

NO. 42215-8-II

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

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STATE OF WASHINGTON, Respondent

v.

ARTHUR CHARLES SETH, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO. 10-1-00895-1

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BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERROR

- I. This Court should find the trial court did not abuse its discretion when it admitted A.M.V.'s out-of-court statements.
  - a. *A.M.V.'s statements to Marcia Stover were admissible under ER 803(a)(4) as statements for medical diagnosis or treatment.*
  - b. *A.M.V.'s statements to S.V. and Karen Vercoe were admissible under ER 803(a)(3) as statements of then existing mental, emotional, or physical condition.*
  - c. *If any error occurred, the error was harmless.*
- II. This Court should decline review of the defendant's second assignment of error because the defendant failed to preserve this challenge for review.

B. STATEMENT OF THE CASE

I. Procedural History

The appellant (hereafter, "defendant") was charged by Second Amended Information with Count One: Rape of a Child in the Second Degree and Count Two: Rape in the Second Degree (both occurring between June 1, 2008 and July 9, 2008). (Clerk's Papers ("CP") 46). The victim in both counts was "A.M.V." (CP 46). For Count One, the State alleged as an aggravating factor that the offense was predatory because the defendant was a stranger to the victim. (CP 46). For Count Two, the State alleged as an aggravating factor that the victim was less than 15 years of

age at the time of the offense. (CP 46). At an omnibus hearing prior to trial the defendant stated the nature of his defense was "general denial." (CP 10).

Trial commenced on the morning of May 2, 2011 and concluded on the afternoon of May 3, 2011. (Verbatim Report of Proceedings ("RP") 2, 411). Following a half-day of deliberations, the jury convicted the defendant of both charges. (RP 413-414). The jury also found the State proved both aggravating factors. (RP 414). The defendant was sentenced on June 8, 2011. (CP 147). With an offender score of 6 points, the trial court sentenced the defendant to a minimum term of 25 years confinement. (CP 150). This timely appeal followed. (CP 169).

## II. Summary of Facts

In June of 2008, A.M.V. was 11 years old and she was in the sixth grade at Discovery Middle School in Clark County, Washington. (RP 132, 138). A.M.V. was best friends with "S.M." (RP 135). S.M. was one year ahead of A.M.V. at school. (RP 109). A.M.V. and S.M. spent a lot of time together when they were at school and they frequently hung out together after school. (RP 137).

A.M.V.'s twelfth birthday was on July 10, 2008. (RP 132). A few weeks before her twelfth birthday, S.M. invited A.M.V. to spend the night

at her house.<sup>1</sup> (RP 139-140). The next afternoon, S.M.'s uncle (the defendant) came over. (RP 140, 143, 157). The defendant was carrying a beer when he arrived. (RP 158). The defendant was slurring his words and he was acting "weird." (RP 156). He was wearing jean shorts and he was not wearing a shirt. (RP 160). The defendant invited the girls to come over to his home. (RP 140). A.M.V. did not know the defendant, she did not want to go to the defendant's home, and she felt uncomfortable; however, she went along. (RP 157-158).

The defendant lived in a one-room apartment over the garage of another person's residence in Clark County, Washington. (RP 140, 158). The apartment contained a bed, a couch, and a TV. (RP 143). The windows were covered by curtains. (RP 163). When the three arrived, the defendant and S.M. sat on the couch and A.M.V. sat on the bed, so that she wouldn't have to sit on the floor. (RP 144). The defendant told A.M.V. that she was "hot," which made her feel uneasy. (RP 176). The defendant offered beer and marijuana to the girls. (RP 144). A.M.V. declined the offer. (RP 144). A.M.V. watched the defendant and S.M. as they smoked marijuana out of a "blunt" and as they drank multiple beers. (RP 144, 145, 162, 174).

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<sup>1</sup> A.M.V. testified to each of these facts at trial. (RP 132-177).

After five to ten minutes, the defendant got up and pushed A.M.V. onto the bed. (RP 145). A.M.V. tried to scream, but the defendant put his hand over her mouth and told her to "shut the fuck up or else he's gonna kill my family and me." (RP 145). The defendant pushed his other hand into her shoulder. (RP 145-146). The defendant pulled down A.M.V.'s shorts and underwear. (RP 146). He did not take her top off. (RP 164). The defendant then pulled down his shorts. (RP 146). The defendant took out his penis and he put it in A.M.V.'s vagina. (RP 147). It "hurt a lot" and A.M.V. was "in shock." (RP 147). A.M.V. was a virgin and she was "really scared." (RP 147). She "just didn't know what to do." (RP 147). It felt like the rape lasted five to ten minutes. (RP 149).

When the defendant was done, he pulled up his shorts and got off of A.M.V. (RP 149). A.M.V. immediately pulled up her shorts and "tried to get out of there as soon as possible." (RP 149). A.M.V. went to get S.M. from the couch. (RP 149). She saw that S.M. was "just laying there." (RP 149). "It looked like she was passed out." (RP 149). When A.M.V. got S.M. up, S.M. "looked out of it." (RP 149). The two walked back to S.M.'s house. (RP 150). A.M.V. cried as she told S.M. what happened. (RP 166). A.M.V. did not feel like S.M. was paying attention because she was "so high and drunk." (RP 149, 166).

