

NO. 42791-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOHN HYRUM PARKES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine Stolz

No. 10-1-02282-3

Brief of Respondent

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Table of Contents

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

 1. Whether defendant can show his right to a fair trial was denied where testimony was properly admitted under ER 106 and ER 613?..... 1

 2. Whether defendant was entitled to a missing witness instruction where Shelley Parkes was not peculiarly available to the State, her testimony as a whole would have been cumulative and inconsequential, and the State adequately provided an explanation for her absence..... 1

B. STATEMENT OF THE CASE. 1

 1. Procedure 1

 2. Facts..... 3

C. ARGUMENT..... 9

 1. DEFENDANT FAILS TO SHOW HIS RIGHT TO A FAIR TRIAL WAS DENIED WHERE TESTIMONY WAS PROPERLY ADMITTED UNDER ER 106 AND ER 613 9

 2. DEFENDANT WAS NOT ENTITLED TO A MISSING WITNESS INSTRUCTION WHERE SHELLEY PARKES WAS NOT PECULIARLY AVAILABLE TO THE STATE, HER TESTIMONY AS A WHOLE WOULD HAVE BEEN CUMULATIVE AND INCONSEQUENTIAL, AND THE STATE ADEQUATELY PROVIDED AN EXPLANATION FOR HER ABSENCE 20

D. CONCLUSION. 27-28

Table of Authorities

State Cases

<i>Bean v. Stephens</i> , 13 Wn. App. 364, 367, 534 P.2d 1047 (1975)	18
<i>McGarvey v. Seattle</i> , 62 Wn.2d 524, 532, 384 P.2d 127 (1963).....	18
<i>State v. Avendano-Lopez</i> , 79 Wn. App. 706, 904 P.2d 324 (1995).....	10
<i>State v. Blair</i> , 117 Wn.2d 479, 491, 816 P.2d 718 (1991)	20, 21, 22
<i>State v. David</i> , 118 Wn. App. 61, 66, 74 P.3d 686 (2003).....	20, 22
<i>State v. Davis</i> , 73 Wn.2d 272, 277, 438 P.2d 185 (1968)(<i>overruled on other grounds by State v. Abdulle</i> , 174 Wn.2d 411, 275 P.3d 1113 (2002)).....	20, 21, 24, 25, 27
<i>State v. Emery</i> , 174 Wn.2d 741, 765, 278 P.3d 653 (2012).....	16
<i>State v. Flora</i> , 160 Wn. App. 549, 249 P.3d 188 (2011)	24, 25, 26
<i>State v. Garcia</i> , 177 Wn. App. 769, 776, 313 P.3d 422 (2013)	15, 16, 17
<i>State v. Gefeller</i> , 76 Wn.2d 449, 455, 458 P.2d 17 (1969)	10
<i>State v. Hartzell</i> , 156 Wn. App. 918, 932-33, 237 P.3d 928 (2010)...	12, 13
<i>State v. Hopson</i> , 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).....	15, 17
<i>State v. Jackson</i> , 70 Wn.2d 498, 503, 424 P.2d 313 (1967).....	18
<i>State v. Johnson</i> , 124 Wn.2d 57, 76, 873 P.2d 514 (1994)	15, 18
<i>State v. Larry</i> , 108 Wn. App. 894, 910, 34 P.3d 241 (2001)	9
<i>State v. Mak</i> , 105 Wn.2d 692, 701, 718 P.2d 407 (1986).....	15
<i>State v. McGhee</i> , 57 Wn. App. 457, 462-63, 788 P.2d 603, <i>review denied</i> , 115 Wn.2d 1019 (1990)	20

<i>State v. McKenzie</i> , 157 Wn.2d 44, 52, 134 P.3d 221 (2006)	16
<i>State v. Ortega</i> , 134 Wn. App. 617, 626, 142 P.3d 175 (2006)	9
<i>State v. Perez-Valdez</i> , 172 Wn.2d 808, 814, 265 P.3d 853 (2011).....	9
<i>State v. Powell</i> , 126 Wn.2d 244, 258, 893 P.2d 615 (1995)	9
<i>State v. Rodriguez</i> , 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002)	16
<i>State v. Russell</i> , 125 Wn.2d 24, 90, 882 P.2d 747 (1994), <i>cert denied</i> , 514 U.S. 1129 (1995)	20
<i>State v. Simms</i> , 151 Wn. App. 677, 692, 214 P.3d 919 (2009).....	9
<i>State v. Wilson</i> , 20 Wn. App. 592, 594, 581 P.2d 592 (1978)	10
<i>State v. Wilson</i> , 71 Wn.2d 895, 889, 431 P.2d 221 (1967)	16
 Rules and Regulations	
ER 106	1, 2, 9, 14, 27
ER 613	1, 9, 14, 15, 27
 Other Authorities	
K. TEGLAND, 5A WASH. PRAC., EVIDENCE AND LAW PRACTICE §613.18 (5th ed.).....	14

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

1. Whether defendant can show his right to a fair trial was denied where testimony was properly admitted under ER 106 and ER 613?

