

NO. 42120-8-II

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

STATE OF WASHINGTON, Respondent

v.

CATREENA RAI MENDENHALL, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-01550-7

BRIEF OF RESPONDENT

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A. STATEMENT OF THE CASE

I. Procedural History

The appellant (hereafter, “defendant”) was charged by Information with Count One: Rape of Child in the Second Degree, Count Two: Child Molestation in the Second Degree, Count Three: Rape of a Child in the Third Degree, and Count Four: Child Molestation in the Third Degree. (CP 1-2). Following a trial by jury, the defendant was found guilty of Count Two: Child Molestation in the Second Degree. (CP 31). Sentencing was held on May 12, 2011. (CP 32). The standard sentencing range for Child Molestation in the Second Degree was 15-20 months confinement. (CP 34). The trial court sentenced the defendant to the bottom of the range: 15 months confinement. (CP 35). This timely appeal followed.

II. Factual Summary

Between September 1, 2008, and July 4, 2009, the defendant repeatedly molested C.D.C. when C.D.C. was between the ages of thirteen and fourteen years old. (CP 1-2). The defendant was approximately nineteen years old at the time of the molestation. (CP 1-2). C.D.C.’s date of birth is January 30, 1995. (RP 269). The defendant’s date of birth is September 13, 1989. (RP 245).

C.D.C. testified that the defendant was a family friend. (RP 271). C.D.C. said she had known the defendant since she was four or five years old and the two played together when C.D.C. lived in Washougal, Washington. (RP 271). C.D.C. said she lost contact with the defendant when her family moved to Longview, Washington. (RP 271). They became reacquainted when C.D.C. and her family moved back to Washougal in 2008. (RP 271). C.D.C. testified that the defendant would often spend the night at her house in Washougal. (RP 274-75). The defendant would sleep in C.D.C.'s twin-size bed with her. (RP 387).

C.D.C. testified that, in 2008 (when she was thirteen years old), the defendant pinned her against the wall of her bedroom and kissed her on the lips, with her tongue. (RP 275-76). C.D.C. said she was shaking all night after this happened. (RP 275). C.D.C. testified that, after this incident, the defendant continued to come over to her house and she continued to touch C.D.C. in her "private areas" and kiss her. (RP 276). C.D.C. said the defendant would touch her genitals, buttocks, and breasts. (RP 277-78). C.D.C. said the defendant would lie on top of her when they were on C.D.C.'s bed. (RP 278). C.D.C. said the defendant would put her fingers in C.D.C.'s vagina. (RP 279). C.D.C. said the defendant would do these things to her when they were alone in C.D.C.'s room. (RP 276-77).

C.D.C. said the molestation continued when she turned fourteen years old. (RP 280). C.D.C. said, on her fourteenth birthday, the defendant put her fingers in C.D.C.'s vagina. (RP 281). C.D.C. said she finally told the defendant she did not want to be friends with her anymore. (RP 281). C.D.C. said it was impossible to get away from the defendant because the defendant moved into her family's home. (RP 282). When the defendant started dating another man, C.D.C. realized the defendant had been "using" her the entire time. (RP 318). C.D.C. said she, the defendant, made her feel "awful." (RP 340).

C.D.C. eventually reported the incidents to her good friend, Marlia Marlow. (RP 366-67). After talking to her friend, C.D.C. realized she needed to talk to a school counselor. (RP 343). C.D.C. said she was hyperventilating when she went to talk to the school counselor. (RP 283). C.D.C. testified that she never wanted to get the defendant into trouble, she just needed someone to talk to. (RP 349, 353). The school counselor reported the incident to the Washougal Police Department. (RP 242).

Marlia Marlow testified that C.D.C. confided in her when they in the school bathroom in 2009. (RP 366-67). Marlow said C.D.C. told her the defendant had been molesting her. (RP 369). Marlow said C.D.C. was crying, freaking out, upset, and as red in the face as she talked to her. (RP 369). Marlow said C.D.C. "seemed hurt." (RP 369).

Marlow testified that she knew the defendant as well. (RP 366). Marlow said she never saw the defendant molest C.D.C.; however, she recalled an incident where the defendant and C.D.C. were sitting on a couch together at Marlow's house. (RP 366). Marlow said she saw the defendant look at C.D.C. in a "seductive" manner; after which, the defendant started "hugging" and "cuddling" C.D.C. (RP 366, 373, 379).