A.M.V. felt like she “got stabbed” by S.M. because S.M. put her into the situation. (RP 150). Despite S.M.’s attempts to talk, A.M.V. never spoke to S.M. after the rape. (RP 169).

The day after the she came home from S.M.’s house, A.M.V. told her mother that S.M.’s uncle hit on her. (RP 169). However, she was scared to tell her parents that S.M.’s uncle had also raped her because she was afraid her parents would “judge” her. (RP 151, 173). She did not think they would understand. (RP 151).

A.M.V. did not tell anyone that she had been raped. (RP 170). Instead, she tried to cope with the rape on her own by self-medicating with alcohol and drugs. (RP 171). A.M.V. also started cutting herself. (RP 171). A.M.V.’s demeanor changed. A.M.V.’s sister said, after she came home from S.M.’s house, she was “more...closed up...not like open to anything.” (RP 89). A.M.V.’s father said A.M.V.’s “whole frame of mind” changed after that day. (RP 96). A.M.V. started running away from home, she became truant from school, she started hanging out with kids who were associated with gangs, and she became sexually promiscuous (RP 221).

Approximately two years after the rape, A.M.V. confided in her younger sister, S.V., because she “couldn’t take it anymore.” (RP 152). S.V. testified that she remembered that “one day, not all that long

ago...something traumatic happened to [A.M.V.] she was out with her friend [S.M.]" (RP 90). S.V. said she called her mother (Karen Vercoe). (RP 90).

Vercoe testified that, when she got the call from S.V., she came home to find that A.M.V. was "very upset, distraught, [and] crying." (RP 116). Vercoe said A.M.V. was having a "hard time breathing" and she "actually physically threw up." (RP 116). Karen said A.M.V. told her

[s]he had felt bad about what had happened, and that she didn't speak up about it to us sooner, and she felt ashamed because she felt like it was her fault for not listening to us about our feelings about [S.M.].

- (RP 117).

Vercoe testified that she and her husband called the police. (RP 118). A.M.V. met with Vancouver Police Department Detective Aaron Holladay on March 12, 2010, at the Children's Justice Center for the Clark County Prosecuting Attorney's Office ("CJC"), in Clark County,

Washington. (RP 77-78). Detective Holladay presented A.M.V. with a photo lay down that included a photograph of the defendant. (RP 82).

A.M.V. did not know the defendant's name; however, she correctly identified him in the photo lay down without any hesitation. (RP 82).

Marcia Stover testified that she conducted a genital and physical examination of A.M.V., after A.M.V. was interviewed by the police. (RP

187). Stover has a Bachelor's and Master's degree in nursing, she is a certified pediatric nurse practitioner, and she has over twenty-one years experience as a pediatric nurse practitioner. (RP 183-184). Stover examined A.M.V. on May 12, 2010, in the fully-equipped medical examination room at CJC. (RP 187).

Stover testified that the purpose of her appointment with A.M.V. was to diagnose and to treat any physical injuries that A.M.V. may have sustained and to refer A.M.V. for any necessary counseling or psychological treatment. (RP 191-192). In order to diagnose and treat A.M.V.'s physical injuries, Stover said she needed to know how the rape occurred, as well as when and where A.M.V. felt pain during the rape, because this information would give Stover an indication of where A.M.V. might have been injured and what was the extent of her injuries. (RP 195). Stover said she also needed to know how the rape occurred, and how it affected A.M.V., in order to determine the type of counseling and psychological treatment that A.M.V. needed. (RP 192-193). Stover testified that A.M.V. told her the following:

[s]he said: 'He pushed me on the bed. He covered up my mouth and then he threatened to hurt my family. And I didn't want it to happen, so I went quiet.'

...

'He had sex with me. It was penis to vagina. I didn't like it, it hurt. There was a lot of pain.'

- (RP 192-193).

Dr. Linda Schmidt testified that she is a board certified child, adolescent, and adult psychiatrist who met with A.M.V. in November of 2010. (RP 268, 273) Dr. Schmidt said she diagnosed A.M.V. with major depressive disorder and Post Traumatic Stress Disorder ("P.T.S.D.") as a result of the rape. (RP 278-279). Dr. Schmidt said, in order to diagnose A.M.V. it was essential to know what happened to her. (RP 275). Dr. Schmidt said A.M.V. told her that she was raped by her friend's uncle when she was eleven years old.<sup>2</sup> (RP 277). Dr. Schmidt testified that A.M.V.'s subsequent abuse of drugs and alcohol was consistent with her P.T.S.D. diagnosis because persons with P.T.S.D. often attempt to "numb themselves" in order to avoid triggering events. (RP 280-281, 283). Dr. Schmidt also testified that, based on her training and experience, it was common for adolescent girls to delay in reporting sexual assaults because they felt shame and guilt. (RP 282).