2. Whether defendant was entitled to a missing witness instruction where Shelley Parkes was not peculiarly available to the State, her testimony as a whole would have been cumulative and inconsequential, and the State adequately provided an explanation for her absence?

B. STATEMENT OF THE CASE.

1. Procedure

On November 17, 2010, the Pierce County Prosecuting Attorney (State) charged John Hyrum Parkes, hereinafter defendant, with five counts of first-degree child molestation for molesting his then minor step-daughter, E.T.¹ CP 1-2, 4-6, 40-42.

Prior to trial, the State informed the court and defendant that it did not anticipate calling E.T.'s mother, Shelley Parkes, even though she was

¹ E.T. was a minor when these incidents occurred. For the purposes of anonymity the State will refer to her by her initials.

on the State's witness list. 1RP 14.² The State explained that Shelley was not aware of the molestation at the time it was occurring, and thus her testimony would not be relevant to the charges at hand. 1RP 14.

Trial began on August 22, 2011, before the Honorable Katherine Stolz. 1RP 165. During trial, the State called Detective Sergeant Teresa Berg to testify. 1RP 404. During cross-examination defendant asked Detective Berg specific questions regarding precise statements E.T. had made that were documented in the detective's report. 1RP 427-29. The State objected, and on re-direct asked Detective Berg about the remaining molestation incidents E.T. described that were also documented in the report. 1RP 431-439. The State argued, and the court subsequently agreed, that the rule of completeness allowed for the E.T.'s remaining statements to Detective Berg to come in. 1RP 432-39; ER 106.

Defendant moved for a mistrial following Detective Berg's testimony, arguing that it was error to allow the State to ask Detective Berg about the remaining incidents of molestation contained in her report. RP (8/29/11) 6-8. The court ultimately denied defendant's motion for a

² The State will refer to the Verbatim Report of Proceedings as follows: the report labeled "Volume 1" will be referred to as 1RP followed by the page number; the remaining two proceedings will be referred to by the date of the proceeding contained within followed by the page number.

mistrial, and informed defendant that he may request a limiting instruction instead. RP (8/29/11) 13.

Prior to closing arguments, defendant requested a missing witness instruction in regard to Shelley Parkes. 1RP 536-39. The court denied defendant's request, finding that the doctrine does not apply where the uncalled witness is equally available to both parties, as was the case here. 1RP 541.

On September 2, 2011, the jury found the defendant guilty on counts I, II, III, and V, and not guilty on count IV. 1RP 612-14; CP 103-07. The court imposed a standard range sentence of 173 months confinement on each count to run concurrently. CP 138; RP (10/14/11) 16. Defendant subsequently filed a timely notice of appeal. CP 155-57.

2. Facts

E.T. was born on August 30, 1991. 1RP 166. E.T.'s parents, Shelley Parkes and David Tullis, separated when she was approximately two years old. 1RP 168-69, 332. E.T. lived with her father growing up but would visit her mother on weekends and during the summer. 1RP 171-72.

Shelley³ and defendant married in 1996, when E.T. was approximately five years old. 1RP 175-76. E.T. recalled multiple incidents where defendant molested her between the ages of six and twelve. 1RP 181, 186, 189, 212. The first incident of inappropriate conduct occurred when E.T. was approximately six or seven years old. 1RP 186-87. Defendant was getting E.T. ready for bed when he told E.T. to keep her underwear off as she was changing into her pajamas. 1RP 187-88. E.T. recalled that it was unusual for her to sleep without her underwear but that she complied because she was young. 1RP 188.

E.T. recalled another incident where defendant ejaculated into her hair as she was sleeping. 1RP 189. E.T. described how she remembered waking up one morning to a warm substance on her face and hair. 1RP 189. When she woke up she saw defendant standing next to her touching his penis to her face.⁴ 1RP 190. E.T. was approximately six years old when this occurred. 1RP 189. E.T. tried to tell her mother that there was something dried and crunchy in her hair but her mother replied that it was probably just gel. 1RP 190.

The second incident of molestation occurred when E.T. was sitting on the floor in their home watching cartoons. 1RP 191. Defendant came

³ The State will refer to Shelley Parkes by her first name in order to avoid confusion. No disrespect is intended.