Washougal Police Department Detective Thad Eakins testified that he spoke to the defendant on two occasions. (RP 396). The defendant admitted to Detective Eakins that she "made a bad choice" with C.D.C. (RP 396).

The defendant also testified at trial. (RP 463). She admitted that she slept in C.D.C.'s bed with her and she admitted she knew C.D.C. was between thirteen and fourteen years old at the time. (RP 463). The defendant denied molesting C.D.C.; however, she admitted she sent a letter to C.D.C., while the case was under investigation, in which she said "please make this go away, just call it off and I'll never come near you again." (RP 464). The defendant also admitted that she asked C.D.C. to forgive her. (RP 464). The defendant also admitted she told one of the investigating officers that she kissed C.D.C. "one time." (RP 466).

During cross-examination, the State impeached the defendant with the fact that she told Clark County Sheriff's Office Detective Rick Buckner that

she kissed C.D.C. “more than fifty times.” (RP 468). The State also impeached the defendant with the fact that she told Detective Buckner that she “cuddled and snuggled” with C.D.C. (RP 468).

III. Facts pertaining to assignment of error

After both parties completed closing argument, the court advised it would be meeting with counsel in-chambers to discuss proposed jury instructions. (RP 472). The court advised the defendant that she was free to leave. (RP 473). The defendant did not object to the court meeting with counsel in-chambers to discuss proposed instructions.

The following morning, in open court and in the presence of the defendant, the court stated it met with counsel the previous evening and discussed proposed jury instructions. (RP 476). The court went on to state it received five additional proposed instructions from the defense that morning. (RP 476). The court provided the State and the defense with copies of all proposed instructions. (RP 476). The court advised, “this would be the opportunity for further discussion on the record and taking of any exceptions, corrections, et cetera to the...proposed instructions.” (RP 476). Defense counsel objected to a number of the State’s instructions and argued on behalf of the defendant’s proposed instructions. (RP 477). The State objected to some of the defendant’s proposed instructions. (RP 477-

78). The court made final rulings as to which instructions would be provided to the jury. (RP 483-86).

B. RESPONSE TO ASSIGNMENT OF ERROR: THE DEFENDANT'S CONSTITUTIONAL RIGHT TO BE PRESENT WAS NOT VIOLATED WHEN THE COURT MET WITH COUNSEL IN-CHAMBERS TO DISCUSS PROPOSED JURY INSTRUCTIONS.

The defendant claims her constitutional right to be present was violated when the court and counsel met in-chambers to discuss proposed jury instructions. The defendant's claim is without merit.

Whether a defendant's constitutional right to be present has been violated is a question of law that is reviewed de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011) (citing *State v. Strode*, 167 Wn.2d 222, 225, 217 P.3d 310 (2009)). Under the Fourteenth Amendment, the defendant has a due process right to be present at trial.¹ U.S. CONST. AMEND. 14. The right to be present is not absolute. *Kentucky v. Stincer*, 482 U.S. 730, 745-46, 107 S. Ct. 2658 (1987); *Irby*, at 882-83. "The core of the constitutional right to be present is the right to be present when evidence is being presented." *In re Det. of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). Beyond that, the courts have found the defendant has a

¹ *Irby*, 170 Wn.2d at 880 (stating Washington applies federal due process jurisprudence, under the Fourteenth Amendment, when reviewing the right to be present at trial).

constitutional right to be present for all “critical stages” of trial. *Irby*, at 799-800. A “critical stage” occurs when the defendant’s presence “has a reasonably substantial relation” “to the fullness of his opportunity to defend against the charge...”” *In Re. Pers. Restraint of Pirtle*, 136 Wn.2d 467, 483, 965 P.2d 593 (1998) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S. Ct. 330 (1934)). A defendant has a constitutional right to be present to the extent that a “fair and just hearing would be thwarted by his absence, and to that extent only.” *Snyder*, 291 U.S. at 107-08 (finding defendant did not have constitutional right to be present for jury’s viewing of crime scene when defendant was represented by counsel and when “there [was] nothing he could do if he were there, and almost nothing he could gain”).

A defendant does not have a constitutional right to be present for in-chambers conferences between the court and counsel on purely ministerial or “legal matters” that do not require the resolution of disputed facts. *Lord*, 123 Wn.2d at 306. For example, in *Lord*, the Washington Supreme Court found the defendant did not have a constitutional right to be present for the following proceedings: trial court’s deferred ruling on an ER 609 motion, court’s ruling on defense’s motion for funds, court’s settlement on wording of jury questionnaires and pretrial instructions, court’s setting of time limit on testing certain evidence, court’s

announcement of rulings on previously-heard evidentiary matters, court's ruling whether jurors could take notes, and court's directing of State to provide defense with summaries of witness testimony. *Lord*, 123 Wn.2d at 306 (finding the defendant did not have a right to be present because each hearing involved purely legal or ministerial matters that did not require resolution of disputed facts).

