Jensen arranged to have P.B. move out of her family home and in with her grandmother. RP 250.

Detective Dorr and Callas decided to make contact with defendant on November 15, 2006, at his home - a van. RP 224, 428. Detective Callas confronted defendant with allegations that that while P.B. was taking a nap she awoke with her pants and underwear off and defendant had at least one finger in her vagina. RP 217, 219-20, 439. Defendant replied no. RP 222, 439. Defendant further denied living in the apartment, and instead asserted that he lived with his brother on and off, and that if he had lived in the apartment it was probably 1999, not 2001. RP 225. During the contact defendant was very jittery. He avoided eye contact, his eyes were dilated, he spoke in a very loud and fast voice, and he appeared as though his "muscles were tightened up and tense." RP 438. RP 225. Based on Detective Dorr's experience and training, he believed defendant was under the influence of methamphetamine at the time of contact. RP 225-26. However, in general defendant's

attitude/demeanor was not problematic, and the officers “really didn’t have any problem with him.” RP 225.

Later, defendant attempted to point to P.B.’s biological father as the one who did this. RP 439.

Detective Dorr spoke with Mrs. Hager, who also appeared to be under the influence of methamphetamine. RP 227. Ms. Jensen, who was also present, made similar observations. RP 256, 263. He asked her questions regarding a specific apartment defendant may/may not have lived in. RP 226-27.

Detective Dorr was able to confirm through further investigation that the Hagers lived at an apartment on 5502 Washington Street, in the city of Sumner, during the 2000-2001 school year. RP 228. Victim P.B. would have gone to Daffodil Elementary and was in the third grade at the time. RP 228. Work records for defendant show that he did not work on March 26, 2001, March 29, 2001, May 11, 2001, May 15, 2001, and May 23, 2001. RP 450. School records of P.B. indicated that she was in the third grade in the 2000-2001 school year, and that there was no school on March 29, 2002, March 30, 2001, and April 16-20th, 2001. RP 451.

P.B. recalls living in an apartment in Sumner with her mother and her mother’s boyfriend, the defendant. RP 267-69. Defendant originally lived in his brother’s apartment, across the street from her apartment. RP

269. P.B. went to school at Daffodil Elementary with defendant's daughters. RP 270. Her routine during that time was to walk to school with defendant's daughters and then come home from school and take a nap. RP 270. At times when her mother was at work she would come home and be alone with defendant in the apartment. RP 271. One time she went to sleep and awoke to defendant sexually touching her. RP 271. Defendant had his hands on her vagina, moving his fingers inside her vagina, as she awakened. RP 271. P.B. felt scared, nervous, and that this was "wrong," that "[h]e shouldn't be doing it," and she told him to stop. RP 272. Defendant proceeded to touch her vagina for a couple of more minutes and then he stopped. RP 272. During this time her top was on but her pants were down to her ankles. RP 272.

The next day defendant told her that it was just between her and him. RP 272-73. P.B. did not tell anyone because she figured she would be taken out of the home, placed in a foster home, and would not be able to see her mom. RP 273. She felt her mom loved defendant and it was a "hard situation," to know whether her mom would be with her or defendant. RP 273.

P.B.'s secret came out in the 9th grade when she wrote a letter to her boyfriend, S.L. RP 274, Pl. Ex. 6.² She explained in the letter that she was raped by her step dad in the third grade, and “[a]ll my thoughts of Tim raping me comes back and they never go away.” RP 297. P.B. related in the letter that she would have flashbacks and bad dream of abuse. RP 304. The letter also described that she lived in an unstable home, had thoughts of killing herself, and missed at least two months of school each year. RP 297-98. The only other person she had ever told was a close friend, S.S, when she was in 7th grade, and P.B. told her not to tell anyone. RP 291, 293.

P.B. met S.L. in the 7th grade. By the 8th grade they were boyfriend/girlfriend. RP 293. When their relationship did come to an end they remained very close friends. RP 293-94. P.B. wrote the letter to SL in the 9th grade and at that point they were no longer romantically involved. RP 294-95. When S.L. got the note he put it in a binder and left it in his room. RP 276-378. Approximately a day or two passed and he was called into the counselor’s office regarding the note. RP 378.

P.B. explained that there was another incident where he took P.B.’s picture, then put other pictures of naked porn girls’ bodies on her head, or

² The State has attached the transcript of P.B. reading the letter (RP 296-98) in court as appendix A.

her body with other girls' heads. RP 281. When P.B. posed for these pictures she had clothes on, but her shirt was raised. RP 281.