Kip Kryger was the lead social worker at "Christie Care," an inpatient treatment facility where A.M.V. was admitted after she was diagnosed by Dr. Schmidt. (RP 207). Kryger testified that A.M.V. was

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<sup>2</sup> The defendant did not object to the admissibility of A.M.V.'s statements to Dr. Schmidt at trial and he does not challenge their admissibility on appeal.

admitted to “Christie Care” on December 28, 2010 and she was a patient at their facility for five months. (RP 208). Kryger said, consistent with P.T.S.D., A.M.V. regularly heard the defendant’s voice in her head. (RP 211, 216). Also consistent with P.T.S.D., A.M.V. regularly had nightmares in which she was raped by the defendant. (RP 214-215).

Kryger said it was “absolutely pertinent and important” to know what had happened to A.M.V. in order to treat her depression and P.T.S.D. (RP 210). Kryger said A.M.V. told her the following: her friend introduced her to the person who raped her; her friend thought the defendant was interested in her; they went to the defendant’s home; the defendant offered them beer and marijuana, S.M. and the defendant drank and took drugs while A.M.V. sat on the bed; the defendant pushed her into the bed; he covered her mouth to prevent her from screaming; he threatened to kill her and her family; he pulled down her shorts and underwear; he pulled down his shorts; he penetrated her; and, after it was over, she tried to wake up her friend, who had passed out. (RP 212-214).<sup>3</sup> A.M.V. said she felt hopeless. (RP 217). She felt like she had no future now and she felt like it was her fault that she was raped because she “shouldn’t have gone over there.” Kryger said these feelings were consistent with P.T.S.D. and depression. (RP 216-218).

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<sup>3</sup> The defendant did not object to the admissibility of A.M.V.’s statements to Kryger at trial and he does not challenge their admissibility on appeal.

A.M.V. testified that, once she disclosed the rape, she wanted to tell the doctors everything that had happened to her. (RP 155). A.M.V. said she wanted them to know that it was “very dramatic for [her]” because this information would explain how she “got into the places that [she] got into.” (RP 155). A.M.V. said she knew the doctors needed to know what happened to her “in order...for them to do their job” and in order to “help [her] get through the process.” (RP 155).

S.M. testified for the defense that said she did not see the defendant rape A.M.V. However, she admitted that there was beer and marijuana available when they arrived at the defendant’s apartment. (RP 315). She also admitted that she had visited the defendant two times since the incident happened. (RP 317). S.M. had no explanation for why A.M.V. never spoke to her again after they left her uncle’s home. (RP 316-317).

When the defendant testified, he was able to describe the afternoon of the alleged rape (three years prior to trial) in great detail. For example, the defendant said, that afternoon, S.M. and A.M.V. came over to his apartment, everyone played on the trampoline, they all watched TV together, he smoked “pot residue.” S.M. and A.M.V. stayed at his apartment between forty-five minutes and one hour, and there was a lady outside “feeding a turtle.” (RP 338-338). However, the defendant agreed

that, when he spoke to Detective Holladay (one year prior to trial), he told Detective Holladay that he did not remember A.M.V. ever coming over to his home. (RP 343). The defendant said his memory was better at trial than it was when he spoke to Detective Holladay. (RP 343). The defendant said he used to be an alcoholic and it would not have been unusual for him to have been drinking on the day in question. (RP 342).

### C. ARGUMENT

#### I. The trial court did not abuse its discretion when it admitted A.M.V.'s out-of-court statements.

The defendant alleges the trial court violated his constitutional right to a fair trial when it allowed Marcia Stover, S.V. (A.M.V.'s sister), and Karen Vercoe (A.M.V.'s mother) to testify to A.M.V.'s out-of-court statements. The defendant's claims are without merit.

The trial court's admission of out-of-court statements is an evidentiary decision that is covered by the Rules of Evidence, not constitutional law. *See State v. Williams*, 30 Wash. App. 558, 565-66, 636 P.2d 498 (1981), rev'd on other grounds, 98 Wash. 2d 428, 656 P.2d 477 (1982). A trial court's decision to admit evidence is reviewed for an abuse of discretion. *State v. Finch*, 137 Wn.2d 792, 810m 975 P.2d 967 (1999). A court abuses its discretion when its evidentiary ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable

reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

ER 801(c) provides: “[h]earsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 803 provides “[h]earsay is not admissible except as provided by these rules, by other court rules, or by statute.”

- a. *A.M.V.’s statements to Marcia Stover were admissible under ER 803(a)(4) as statements for medical diagnosis or treatment.*

Under ER 803(a)(4), hearsay is admissible when the declarant made the statement for the purposes of medical diagnosis or treatment. ER 803(a)(4) provides

[s]tatements [are] made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

- ER 803(a)(4).