⁴ This conduct was the basis for Count I.

up behind E.T. and put a vibrator on her vaginal area.⁵ 1RP 191-92.

Defendant placed the vibrator underneath E.T.'s clothing and made direct contact with her vagina. 1RP 192. Defendant kept the vibrator on E.T.'s vagina for several minutes. 1RP 192-93. E.T. was approximately six years old when that incident occurred as well. 1RP 191.

On another occasion, defendant called E.T. into his bedroom as he was lying on the bed naked. 1RP 194. Defendant made E.T. sit on the bed next to him while he talked to her and stroked his erect penis. 1RP 195-96. Another time, defendant put E.T.'s hand on his penis and masturbated for several minutes.⁶ 1RP 199-200. When defendant eventually ejaculated he put some semen on E.T.'s hand told her to "try it." 1RP 199.

The fourth incident of molestation E.T. recalled occurred when she was approximately nine years old. 1RP 200, 203-04, 206. Defendant walked into E.T.'s room naked and with an erection. E.T. was lying on the bed when defendant touched his penis to her face and arm.⁷ 1RP 204. E.T. recalled that this type of conduct happened on numerous occasions. 1RP 207. On one particular incident, Shelley walked by and asked defendant what he was doing. 1RP 204-05. Defendant replied that he was tucking E.T. into bed. 1RP 205.

⁵ This conduct was the basis for Count II.

⁶ This conduct was the basis for Count III.

⁷ This conduct was the basis for Count IV.

When E.T. was approximately ten years old, defendant called her into the bathroom and sat her on the counter. 1RP 208. Defendant had an erection, took E.T.'s hand, and inserted her pinky finger into his urethra.⁸ 1RP 208. Defendant then told E.T. to tell her stepbrothers, who were in the house, that he had called her into the bathroom to show her the new tiles. 1RP 209.

In addition to the molestation incidents, E.T. recalled how one time she was sitting in the front seat of the car while defendant was driving and defendant put his hand on her upper thigh. 1RP 210-11. After that incident E.T. became extremely uncomfortable being alone in the car with defendant and would cry every time he had to drive her somewhere. 1RP 210. E.T. recalled another incident where defendant touched her inappropriately. 1RP 212. One evening, E.T. was sitting at the breakfast bar in their home when defendant came up behind her and rubbed her shoulders and lower back. 1RP 212.

E.T. stated that defendant made her watch pornography with him at least five times between the ages of six and twelve. 1RP 214. Defendant would stroke his penis while he did so and would ask E.T. what she thought of the pornography. 1RP 214.

The abuse stopped when E.T. was approximately twelve years old. 1RP 224. E.T. stated that as she got older she "tried not to give [defendant]

⁸ This conduct was the basis for Count V.

opportunities" to molest her by avoiding being in the same room with him whenever possible. 1RP 224. E.T. also began wrapping herself with multiple blankets and sheets at night when she slept so that defendant would not be able to easily get them off of her and molest her. 1RP 224.

While defendant never threatened E.T., he did tell her that she could not tell anyone about the molestation. 1RP 220. E.T. never told Shelley because she knew Shelley loved defendant and she did not want to make her mother unhappy. 1RP 194, 205, 219. E.T.'s father, David Tullis, was not aware of the molestation when E.T. was growing up. 1RP 334-35. He did recall that on several occasions E.T. told him she did not want to go to Shelley's house for visitations and that upon return she would be unusually quiet and withdrawn. 1RP 342, 344-45.

Sometime during elementary school, E.T. told her childhood friend, Marina Wilson, about the abuse. 1RP 367. Wilson never told anyone because E.T. had made her promise to keep it a secret. 1RP 369. When E.T. was in seventh grade she told another friend, Gustav St. Andrews, about the molestation. 1RP 399. St. Andrews also never told anyone at E.T.'s request. 1RP 399.

When E.T. was eighteen years old Shelley and defendant separated. 1RP 177. The separation was bitter and acrimonious. 1RP 177, 502. The following year, Shelley brought some belongings to E.T.'s new apartment. 1RP 243. Among the belongings was a photograph of defendant. 1RP 243. E.T. was adamant that she did not want the

photograph in her apartment, and when asked why, she responded that defendant had molested her. 1RP 243. Shelley was upset and reported the allegations to the police. 1RP 246, 251.

E.T. was initially reluctant to speak to the police because she wanted to put the incidents behind her and move on with her life. 1RP 251-52. She also did not want the allegations to be used in Shelley's divorce proceeding. 1RP 408. E.T. eventually spoke to Detective Theresa Berg and gave a statement describing all of the molestation incidents. 1RP 408.