P.B. further recalled that she used to sit with defendant in a chair and he would put his hand down between her legs in the area of her vagina. RP 282. Defendant's hand remained above her clothes but he would move his hand around. RP 282-83. P.B.'s mother was not a witness to this because she was usually sitting on the couch or was in her bedroom. RP 283.

All of this touching behavior stopped when she was in the fifth grade and they moved. RP 285. However, defendant continued with some inappropriate behavior including commenting on P.B.'s friends "boobs" and "butts." RP 292.

P.B. never intended anyone but S.L. to see the letter. RP 306. She had simply wanted him to understand why she was always sad and tired during the day. RP 305. Since the letter came out to Mr. Daniels, life has been a "lot better." RP 306. She now gets better grades, has a new school, stable home, and food on the table. RP 307.

Sherry Hager recalled that her first husband was abusive both physically and mentally, and P.B. was a witness to this. RP 383. There was also substance abuse – methamphetamine, during the marriage. RP 384. The marriage finally ended when he ended up in jail and she

obtained a protection order. RP 384. P.B. was in the second grade at the time. RP 386.

After the divorce, Ms. Hager and P.B. moved from home to home, they were homeless for a time, and finally moved into an apartment in Sumner. RP 386. While P.B. was in the third grade, defendant moved into the apartment with them. RP 388. Both defendant and Ms. Hager abused methamphetamine. RP 303.

During this time she was working at the Goodwill through a Work First Welfare program. RP 390. Mrs. Hager's routine was to go to work, then to the Welfare office, and return home sometime around 4:00-5:00. RP 391. They lived in the Sumner apartment until P.B. was in the fifth grade. RP 393. They then moved from home to home, until moving in with defendant's parents where defendant and she slept in a van, and P.B. slept in the house. RP 395, 396. At times P.B. slept in the van as well while they were homeless. RP 395.

Mrs. Hager confirmed there was "regular pornography" on defendant's computer, and that he had a photo shop program. RP 397. Ms. Hager explained that on the day the officers came to her home with information about the abuse she was "[u]pset because my daughter was being taken away from me and he had done what he had done." RP 402.

When Mrs. Hager confronted defendant about the incident, he denied it occurred and blamed his father. RP 406. Mrs. Hager was still married to defendant at the time of trial, but in a relationship with someone else. RP 383, 409.

C. ARGUMENT.

1. A WITNESS'S ISOLATED, SINGLE REMARK REGARDING DEFENDANT'S DEemeanOR DOES NOT WARRANT THE GRANTING OF A MISTRIAL WHERE THE COURT IMMEDIATELY GAVE AN INSTRUCTION TO THE JURY TO DISREGARD THE COMMENT.

A court conducts a three part test in evaluating whether a trial irregularity requires a new trial. A court looks to: (1) The seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark. *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). The trial court is in the best position to examine the effect of the statement, so its decision will only be overturned if there was an abuse of discretion. *Id.*

This court "must presume that the jury followed the judge's instructions to disregard the remark." *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). A mistrial should be granted only if the statement

is so prejudicial that the defendant cannot possibly receive a fair trial. *Id.*

State v. Demery, cited by defendant, is inapplicable. *See State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001). That case involved tape recordings of police officers directly accusing the defendant of lying. 144 Wn.2d at 765. Also, the majority opinion in *Demery* ruled that admission of the tapes either was not error, or was harmless error. *Id.* at 764.

The statement by one officer that defendant was "evasive" during initial questioning, while improper in this case because of the pretrial order, is not equivalent to a statement that the defendant is lying.

While the defendant does not outline a constitutional claim regarding a violation of the defendant's right to remain silent, the State feels it necessary to distinguish this line of cases given the content of the officer's testimony and the State's hope to steer this court to the right standard of review should it analyze the claim this way (e.g. constitutional error analysis versus nonconstitutional error).³ *See* Opening Brief of Appellant at 10-11 (analyzing the assignment of error as one of witnesses offering opinion testimony as to guilt of defendant).

The Fifth Amendment of the United States Constitution provides, in part, that no person "shall be compelled in any criminal case to be a witness against himself." In a similar provision, article I, section 9 of the

³ The State maintains, however, that pursuant to RAP 10.3 (a)(4)(brief of appellant must contain a separate and concise statement of each error a party contends was made by the trial court), the defendant is prohibited at this point from making this legal claim.

Washington Constitution reads in part: "[n]o person shall be compelled in any criminal case to give evidence against himself." Washington courts give the same interpretation to both clauses. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996).