A statement is “reasonably pertinent to diagnosis or treatment” when (1) the declarant’s motive in making the statement is to promote treatment and (2) the medical professional reasonably relies on the

statement for the purposes of treatment. *State v. Butler*, 53 Wn. App. 214, 220, 766 P.2d 505 (1989).

Under ER 803(a)(4), the definition of medical “treatment” is not limited “to a medical lexicon involving only physical injuries.” *State v. Woods*, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001). Rather, psychological treatment also falls within the definition of the medical treatment exception. *Woods*, 143 Wn.2d at 602. For example, in *Woods*, the Court found, when a witness observed her friend being beaten, the emergency room doctor needed to know “what happened” from the perspective of the witness because she was likely to experience post traumatic distress and the doctor needed to assess her need for counseling. *Id.*

In addition, under ER 803(a)(4), hearsay is admissible even if the purpose of the questioning is to gather evidence as well as to identify treatable injuries. *State v. Williams*, 137 Wn. App. 736, 747, 154 P.3d 322 (2007). For example, in *Williams*, the Court of Appeals found, when a forensic nurse provided a written questionnaire to an alleged rape victim, the victim’s responses were admissible under the medical treatment exception even though the victim admitted during cross-examination that “at first” she “didn’t feel like [she] needed any specific medical treatment.” *Williams*, 137 Wn. App. at 740, 747 (finding victim’s

statements were admissible because victim did not state that her “only” purpose for going to the hospital was to “gather evidence” and because forensic nurse testified that the purpose of the questionnaire was two-fold: to gather evidence and to identify treatable injuries).

Statements of fault are generally inadmissible under ER 803(a)(4); however, “much...depends on the context in which the statements are made.” *Williams*, at 746 (internal citations removed) (finding, even though victim “did not identify [the defendant] as the assailant in her answers to the questionnaire, such disclosure would have been permissible under ER 803(a)(4) to prevent future injury”).

Here, A.M.V. testified that her motive for telling the medical providers about the rape was to promote treatment. A.M.V. said, once she disclosed the rape, she wanted to tell the medical providers everything, so that they could “help [her] through the process.” (RP at 155).

Marcia Stover testified that she reasonably relied on A.M.V.’s statements in order to treat her. Stover testified that the purpose of her examination of A.M.V. was to diagnose and treat any physical injuries that A.M.V. may have sustained as a result of the rape (including sexually transmitted diseases) and to refer A.M.V. to appropriate counseling and psychological care. Stover said, in order to diagnose any physical injuries,

she needed to know how the rape occurred as well as when and where A.M.V. felt pain during the rape. Stover said, in order to refer A.M.V. to appropriate counseling and appropriate psychological care, she also needed to know how the rape occurred and what trauma A.M.V. experienced as a result of it.

A.M.V. was not motivated to disclose the details of the rape to Stover because she wanted to prosecute the defendant; rather, A.M.V. was motivated to disclose the details of the rape because she wanted to get help. Stover was not motivated to take statements from A.M.V. solely because she wanted to gather evidence against the defendant; rather, Stover was motivated to take statements from A.M.V. because she wanted to help her. Consequently, A.M.V.'s statements to Stover were reliable.

Also, pursuant to the trial court's rulings during motions in limine, the State never elicited statements of identification from Stover during her direct examination.<sup>4</sup> Stover testified only to the following during her direct examination:

Q: And specifically what did [A.M.V.] tell you was her reason for being presented to you that day?"

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<sup>4</sup> During motions in limine, the trial court ruled that Stover could testify to A.M.V.'s statements, which were "germane" to her medical diagnosis or treatment; however, the court stated it would likely exclude statements identifying the defendant. (RP 27-28).

A: I said: 'Can you tell me about what happened?' And she said: '*He* pushed me on the bed. *He* covered up my mouth and then he threatened to hurt my family. And I didn't want it to happen, so I went quiet.'

...

Q: [Y]ou said you asked [A.M.V.] about the pain. ...[W]hat did she tell you?

A: I asked her for more clarification about what actually happened and she said: '*He* had sex with me. It was penis to vagina. I didn't like it, it hurt. There was a lot of pain.'

(RP at 192-193, 197) (emphasis added). During direct examination, Stover never testified that A.M.V. told her *who* raped her. Similarly, Stover never testified that A.M.V. told her when she was raped, where she was raped, or who else was present during the rape. To the extent that the defendant argues otherwise in his brief, he completely misstates the evidence that was presented at trial.<sup>5</sup>

Stover *did* testify to the identity of the defendant during trial: however, she only did so during cross-examination, when the defendant specifically elicited this information from her. The following exchange took place between defense counsel and Stover during cross-examination:

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<sup>5</sup> For example, the defendant writes "[A.M.V.] told [Stover] that during the summer of 2008, she and her then friend SM went to the defendant's apartment, that during this visit the defendant pushed her down on a bed..." See Br. of Appellant at 7 (citing RP at 192-197). However, a review of this portion of the transcript reveals that Stover never testified that A.M.V. told her when she was raped, where she was raped, or by whom she was raped.