Doctor Yolanda Duralde testified at trial, and stated that the majority of children who are molested do not disclose the abuse right away or even at all. 1RP 476. Doctor Duralde explained that often times children do not want to create a disruption in the family or fear that other family members will become upset if the molestation comes out. 1RP 476-77.

Defendant testified at trial. 1RP 500-528. He denied all of the allegations against him and claimed he never touched E.T. in an inappropriate manner. 1RP 515-28.

C. ARGUMENT.

1. DEFENDANT FAILS TO SHOW HIS RIGHT TO A FAIR TRIAL WAS DENIED WHERE TESTIMONY WAS PROPERLY ADMITTED UNDER ER 106 AND ER 613.

A trial court's decision regarding the admission of evidence is reviewed for abuse of discretion. *State v. Perez-Valdez*, 172 Wn.2d 808, 814, 265 P.3d 853 (2011). A trial court's evidentiary ruling is an abuse of discretion only if it is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

"Under the rule of completeness, if a party introduces a statement, an adverse party may require the party to introduce any other part 'which ought in fairness to be considered contemporaneously with it.'" ER 106; *State v. Simms*, 151 Wn. App. 677, 692, 214 P.3d 919 (2009)(citing *State v. Larry*, 108 Wn. App. 894, 910, 34 P.3d 241 (2001)). The trial judge decides how much of the remaining portions of the statement to admit which are needed to clarify or explain the portion already received. See *State v. Larry*, 108 Wn. App. at 910. When a trial court decides that one party has "opened the door" to the rest of a statement by using part of the statement, the ruling is reviewed for abuse of discretion. See *State v. Ortega*, 134 Wn. App. 617, 626, 142 P.3d 175 (2006)(citing *State v.*

Wilson, 20 Wn. App. 592, 594, 581 P.2d 592 (1978), and *State v. Avendano-Lopez*, 79 Wn. App. 706, 714, 904 P.2d 324 (1995)).

"It is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was introduced." *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

Our State Supreme Court clarified this rule by noting:

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

State v. Geller, 76 Wn.2d at 455.

In the present case, the State called Detective Theresa Berg of the Pierce County Sheriff's Department to testify. 1RP 404. Detective Berg was the lead detective assigned to E.T.'s case and had interviewed her during the course of the investigation. 1RP 407-08. Prior to cross-examinations and outside the presence of the jury, defendant informed the court that he planned to ask Detective Berg regarding prior statements E.T. had made that were referenced in Detective Berg's and another detective, Detective Heishman's, report. 1RP 417. The court informed

defendant that he could not ask any Detective Berg specific questions about Detective Heishman's report. 1RP 417. The court further cautioned defendant that if he questioned Detective Berg on any specific issues regarding the reports "the State can amplify and go back and deal with it on redirect...." 1RP 422.

During cross-examination, however, defendant questioned Detective Berg regarding specific statements E.T. made:

DEFENDANT: Okay. Looking at your report on page four, do you recall there being a question of [E.T.] talking about Mr. Parkes ejaculating in her hair?

DETECTIVE BERG: Yes.

DEFENDANT: Okay. And she disclosed or provided information surrounding that?

DETECTIVE BERG: She did.

DEFENDANT: All right. And did she say to you that after this event occurred that in the morning, she went to her mother and told her mother that something was in her hair?

DETECTIVE BERG: Yes.

DEFENDANT: [E.T.] told you that; correct?

DETECTIVE BERG: Correct. That's what's in my report.

DEFENDANT: All right. And that she persisted to tell her mother that there was something crunchy in her hair?

DETECTIVE BERG: Yes.

DEFENDANT: All right. And was it your impression that she was talking to her mother as I'm talking to you?

PROSECUTOR: Objection; calls for speculation.

THE COURT: I'll sustain the objection.

1RP 428-29. On re-direct examination, the State asked Detective Berg about the remaining incidents of molestation contained in the report. 1RP 431-39. The court ruled that the statements could come in under the rule of completeness. 1RP 432-39.

In *State v. Hartzell*, 156 Wn. App. 918, 932-33, 237 P.3d 928 (2010), the defendant wanted to question a detective about specific details in his report regarding a witness' statements because defendant believed the statements would support his theory of the case. The court cautioned the defendant that if he sought to elicit specific statements that favored his version of events the State could elicit the entirety of the statements, some of which were prejudicial to the defendant. *Id.* at 933. The defendant disregarded the court's warning and questioned the Detective about specific statements the witness made to the detective. *Id.* In response, the State elicited the remaining statements the witness made to the detective, which in their entirety were incriminating to the defendant. *Id.* The appellate court upheld the trial court's ruling that the defendant's cross-examination opened the door to allow the detective to give a full account of what the witness had stated. *Id.* at 935.