The trial court necessarily reviews the evidence that was presented at trial when it considers which jury instructions should be given. However, whether the evidence presented at trial warrants a particular instruction is a legal determination. *See State v. Berube*, 150 Wn.2d 498, 510, 79 P.3d 1144 (2003). Jury instructions involve the resolution of legal issues, not factual issues. *State v. Edwards*, 92 Wn. App. 156, 164, 961 P.2d 969 (1988). Consequently, the courts have consistently found a defendant does not have a constitutional right to be present for in-chambers conferences between the court and counsel regarding jury instructions. *Pirtle*, 136 Wn.2d at 484 (finding defendant did not have right to be present during in-chambers discussion regarding wording of jury instructions); *State v. Koss*, 158 Wn. App. 8, 241 P.3d 415 (2010) (finding defendant did not have right to be present for in-chambers discussion regarding the removal of accomplice liability language from jury instruction); *State v. Bremer*, 98 Wn. App. 832, 991 P.2d 118 (2000)

(finding defendant did not have right to be present for in-chambers discussion regarding proposed jury instructions).

1. *The defendant did not have a right to be present because the court's discussion with counsel pertained to a legal matter and it did not constitute a critical stage of trial.*

Here, there is no evidence from the record that the court reviewed new evidence, heard testimony, discussed possible defenses, or conducted any adversarial proceedings when it met with counsel in-chambers to discuss proposed jury instructions. Also, there is no evidence from the record that the discussion of proposed jury instructions required the resolution of any disputed facts. The in-chambers discussion between the court and counsel pertained only to "legal matters;" therefore, the defendant did not have a constitutional right to be present. *Lord*, at 306.

Also, the presence of the defendant for this discussion was not required to ensure fundamental fairness or to provide a reasonably substantial opportunity for the defendant to defend against the charges. *Snyder*, at 105-06, 108. First, the court did not make any decisions during its in-chambers discussion with counsel; rather, the court and counsel simply reviewed "proposed" instructions. Second, a discussion of possible jury instructions is not the primary means by which the court protects a defendant's right to a fair trial. Third, because the defendant was represented by counsel, she would not have been allowed to speak if

she had been present and there is nothing she could have contributed if present. Consequently, the court's in-chambers discussion with counsel was not a critical stage of trial, for which the defendant had a right to be present. *Contrast Irby*, at 883-84 (finding fundamental fairness required defendant's presence for jury selection because jury selection was the primary means by which the court enforced the defendant's right to be tried before a neutral and unbiased jury; the defendant could have given advice to his attorney during jury selection; and prospective jurors may have behaved differently if defendant was present for this proceeding).

In the absence of some "extraordinary circumstance," a discussion involving jury instructions is not a critical stage of trial for which the defendant has a right to be present. *Bremer*, at 835. Here, the defendant has made no showing that the court's in-chambers discussion of proposed jury instructions differed in any way from the courts' in-chambers discussions of jury instructions in *Pirtle*, *Koss*, or *Bremer*. *See Pirtle*, *Koss*, and *Bremer*, *supra*. It is not relevant that the defendant was "available" to attend this discussion, when the defendant had no constitutional right to be present in the first place. *See Br. of Appellant*, at 8-9. This Court should find no error occurred when the court met with counsel in-chambers to discuss proposed instructions.

2. *Assuming, arguendo, that the defendant had a right to be present, the defendant cannot demonstrate she was prejudiced by the violation of this right.*

A violation of the right to be present is reviewed for harmless error. *Irby*, at 885-86 (finding a violation of the right to be present is not structural error). However, in order for the reviewing court to engage in a harmless error analysis, the defendant must first demonstrate that he or she was prejudiced. *Lord*, at 306-07 (finding “prejudice to the defendant will not simply be presumed”). It is the defendant’s burden to show that his or her absence from a courtroom proceeding adversely affected the outcome of his or her case. *Kentucky*, 482 U.S. at 747; *Lord*, at 306-07.