Q: And you indicated that she - - I'm going to lead you to page 2 of your report. Can you state for the jury just the - the history from the child, that paragraph[?]

...

A: Okay. 'I spoke to [A.M.V.] after speaking to her mother....

And [A.M.V.] tells me that she spent the night *at [S.M.'s] house*, and she said [S.M.] asked *her uncle* if she could go over there. And [A.M.V.] said: 'They were smoking and drinking all day and her uncle asked me if I wanted pot, and I told him no. He got out of control.

After we were done, I started crying and I told [S.M.] what happened and she said he wouldn't do that.'

Q: Okay. So I just want to make it clear, the notes that you wrote in here, her indicating they were smoking and drinking all day: is that what your recollection is?

...

A: Yes, yes.

- (RP at 199-200) (emphasis added).

Arguably, A.M.V.'s statements of identification would have been admissible for the purposes of medical diagnosis or treatment because Stover needed to know the identity of the perpetrator in order to develop a safety plan for A.M.V. Also, the relationship of the perpetrator to A.M.V.'s former best friend was part-and-parcel to A.M.V.'s depression and P.T.S.D. However, the State did not elicit statements of identification

from Stover. If any error occurred here, the error was invited by the defendant and he may not seek relief for it on appeal. *See State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (finding, under the invited error doctrine, a party may not set-up an error at the time of trial and then complain about the issue on appeal).

For each of these reasons, the trial court did not abuse its discretion when it admitted A.M.V.'s statements to Stover. A.M.V.'s statements were admissible under ER 803(a)(4) as statements for the purposes of medical diagnosis or treatment.

- b. *A.M.V.'s statements to S.V. and Karen Vercoe were admissible under ER 803(a)(3) as statements of then existing mental, emotional, or physical condition.*

Under ER 803(a)(3), hearsay is admissible in order to show the declarant's then existing mental, emotional, or physical condition. ER 803(a)(3) defines a statement of "then existing mental, emotional, or physical condition" as

[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed..

- ER 803(a)(3).

Hearsay is admissible under ER 803(a)(3) so long as the declarant's then existing mental, emotional, or physical condition is relevant to an issue in the case and so long as the out-of-court statement contains an indicia of trustworthiness. *State v. Parr* 93 Wn.2d 95, 98-99, 606 P.2d 263 (1980). Under ER 803(a)(3), statements reporting the conduct of another, which might have induced the declarant's state of mind, are not admissible. *Parr*, 93 Wn.2d at 98. However, a statement is not rendered inadmissible under this exception simply because, by inference, the statement refers to a past event. *State v. Flett*, 40 Wn. App. 277, 287-288, 699 P.2d 774 (1985).

For example, in *Flett*, the Court of Appeals found the trial court did not abuse its discretion when it admitted a statement that an alleged rape victim made to her son, more than six hours after the rape, wherein she said "[s]omething upset me." *Flett*, 40 Wn. App. at 287-288. The Court held this statement was admissible under ER 803(a)(3) because it was demonstrative of the victim's then-existing mental and emotional state and because the victim's then-existing mental and emotional state was relevant to the issue of "lack of consent." *Flett*, at 287-288. Also, the Court stated, even though the victim's statement, by inference, referred to a past event, this inference did not render her statement inadmissible under

ER 803(a)(3) because it was “reasonable to believe the [victim’s] condition existed at the time of the utterance, as well.” *Id.*

Here, the trial court limited the statements to which S.V. and Vercoe could testify.<sup>6</sup> Accordingly S.V. only testified that “...one day...not all that long ago...something traumatic had happened to [A.M.V.] when she was out with her friend [S.M.]” (RP at 90). Similarly, Vercoe only testified that A.M.V. said

she felt bad about what had happened, and that she didn’t speak up about it to [her family] sooner, and she felt ashamed because she felt like it was her fault for not listening to [her parents] about [their] feelings about [S.M.].

- (RP at 117).

The limited statements to which S.V. and Vercoe testified were relevant to explain A.M.V.’s then existing mental emotional and physical condition. Vercoe said, at the time A.M.V. disclosed that something happened to her, she was “very upset, distraught, crying, and [she] had a hard time breathing.” (RP at 116). Vercoe said A.M.V. “actually physically threw up,” she “could hardly talk,” “[s]he looked physically ill,” and she was “pale.” (RP at 116, 118). A.M.V.’s statements to S.V.

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<sup>6</sup> During motions in limine, the court ruled that A.M.V.’s sister and mother could testify that A.M.V. was “upset;” however, the court ruled they could only testify to A.M.V.’s statements identifying the defendant insofar as their testimony satisfied the “res gestae” rule. (RP 27-28, 90).

and to Vercoe explained why A.M.V. was crying, why she was distraught, and why she was physically ill: A.M.V. was in hysterics because she believed what had happened to her was her fault and she had been carrying the guilt and shame of this belief for over one year.