Hartzell controls here. Defendant here, like in *Hartzell*, was cautioned by the court about opening the door during cross-examination. 1RP 422. And, as in *Hartzell*, defendant here disregarded the court's warning and proceeded to ask Detective Berg about specific statements E.T. had made because he wanted to point out discrepancies between the report and E.T.'s earlier testimony. 1RP 428-29; 266-69. As a result, the State was properly permitted to elicit the remaining statements E.T. made that were consistent with her prior testimony. 1RP 432-39.

As defendant points out in his brief, the Constitution protects a defendant's right to impeach, confront, or cross-examine a witness. App.Br. at 12. However, the constitutional guarantee does not insulate defendant's cross examination or impeachment from the rehabilitation of a witness on re-direct or in rebuttal. Cross-examination or impeachment with a previous statement raises the risk that the rest of that statement will be introduced on re-direct. *See, e.g., State v. Hartzell*, 156 Wn. App. at 935.

Defendant knowingly opened the door during cross-examination for damaging parts of E.T.'s statements to come in. Thus, the trial court properly allowed the statements to be admitted under the rule of completeness. The entirety of the statements were relevant because they enabled the jury to properly weigh the credibility of E.T.'s testimony. As such, the trial court did not abuse its discretion.

- a. Detective Berg's testimony regarding E.T.'s prior statements was also admissible for rehabilitation purposes under ER 613 where defendant impeached E.T. on various statements she had previously made to Detective Berg.

Detective Berg's testimony regarding E.T.'s prior statements was also admissible under ER 613 to rehabilitate E.T. with her prior consistent statements after defendant had attacked her credibility. "Once a witness's credibility has been attacked, prior consistent statements by the witness may be admissible to rehabilitate the witness's credibility." K. TEGLAND, 5A WASH. PRAC., EVIDENCE AND LAW PRACTICE §613.18 (5th ed.).

During defendant's subsequent motion for a mistrial, the State argued that in addition to being admissible under the rule of completeness, E.T.'s statements were admissible under Detective Berg's testimony for purposes of rehabilitation as provided by ER 613.⁹ RP (8/29/11) 11. Here, defendant attacked E.T.'s credibility when he impeached her on various statements she had previously made to detectives. Defendant questioned E.T. extensively about which house the molestation occurred in, as well as pointed out inconsistencies in her testimony regarding the description of each molestation incident. 1RP 267-70. Therefore, the State was permitted

⁹ The court denied defendant's motion for a mistrial but did not comment as to whether that ruling was based on an application of ER 106 or ER 613. RP (8/29/11) 13.

to rehabilitate E.T. with her prior consistent statements as permitted under ER 613. The trial court did not abuse its discretion when it properly allowed E.T.'s remaining statements to be admitted at trial through detective Berg's testimony.

- b. The trial court properly denied defendant's motion for a mistrial where no irregularity occurred, any evidence improperly admitted was cumulative, and defendant did not request a limiting instruction even after the court explicitly stated that it would grant one.

"The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly. Only errors affecting the outcome of the trial will be deemed prejudicial." *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)(citing *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986)). In determining the effect of an irregular occurrence during trial, reviewing courts examine: (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

"A trial court's denial of a mistrial motion will be overturned only when there is a substantial likelihood that the error affected the jury's verdict. *State v. Garcia*, 177 Wn. App. 769, 776, 313 P.3d 422 (2013)

(citing *State v. Rodriguez*, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002)).

This Court reviews a trial court's denial of a mistrial for abuse of discretion. *State v. Garcia*, 177 Wn. App. at 776. "Our Supreme Court has stated that abuse of discretion will be found for a denial of a mistrial only when 'no reasonable judge would have reached the same conclusion.'" *State v. Garcia*, 177 Wn. App. at 776 (citing *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012)). The high standard is very deferential to the trial court, which has seen and heard the proceedings and "is in a better position to evaluate and adjudge than can [the reviewing court] from a cold, printed record." *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)(quoting *State v. Wilson*, 71 Wn.2d 895, 889, 431 P.2d 221 (1967)).

i. No irregularity occurred in the present case.

The court did not abuse its discretion in denying defendant's motion for a mistrial because no irregularity occurred. As discussed previously, the court did not err in admitting E.T.'s full statements to Detective Berg after defendant opened the door to them during cross-examination. The rule of completeness allowed the full statements to come after defendant specifically questioned Detective Berg about a portion of the statements E.T. gave. Thus, because no irregularity occurred, defendant's motion for a mistrial was properly denied.

ii. Even if the statements were admitted in error, the evidence was cumulative and did not warrant a mistrial.