Generally courts distinguish between mere references to silence, and comments that use silence "to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996); *State v. Sweet*, 138 Wn.2d 466, 480, 481, 980 P.2d 1223 (1999); *See also State v. Romero*, 113 Wn.App. 779, 54 P.3d 1255 (2002) (Division III adopts a three part framework for analyzing whether a comment is a mere reference to silence and therefore nonconstitutional error). References to silence are of less concern because "[m]ost jurors know that an accused has a right to remain silent and, absent any statement to the contrary by the prosecutor, would probably derive no implication of guilt from a defendant's silence." *Lewis*, 130 Wn.2d at 706. Consequently, mere references to silence are not reversible absent a showing of prejudice. *Sweet*, 138 Wn.2d at 481

"A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). But introduction of nontestimonial evidence, such as physical evidence, demeanor, and conduct, is

permissible. *Easter*, 130 Wn.2d at 243. And "a mere reference to silence which is not a 'comment' on the silence is not reversible error absent a showing of prejudice." *Lewis*, 130 Wn.2d at 706-07.

Here, Detective Callas's single, isolated reference to defendant's demeanor cannot constitute a "comment" on defendant's right to remain silent. Instead, his testimony is more akin to the instruction of evidence regarding a defendant's demeanor or conduct. It was undisputed in this case that defendant appeared to be high and under the influence of methamphetamine at the time of contact. He did not invoke his right to remain silent, but instead denied the accusations. Nor was the comment "evasive" tied to an invocation of rights. *See Easter, supra* at 242-43 (constitutional error where officer testified that defendant did not answer and looked away when questioned, was evasive and silent when interrogated, was a "smart drunk," and prosecutor argued "smart drunk" in closing). Instead, witnesses testified that defendant's demeanor was: "jittery. He avoided eye contact, his eyes were dilated and he spoke in a very loud and fast voice." RP 225. Thus, the reference to "evasive" could have just as much to do with a methamphetamine user's demeanor, and less to do with invoking the right to remain silent.

There is also no prejudice where the State's witnesses also testified that defendant's general demeanor was: "But his demeanor towards us was - - we really didn't have any problems with him." RP 225.

The State and the witness also did not use this evidence to infer or suggest guilt. Instead, immediately following the testimony, an objection was made and sustained and a curative instruction was issued. Given this fleeting reference to defendant's demeanor, the court's instruction, and the failure to use this evidence as a comment on defendant's right to remain silent, any error was harmless.

2. DEFENDANT MAY NOT RAISE A SENTENCING ISSUE WHERE DEFENDANT DID NOT ASSIGN ERROR TO THIS ISSUE, OR BRIEF THE ISSUE.

Where a party fails to assign error or brief an issue, an appellate court will not consider the issue. See *State v. Thomas*, 150 Wn.2d 821 at 868-69, 83 P.3d 970 (2004); RAP 10.3(a)(4), (6).

In defendant's "CONCLUSION" section of his brief, he outlines a new issue without any assignment of error, argument, or briefing:

Should this Court conclude that reversal is not required, this case must be remanded for resentencing because the judgment and sentence ordering community custody imposes a condition not to "possess or peruse pornographic materials," which has been held unconstitutionally vague by the Washington Supreme Court. *State v. Bahl*, - Wn.2d - (October 9, 2008).

Opening Brief at 15.

This concluding remark is insufficient to place a new issue before the court.

However, the State is familiar with *State v. Bahl*, 164 Wn.2d 739, - P.2d – (2008). Should this court consider the sentencing issue, the State should not be prevented on remand for resentencing with less vague language, such as defendant is prohibited from “possessing or accessing sexually explicit materials as defined in RCW 9.68.130(2)⁴.” See *Bahl*, 164 Wn.2d at 767, Johnson, concurring (arguing that the term “sexually explicit material” should be upheld if the State uses this term, rather than pornographic material).

⁴ RCW 9.68.130 defines “sexually explicit material” as:

any pictorial material displaying direct physical stimulation of unclothed genitals, masturbation, sodomy (i.e. bestiality or oral or anal intercourse), flagellation or torture in the context of a sexual relationship, or emphasizing the depiction of adult human genitals: PROVIDED HOWEVER, That works of art or of anthropological significance shall not be deemed to be within the foregoing definition.

D. CONCLUSION.

The State respectfully submits that this court affirm the defendant's conviction and sentence.

DATED: January 16, 2008.

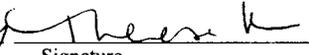
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Certificate of Service:

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.

1-16-08 
Date Signature

STATE OF WASHINGTON
BY 
09 JUN 16 PM 1:59
COURT OF APPEALS
TACOMA, WA