A.M.V.'s then-existing mental, emotional, and physical condition was relevant to issues in the case. The defendant claimed that no rape occurred. Also, the defendant repeatedly attacked the credibility of A.M.V.'s story, because A.M.V. delayed in reporting the rape. For example, during the defendant's cross-examination of A.M.V., defense counsel questioned her: "...did you disclose to anyone other than [S.M.] what had happened to you?...You didn't tell any friends?...And then after you told [your sister]...you told other people who have been involved in this case what happened, correct?" (RP 170). Consequently, the fact that A.M.V. was in hysterics and the fact that she became physically ill when she eventually disclosed to her family that something happened to her was relevant to rebut the defendant's claim of recent fabrication and it was relevant to explain A.M.V.'s delay in reporting.

Also, A.M.V.'s statements had an indicia of trustworthiness. A.M.V. confided in her younger sister -- she did not report the rape to a "mandatory reporter" such as a police officer or a school counselor.

A.M.V. disclosed the incident to her mother only because S.V. called their mother after A.M.V. confided in S.V. There was no evidence presented at trial that A.M.V. made these statements in an effort to prosecute the defendant; in fact, there was no evidence that A.M.V. made these statements for any reason other than to reach out for help.

Furthermore, neither S.V. nor Vercoe testified to any statements made by A.M.V. in which A.M.V. "reported the conduct of another." For example, neither S.V. nor Vercoe testified that A.M.V. told them who raped her, when she was raped, how she was raped, where she was raped, or who else was present when she was raped. In fact, neither S.V. nor Vercoe testified that A.M.V. said she had "been raped." To the extent that the defendant argues otherwise in his brief, he completely misstates the evidence that was presented at trial.<sup>7</sup> Consequently, their testimony was not "outside the scope" of ER 803(a)(3).

For each of these reasons, the trial did not abuse its discretion when it admitted limited statements that A.M.V. made to her sister and mother. A.M.V.'s statements were admissible under ER 803(a)(3) in order to explain her then-existing mental, emotional, and physical condition.

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<sup>7</sup> The defendant writes "[o]nce home, AV told her mother that the defendant had raped her." See Br. of Appellant at 4, citing RP at 115-118. These facts are not to be found in RP at 115-118.

c. *If any error occurred, the error was harmless.*

When the trial court abuses its discretion in admitting hearsay, reversal is required only “where there is any reasonable probability that the use of the inadmissible evidence was necessary to reach a guilty verdict.” *Williams*, at 747 (quoting *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)) (finding, if trial court abused its discretion in admitting victim’s statements to ER doctor, any error was harmless because doctor’s testimony “was consistent” with victim’s testimony at trial).

The trial court properly admitted A.M.V.’s out-of-court statements pursuant to the rules of evidence. However, if this Court finds any error occurred, it should also find the error was harmless. A.M.V. provided a detailed and nuanced recounting of the events that took place in June of 2008, three years prior to trial. A.M.V.’s story was consistent with, and was corroborated by, the story that she told Dr. Schmidt and the story that she told Kip Kryger. A.M.V.’s story was corroborated by the fact that, two years after the rape, she was able to identify the defendant in a photo lay down, even though she did not even know the defendant’s name and even though she had not seen him since the rape. A.M.V.’s story was corroborated by the fact that she was diagnosed with severe depression

and Post Traumatic Stress disorder, two years after the rape. A.M.V.'s story was corroborated by the fact she was hearing the defendant's voice in her head and she was having nightmares about being raped by the defendant, two years after the rape. A.M.V.'s story was corroborated by the fact that her entire persona drastically changed following the rape and it remained changed from that day forward. A.M.V.'s story was corroborated by the fact she delayed in reporting when the reasons for her delay in reporting were consistent with reasons commonly expressed by female adolescents who had been sexually assaulted. Lastly, A.M.V.'s story was corroborated by the inconsistencies in and by the implausibility of the defendant's story. There was no evidence that A.M.V. had any motive to fabricate these charges. By all accounts, A.M.V. would have preferred to have never disclosed the rape; however, her need for help overcame her sense of guilt and her fear of being judged. The evidence in this case was overwhelming. Consequently, and *any* error was harmless under either a constitutional or a non-constitutional harmless error standard.

II. The defendant did not preserve his second assignment of error for review.

In his second assignment of error, the defendant claims the trial court improperly commented on the evidence when it used the term

“victim” in the special verdict instructions and in one of the special verdict forms. The defendant did not object to the language in the special verdict instructions or in the special verdict form at the time of trial and he did not request alternative language to be used.<sup>8</sup> Because the defendant cannot show manifest constitutional error, this issue has been waived.