Even if this Court finds that it was error to admit the entirety of E.T.'s statements, the alleged improper evidence is cumulative and thus did not warrant a mistrial. *See State v. Garcia*, 177 Wn. App. 769, 781, 313 P.3d 422 (2013) ("If the evidence was cumulative, a mistrial may not be necessary."). In the present case, E.T. had already testified to each of the incidents of molestation before Detective Berg took the stand. 1RP 181-259. There was nothing in Detective Berg's testimony that the jury had not already heard in E.T.'s prior testimony. Thus, even if the statements to Detective Berg were admitted in error, the same evidence had been properly admitted previously. 1RP 181-259. Therefore, Detective Berg's account was cumulative and did not affect the outcome of the trial. Only errors affecting the outcome of the trial are deemed prejudicial. *See State v. Hopson*, 113 Wn.2d at 284. Defendant cannot show prejudice. The trial court properly denied defendant's motion for a mistrial.

iii. Defendant declined a limiting jury instruction even after the court explicitly offered one.

The third element of review of a ruling on a motion for mistrial involves other remedies short of a mistrial, specifically, a curative or limiting instruction. *See State v. Johnson*, 124 Wn.2d at 76. When a defendant fails to request a specific instruction, he cannot later predicate error on its omission. *Bean v. Stephens*, 13 Wn. App. 364, 367, 534 P.2d 1047 (1975) *citing McGarvey v. Seattle*, 62 Wn.2d 524, 532, 384 P.2d 127 (1963). Reviewing courts "will not consider on appeal errors claimed in the instructions unless the trial court has had an opportunity to pass upon the asserted errors and had a chance to make corrections." *State v. Jackson*, 70 Wn.2d 498, 503, 424 P.2d 313 (1967). Likewise, where the court has offered a limiting instruction regarding objected to evidence and defendant declines it, a reviewing court should not hear him complain that one was not given.

Here, defendant did not propose a limiting instruction regarding Detective Berg's testimony, even after the court explicitly suggested and offered one immediately following its denial of defendant's motion for a mistrial. 1RP 449-460; RP (8/29/11) 13. Nor did defendant object to the State's proposed jury instructions, which did not include a limiting instruction for this purpose. 1RP 449-460. Defendant's failure to request

such an instruction not only deprived the trial court of the opportunity to cure any alleged error but also strongly suggests that defendant himself did not view the Detective's testimony as improper. Because defendant failed to take advantage of the court's offer to give a limiting instruction, he cannot now argue that he was unduly prejudiced. The court gave defendant an opportunity to limit the use of the testimony or to correct any alleged errors. Defendant declined to do so. Defendant fails to show or argue why a limiting or curative instruction was inadequate, and therefore only a mistrial would have cured the asserted error. Again, on appeal, defendant fails to demonstrate why his motion for mistrial should have been granted.

Because no irregularity occurred, any alleged improper evidence would have been cumulative, and defendant did not request a limiting instruction despite the court explicitly offering one, defendant cannot show that he was prejudiced to the extent that nothing short of a new trial could ensure he was tried fairly. The detective's statements were properly introduced under the rule of completeness after the defendant opened the door to those statements during cross-examination. Therefore, it cannot be said that the trial courts decision to allow the statements was based upon unreasonable or untenable grounds.

2. DEFENDANT WAS NOT ENTITLED TO A MISSING WITNESS INSTRUCTION WHERE SHELLEY PARKES WAS NOT PECULIARLY AVAILABLE TO THE STATE, HER TESTIMONY AS A WHOLE WOULD HAVE BEEN CUMULATIVE AND INCONSEQUENTIAL, AND THE STATE ADEQUATELY PROVIDED AN EXPLANATION FOR HER ABSENCE.

In certain circumstances, a party's failure to produce a particular witness who would "ordinarily and naturally testify raises the inference...that the witness's testimony would have been unfavorable." *State v. McGhee*, 57 Wn. App. 457, 462-63, 788 P.2d 603, *review denied*, 115 Wn.2d 1019 (1990); *see also State v. David*, 118 Wn. App. 61, 66, 74 P.3d 686 (2003). Under the missing witness doctrine, where a party fails to produce otherwise proper evidence within his or her control, the jury may draw an inference unfavorable to that party. *State v. Russell*, 125 Wn.2d 24, 90, 882 P.2d 747 (1994), *cert denied*, 514 U.S. 1129 (1995).