Here, the defendant claims the court “approved” instructions when it met with counsel in-chambers. *Br. of Appellant* at 8. The defendant claims she was prejudiced because she would have objected to instruction No. 20, if she had been present for the court’s in-chambers discussion. *Br. of Appellant* at 8. This argument must fail.

First, the defendant cannot demonstrate prejudice because she was aware of proposed instruction No. 20 before the court met with counsel in-chambers. Instruction No. 20 was a limiting instruction. It stated:

[y]ou may have heard evidence relating to one witness’s opinion on the credibility of another witness. You are not to consider one witness’s opinion of another witness’s

credibility. You are the sole judges of the credibility of the witness.

- (CP 25).

Instruction No. 20 was provided in response to defense counsel's violation of his own motion in limine. During motions in limine, the court granted the defendant's motion to prohibit any witness from testifying to his or her opinion about another witness's credibility. (RP 185). During cross-examination of Detective Eakins, defense counsel asked Detective Eakins "[d]id you at any time through the course of this interview with [the defendant]... [c]all her a liar?" (RP 424). Detective Eakins responded, "[y]es, I called her a liar." (RP 424). The court excused the jury after Detective Eakins completed his testimony. The court then stated, on the record and in the presence of the defendant:

I wish to place on the record [defense counsel] has brought up the issue of the detective calling the defendant a liar. ...This does violate the pretrial motion by Defense that a witness may not express an opinion about the truthfulness of another witness.

(RP 428). The court asked defense counsel whether he would be requesting a limiting instruction. (RP 429). Defense counsel responded: "[e]ither I or the State, that's okay with me." (RP 429). The court then stated to defense counsel: "[w]ell, I'd give you a chance to think about it and discuss it with your client." (RP 429). The court then took a fifteen

minute recess. (RP 431). The record makes it clear that the defendant was aware of proposed instruction No. 20 before the court met with counsel in-chambers. The record also makes it clear that the defendant and her attorney discussed this limiting instruction before the court met with counsel in-chambers. Further, the record makes it clear that, before the court met with counsel in-chambers, defense counsel indicated, in the defendant's presence, that he believed it was in his client's best interest to include this limiting instruction.

Second, the defendant cannot demonstrate prejudice because she had an opportunity to object to instruction No. 20 after the court met with counsel in-chambers. Contrary to the defendant's assertion, the court did not "approve" any instructions when it met with counsel in-chambers. Rather, the court approved instructions when it reconvened the following morning, in open court, on the record, and in the presence of the defendant. (RP 476, 483-86). The defendant was given a copy of all proposed instructions at that time. (RP 476). The defendant had an opportunity to object to any proposed instruction. (RP 476). The defendant did not object to instruction No. 20. (RP 477).

The defendant did not have a right to be present when the court met with counsel in-chambers to discuss proposed instructions. However, assuming for the sake of argument, this Court finds the defendant's right

to be present was violated, the Court should also find the defendant was not prejudiced by the violation.

3. *The Court should not engage in a harmless error analysis.*

This Court does not need to engage in a harmless error analysis because the defendant's right to be present was not violated. Also, the defendant cannot demonstrate she was prejudiced when the court met with counsel in-chambers to discuss proposed instructions because she had an opportunity to object to any proposed instructions the following morning.

C. RESPONSE TO DEFENDANT'S FIRST STATEMENT OF ADDITIONAL GROUNDS

In her first Statement of Additional Grounds ("SAG"), the defendant claims she is entitled to relief because the State "used something" from the DVD of her polygraph examination, even though the court ruled the State "could use nothing on the DVD" because she requested an attorney. *Appellant's Statement of Additional Grounds for Review, Additional Ground 1*. Pursuant to RAP 10.10(c), this Court should decline review of the defendant's first SAG. The defendant makes no citations to the record and she cites to no authority to support her argument.

Also, if the defendant is referring to when the State impeached her with the prior inconsistent statements she made to Detective Buckner

during her polygraph examination, then the defendant's claim is without merit. Clark County Sheriff's Office Detective Rick Buckner conducted a polygraph examination of the defendant while her case was still under investigation. (RP 194). The court held a CrR 3.5 hearing prior to trial, during which Detective Buckner testified. (RP 193). Detective Buckner testified that the defendant signed a *Miranda* waiver prior to the examination, he never made any threats or promises to the defendant, the defendant was not restrained, and the defendant was at all times free to leave the examination. (RP 195, 196, 199, 202). Following the CrR 3.5 hearing, the trial court ruled all statements made by the defendant to Detective Buckner during the polygraph examination were made voluntarily and were admissible in the State's case-in-chief. (RP 225, 227). Immediately prior to trial, the State and defense learned the defendant requested an attorney during the polygraph examination. (RP 231). Consequently, the State advised the court and defense that it would not seek to admit any statements made by the defendant to Detective Buckner, except for statements that may be admissible for impeachment. (RP 231). Defense counsel responded: "okay." (RP 231).