Under Washington Superior Court Criminal Rule (“CrR”) 6.15, a defendant must state a reasoned objection to a jury instruction at the time of trial in order to preserve an alleged instructional error for review. *State v. Bertrand*, 165 Wn. App. 393, 400, 267 P.3d 511 (2011). Under Washington Rule of Appellate Procedure (“RAP”) 2.5(a), the appellate court may refuse to review any claim of error that was not raised in the trial court and preserved for review. The rule requiring issue preservation “encourages the efficient use of judicial resources” by affording the trial court the opportunity to correct an error before it reaches the jury. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

An exception to the rule requiring issue preservation applies only if the defendant can demonstrate manifest error affecting a constitutional right. RAP 2.5(a)(3); *Scott*, 110 Wn.2d at 687; *see also State v. O’Hara*, 167 Wn.2d 91, 102, 217 P.3d 756 (2009) (finding challenges to jury

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<sup>8</sup> The court reviewed all proposed jury instructions with both parties, on the record, and in the presence of the defendant. Defense counsel affirmatively stated that she did not object to the instructions to which the defendant now assigns error. (RP 356-357).

instructions do not automatically give rise to a claim of manifest error affecting a constitutional right). In order to demonstrate “manifest” error, the claimant must show he was “actually prejudiced.” *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The burden shifts to the State to demonstrate the error was harmless only if the defendant can successfully make the threshold showing that manifest constitutional error occurred. *See State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Jury instructions are reviewed de novo, within the context of the instructions as a whole. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 315 (2009). Under article IV, section 16 of the Washington Constitution, a judge is prohibited from conveying his or her personal attitudes toward the merits of a case. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). Whether a comment is improper depends on the facts and circumstances of each case. *State v. Eisner*, 95 Wn.2d 458, 462, 626 P.2d 10 (1981). A jury instruction constitutes an improper comment on the evidence when it evinces the court’s personal opinion regarding the credibility, weight, or sufficiency of evidence or when it implies that “matters of fact have been established as a matter of law.” *Becker*, 132 Wn.2d at 64 (finding special verdict form was improper comment on the evidence when it told jury that a facility was a school, thereby relieving

State of burden to prove the facility was a school); *see also State v. Levy*, 156 Wn.2d 709, 721-22, 132 P.3d 1076 (2006) (finding “to convict” instruction was improper in a burglary case when instruction stated the apartment at issue was a “building” and the crowbar and handgun at issue were “deadly weapons”). In contrast, a jury instruction does not constitute an improper comment on the evidence when it is supported by sufficient evidence in the record and when it is “an accurate statement of the law.” *State v. Stearns*, 61 Wn. App. 224, 231, 810 P.2d 41 (1991), *review denied*, 117 Wn.2d 1012, 816 P.2d 1225 (1991).

Here, the defendant takes exception to Instruction No. 12, (special verdict concluding instruction), Instruction No. 13 (definition of “predatory” for special verdict on Count One), and the Special Verdict Form for Count Two (asking, “[w]as the victim less than fifteen years of age at the time of the offense”). (CP 107, 108, 113). Each instruction pertains only to the special verdicts and none of the instructions constitute improper comments on the evidence. First, the court did not convey its opinion as to the defendant’s guilt by simply using the term “victim.” This is the case because a “victim” is defined as “anyone who suffers either as a result of ruthless design or incidentally or accidentally.” Webster’s Third New International Dictionary 2550 (2002). Use of the term “victim,” without more, did not imply that the court believed

“A.M.V.” was the victim or that “the defendant” committed a criminal act against her. Therefore, the language in the challenged instructions was not improper because it did not reveal the court’s personal opinions as to the weight and sufficiency of the evidence.

In addition, the language in the challenged instructions was not improper because it did not relieve the State of its burden of proof for either offense (to wit: Rape of a Child in the First Degree, as charged in Count One, or Rape in the Second Degree, as charged in Count Two). For example, the court never said that “AMV” was *the victim*. Also, the court never stated that “the defendant” had “sexual intercourse” with *the victim*, that “the defendant” had “sexual intercourse” with *the victim* by “foreible compulsion,” that *the victim* was “less than twelve years old at the time of the offense,” or that *the victim* was the object of an offense that occurred “in the State of Washington” “between June 1, 2008 and July 9, 2008.” (Inst. no. 7, 9; CP 102, 104).

Additionally, it was not improper for the court to use the term “victim” in the challenged instructions because these instructions were only applicable *after* the jury found the defendant guilty of the charged offenses. The introductory sentence of Instruction No. 12 stated “[i]f you find the defendant not guilty of the charge, do not use the special verdict form for that charge.” (Inst. no. 12; CP 107). Similarly, the introductory

sentence for the special verdict form on Count Two stated: “this special verdict is to be answered only if the jury finds the defendant guilty...” (CP 113). Also, during closing argument, the prosecutor reminded the jury that they should only review the special verdict instructions *if* they found the defendant guilty of the underlying charges when he said “[t]hen there’s the special verdicts that you look at if you find the defendant guilty and only if you find the defendant guilty on the Count One and Count Two.” (RP 408). It was not improper for the court to use the term “victim” here because, if the jury found the defendant guilty of either Rape of a Child in the First Degree or Rape in the Second Degree, then they necessarily found the State had proven the presence of “a victim” for the purposes of the special verdict instructions.