This instruction is appropriate only when an uncalled witness is "peculiarly available" to one of the parties. *State v. Davis*, 73 Wn.2d 272, 277, 438 P.2d 185 (1968)(*overruled on other grounds by State v. Abdulle*, 174 Wn.2d 411, 275 P.3d 1113 (2002)). Accordingly, a party seeking the benefit of the inference must show the missing witness was "peculiarly within the other party's power to produce." *State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991). As the court in *Davis* explained, for a witness to be "peculiarly available" there must have been such a "community of

interest" between the party and the witness, or the party "must have so superior an opportunity for knowledge of a witness, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except the fact that his testimony would have been damaging." *State v. Davis*, 73 Wn.2d at 276-77. "The rationale behind this requirement is that a party 'will likely' call as a witness 'one who is bound to him by ties of affection or interest unless the testimony will be adverse,' and that party with a close connection to a potential witness will be more likely to determine in advance what the testimony would be." *State v. Blair*, 117 Wn.2d at 490(citing *State v. Davis*, 73 Wn.2d at 277).

The defendant must establish circumstances that would indicate as a matter of "reasonable probability" that the State would not knowingly fail to call the witness unless his testimony would be damaging. *State v. Davis*, 73 Wn.2d at 280. "In other words, the inference is based, not on the bare fact that a particular person is not produced as a witness, but on his non-production when it would be natural for him to produce the witness if the facts known by him had been favorable." *State v. Davis*, 73 Wn.2d at 280.

Notably, no inference is permitted if the witness is unimportant or if the testimony would be cumulative. *State v. Blair*, 117 Wn.2d at 489. The testimony's importance depends on the facts of each case. *Id.* Moreover, if the witness's absence can be satisfactorily explained, no

inference is permitted. *Id.* The party against whom the rule would operate is entitled to explain the witness's absence and avoid operation of the inference. *Id.* An appellate court will not disturb a trial court's refusal to give the missing witness instruction absent a clear showing of abuse of discretion. *State v. David*, 118 Wn. App. 61, 66, 74 P.3d 686 (2003).

Here, the State thoroughly explained prior to trial why it would not be calling Shelley Parkes to testify. 1RP 13-19. The State informed the court that it did not believe Shelley's testimony was relevant given that she did not know about the abuse until years after it ended. 1RP 14-15, 32. The State further explained that the disclosures E.T. made to Shelley were impermissible hearsay, and as such her testimony as a whole was inadmissible. 1RP 32. More importantly, the State disclosed to the court that there were significant collateral issues between Shelley and defendant that should not be heard by the jury. 1RP 15.

As a result of the acrimonious divorce between defendant and Shelley, both parties had made allegations against the other alleging domestic violence, theft, burglary, and vehicle prowling. 1RP 15. Additionally, there was an allegation that Shelley had attempted to hire someone to murder defendant as a result of their divorce. 1RP 15-16. The State was concerned that if Shelley testified those matters would be heard before the jury and implicate issues of prejudice for both sides. 1RP 14-19. The State reiterated that these collateral matters were irrelevant to the

molestation of E.T. and would be an "undue waste of time" should they come out at trial. 1RP 18-19.

The court concurred with the State, noting that "it doesn't look like Ms. Parkes has any substantive value at all in the case in chief....however acrimonious it is between the parents and their [dissolution] I don't think it has any relevancy here." 1RP 26. In further explaining its reasoning, the court added "...from what I saw on the statement on probable cause, the child apparently reported things to the mother that the mother ignored or didn't pick up on because it was too subtle for the mother to gather...."

At the conclusion of trial, the court denied defendant's request for a missing witness instruction, finding that "the doctrine does not apply if the uncalled witness is equally available to the parties," as was the case here.

1RP 541. The court stated that:

"In the circumstances of this case, Shelley Parkes is the defendant's wife. They are embroiled in, as the defendant testified, an acrimonious dissolution action. We had a discussion about why Shelley was not being called, part of the problem being that by inference....if she had been called by either side, would have been an extremely loose cannon. [Defendant] had an extensive right to do discovery of this witness. He had an extensive right to do discovery through the dissolution action."

1RP 542-43. The court further noted that it would be highly unlikely that Shelley's testimony would be favorable to defendant given their bitter separation:

I mean, if you put the bland instruction in there, it would free the State to argue that you could have called her if she was going to say that she, you know, was going to

exonerate her. It's unlikely, given the acrimonious divorce, that she would be doing that; so, I mean, there's just as much reason for you not to call her because she'd probably come in here and validate everything her daughter said; so we're not going to discuss, either side, why Shelley Parkes did not testify. We dealt with that in pretrial motions. She's not a missing witness; and therefore, we're not going to argue it in closing, either side; and I'm not going to give a missing witness instruction.