At trial, the defendant testified she never told any officer that she kissed C.D.C. more than one time. (RP 466, 468). The State proceeded to impeach the defendant with her prior statements to Detective Buckner, in

which she admitted she kissed C.D.C. at least fifty times. (RP 468).

Defense did not object.

The courts have repeatedly held that, “although statements taken in violation of the...*Miranda* rules may not be used in the State’s case in chief, they are admissible to impeach conflicting testimony of the defendant,” so long as the statements were made voluntarily. *Michigan v. Harvey*, 494 U.S. 344, 350-51, 110 S. Ct. 1176 (1975); *see also State v. Greve*, 67 Wn. App. 166, 834 P.2d 656 (1992). Here, the defendant’s statements to Detective Buckner were voluntary. Detective Buckner never made threats or promises to the defendant, the defendant was at all times free to leave the polygraph examination, and the defendant made statements to Buckner after being advised of and waiving her rights under *Miranda*. At trial, the defendant testified inconsistently with her prior statements to Detective Buckner. Consequently, the defendant’s prior statements to Detective Buckner were admissible for impeachment.

If this Court does not decline review of the defendant’s first SAG, pursuant to RAP 10.10(c), then it should find the defendant is not entitled to review of this issue, pursuant to RAP 2.5(a). The defendant cannot demonstrate manifest error affecting a constitutional right and she failed to preserve this issue for review when her attorney did not object at trial.

D. RESPONSE TO THE DEFENDANT’S SECOND STATEMENT OF ADDITIONAL GROUNDS.

In her second SAG, the defendant claims she is entitled to relief because the State “used something, a letter” she wrote, even though the court said “both sides were unable to use anything from the internet.” *Appellant’s Statement of Additional Grounds for Review, Additional Ground 2.* Pursuant to RAP 10.10(c), this Court should decline review of the defendant’s second SAG because the defendant makes no citations to the record and she cites to no authority to support her argument.

Also, if the defendant is referring to when the State questioned her about a letter she wrote to the victim (wherein she asked the victim to “drop the charges”), then the defendant’s claim is without merit. In its pre-trial motions, the State moved the court to exclude any evidence of the “victim’s” internet activities unless the court first held a hearing to determine admissibility. (RP 174). Defense concurred with the State’s motion. (RP 174). The court granted the State’s motion to “exclude any comment or reference to the Internet activities of the *alleged* victim...without a hearing.” (RP 175) (emphasis added). During cross-examination, the State asked the defendant about a letter she sent to the victim, via the internet, while her case was under investigation. (RP 463-

64). In the letter, the defendant asked the victim to drop the charges. (RP 464). Defense counsel did not object.

The State's questioning of the defendant about the letter she wrote was admissible under ER 801(d)(2) because the letter was a statement by a party opponent. Also, the State's questioning about the letter was admissible under ER 607 for impeachment because it showed the defendant's bias. Further, the trial court never ruled the State was prohibited from admitting evidence about the "defendant's" internet activities. No error occurred here.

If this Court does not decline review of the defendant's second SAG, pursuant to RAP 10.10(c), then it should find the defendant is not entitled to review of this issue, pursuant to RAP 2.5(a). The defendant cannot demonstrate manifest error affecting a constitutional right and she failed to preserve this issue for review when her attorney did not object at trial.

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E. CONCLUSION

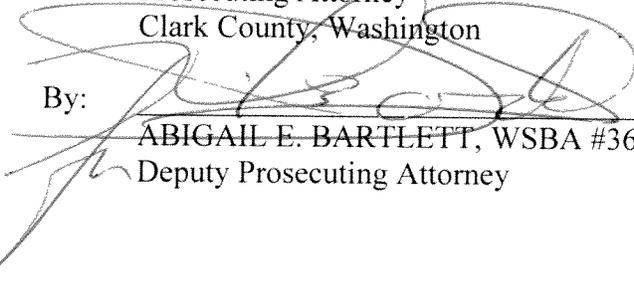
The defendant's conviction should be affirmed.

DATED this 29^B day of December, 2011.

Respectfully submitted:

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