More importantly, the language used by the court in the special verdict instructions and in the special verdict form was not improper because it tracked the language used by the legislature in the relevant statutes. For example, for Count One (Rape of a Child in the First Degree), the State alleged as an aggravating factor that the offense was “predatory.” (Inst. No. 12; CP 107). In Instruction No. 13, the court provided the following definition of “predatory”:

[p]redatory means that the perpetrator of the crime was a stranger to *the victim*. “Stranger” means that *the victim* did

not know the perpetrator twenty-four hours before the offense.

(Inst. No. 13; CP 108) (emphasis added). Instruction No. 13 was based on the legislature's definition of "predatory" under RCW 9.94A.030(38) and RCW 9.94A.030(50). RCW 9.94A.030(38) provides

'[p]redatory' means: (a) The perpetrator of the crime was a stranger to *the victim*, as defined in this section...

(RCW 9.94A.030(38)) (emphasis added). Also, RCW 9.94A.030(50) provides

'[s]tranger' means that *the victim* did not know the offender twenty-four hours before the offense.

- (RCW 9.94A.030(50)) (emphasis added).

For Count Two (Rape in the Second Degree) the State alleged as an aggravating factor that A.M.V. was less than fifteen years of age at the time of the offense. In Instruction No. 12 (the concluding instruction for the special verdicts) and in the Special Verdict Form for Count Two the court asked

...[w]as *the victim* less than fifteen years of age at the time of the offense?

(Inst. No. 12, Special Verdict form for Count Two; CP 107, 113)

(emphasis added). Instruction No. 12 and the Special Verdict Form for Count Two were based on RCW 9.94A.837, which provides

[i]n a prosecution for...rape in the second degree...the prosecuting attorney shall file a special allegation that *the victim* of the offense was under fifteen years of age at the time of the offense...

- RCW 9.94A.837(1) ( emphasis added).

Here, the language that the court used in Instruction No. 13 mirrored the language that the legislature used in RCW 9.94A.030(38) and RCW 9.94A.030(50). The language that the court used in Instruction No. 12 and in the Special Verdict Form for Count Two mirrored the language that the legislature used in RCW 9.94A.837. The court presumably used the term “victim” in these instructions and in this special verdict form because this is the term that the legislature used in the relevant statutes. Because the language in the challenged instructions was an accurate statement of the law, it was not improper.

In addition, the defendant cannot demonstrate that he was prejudiced by the language used in the challenged jury instructions. Division One addressed a similar challenge to the court’s use of the term “victim” in *State v. Alger*, 31 Wn. App. 244, 640 P.2d 44 (1982), *review denied*, 97 Wn.2d 1018 (1982). In *Alger*, the court read a stipulation to the jury, prior to trial, in which it stated “[the defendant’s] age is 36, and he has never been married to *the victim*.” *Alger*, 31 Wn. App. at 249 (emphasis added). The reviewing court found the defendant was not

prejudiced by the court's use of the word "victim" because "[i]n the context of a criminal trial, the trial court's use of the term 'victim' has ordinarily been held not to convey to the jury the court's personal opinion of the case" and because the term was not used repeatedly throughout the trial. *Id.* *Alger* should control in this case. Here, the term "victim" was not used repeatedly throughout the defendant's trial. In fact, the court did not utter the word "victim" until after trial, when the jury reviewed the court's special verdict instructions.<sup>9</sup>

Furthermore, the jury was properly instructed that "a trial judge may not comment on the evidence" and if it appeared that the judge had done so, the jury "must disregard this entirely." (Inst. No. 1; CP 95). The jury was also instructed that they were the "sole judges of credibility" (Inst. No. 1; CP 95), and that the defendant was "presumed innocent." (Inst. No. 3; CP 98). The jury is presumed to follow the court's instructions and there is no evidence that they failed to do so in this case. *See State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

For each of these reasons, the defendant cannot demonstrate manifest constitutional error. Consequently, this Court must find the

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<sup>9</sup> The cases to which the defendant cites are inapposite. *See* Br. of Appellant at 24-25, citing *State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985); *State v. Black*, 109 Wn.2d 336-745 P.2d 12 (1987). Here, unlike in the cases the defendant cites, there is no allegation that a witness rendered improper opinion testimony during trial.

defendant waived any challenge to the language in the trial court's special verdict instructions when he did not object to this language, or request alternative language, at the time of trial.

Because the defendant cannot demonstrate manifest constitutional error, this Court should not review the defendant's second assignment of error for harmless error. Assuming *arguendo*, the Court finds manifest constitutional error occurred, for the reasons set forth above, the Court should find any error was harmless beyond a reasonable doubt. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

D. CONCLUSION

The defendant's convictions should be affirmed. The defendant's sentence should also be affirmed.

DATED this 6 day of April, 2012.

Respectfully submitted:

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By:

  
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# CLARK COUNTY PROSECUTOR

## April 06, 2012 - 1:29 PM

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