1RP 543.

The trial court did not abuse its discretion in this case because Shelley was not peculiarly available to the State. In *State v. Davis*, 73 Wn.2d at 277-78, our Supreme Court found that the uncalled witness was peculiarly available to the prosecution when the witness was a member of the same law enforcement agency as the testifying officer, and was the only other witness to the interrogation in question. In that case, the law enforcement agency of which the witness was a member of was responsible for investigating and gathering all of the evidence relative to the charges made against the defendant. *Id.* at 278. The court held that because "[t]he uncalled witness worked so closely and continually with the county prosecutor's office with respect to this and other criminal cases as to indicate a community of interest between the prosecutor and the uncalled witness" it was error not to give a missing witness instruction. *Id.* at 278-79.

Conversely, in *State v. Flora*, 160 Wn. App. 549, 556-57, 249 P.3d 188 (2011), a civilian who was riding along with the arresting officer was

not called as a witness and the court declined to give a missing witness instruction. The appellate court agreed with the lower court, holding that the civilian witness was not peculiarly available to the State. *Id.* The court noted that "if [the witness] was an undersheriff or employee, a party, law enforcement officer...that would be another matter. This is a civilian witness just like any other civilian witness not under the control of or peculiarly available to the State." *Id.* at 557.

The facts in this case are more similar to *Flora* than they are to *Davis*. Here, like in *Flora*, Shelley was not in any way associated with law enforcement, the investigation of this case, or the prosecutor's office. Furthermore, her involvement in these allegations is very minimal, unlike in *Davis*.

During her testimony, E.T. briefly mentioned only two instances where Shelley was involved. 1RP 190, 204-05. The first was after defendant ejaculated into her hair and E.T. called Shelley to tell her there was something crunchy in it. 1RP 190. E.T. was trying to subtly hint to her mother about what happened, but Shelley did not perceive it as such and instead told E.T. that the substance in her hair was probably gel. 1RP 190. The second encounter was when defendant was in E.T.'s room and touched his penis to her face. 1RP 204-05. E.T. remembered Shelley walking by and asking defendant what he was doing, and defendant replying that he was just tucking E.T. into bed. 1RP 204-05.

As in *Flora*, Shelley was a civilian who by happenstance observed something that was later discovered to be a crime. Shelley had no knowledge of the molestation until E.T. disclosed it to her years later. 1RP 243, 246, 251. She was not in any way involved with the investigation or prosecution of the offense. As such, it cannot be said that she was under the control of or peculiarly available to the State. As the State aptly pointed out during argument, defendant had previously interviewed Shelley. 1RP 535. Therefore, he cannot now argue that Shelley was not equally available to him for the purpose of trial. Defendant had ample opportunity to contact, interview, and decide whether to call her as a witness.

Additionally, defendant was not entitled to a missing witness instruction because any admissible testimony by Shelley would have been minor and cumulative. Because Shelley had no knowledge of the molestation while she was married to defendant the only relevant things she could testify to was the phone call she received from E.T. and the observations she had when she saw defendant in E.T.'s room with his penis exposed. 1RP 190, 204-05, 243, 246, 251. Neither of those instances were essential to proving or disproving the charges against defendant, and the jury had already heard testimony from E.T. about those

events. 1RP 190, 204-05, 243, 246, 251. Furthermore, any information conveyed to Shelley by E.T. regarding the incidents would likely be deemed inadmissible hearsay. Therefore, Shelley's testimony would have been wholly cumulative and overall insignificant.

Because the State adequately explained the reasons for Shelley's absence, Shelley was not peculiarly available to the State, and her testimony as a whole was cumulative and inconsequential, defendant fails to show that the State knowingly failed to call Shelley because her testimony would be damaging. *See State v. Davis*, 73 Wn.2d at 280. The trial court did not abuse its discretion in denying defendant's request for a missing witness instruction.

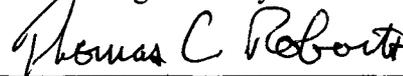
D. CONCLUSION.

Defendant's right to a fair trial was not denied where testimony was properly admitted under ER 106 and ER 613. Additionally, defendant was not entitled to a missing witness instruction where Shelley Parkes was not peculiarly available to the State, her testimony as a whole would have been cumulative and inconsequential, and the State adequately provided

an explanation for her absence. As such, the State respectfully requests this Court to affirm defendant's conviction and sentence.

DATED: December 2, 2014.

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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.

12.3.14 
Date Signature

PIERCE COUNTY PROSECUTOR

December 03, 2014 - 10:08 AM

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