

NO. 47841-2-II

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

STATE OF WASHINGTON, RESPONDENT

v.

JORGE ALVAREZ-GUTIERREZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh

No. 14-1-02387-3

BRIEF OF RESPONDENT

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

1. Did the trial court properly exercise its discretion when it allowed expert testimony on delayed disclosure that was helpful to the jury in assessing the child victim's credibility?
2. Does this court have discretion to award appellate costs to the State if it prevails in this appeal?

B. STATEMENT OF THE CASE.

1. Procedure

On June 19th, 2014, the Pierce County Prosecutors charged Jorge Alvarez-Gutierrez ("defendant") with three counts of Rape of a Child in the First Degree (Counts I, II, III) and one count of Child Molestation in the First Degree (Count IV). CP 1-3; RCW 9A.44.073; RCW 9A.44.083. The State filed a motion in limine to allow expert testimony on the physiological concept of delayed disclosure and its relationship to sexually abused minors. 1RP 31-5. The court granted the motion based on the theory's acceptance in the field. 1RP 34-5.

After the State concluded its case, defendant moved to dismiss Counts I and II, alleging the State did not prove a prima facie case on those counts; the court granted the motion. CP 273-81; 7RP 24-7. Following a jury trial, defendant was found guilty on Counts III and IV. CP 256; 8RP

3-5. Defendant was sentenced to confinement of 160 months to life on Count III, and 89 months to life on Count IV, to be served concurrently. CP 259; 8RP 17. He was also placed on lifetime community custody among other conditions. *Id.*

2. Facts

On February 14th, 2014, E.A., a twelve-year old minor, revealed to Janine Taylor, the mother of another child, that her father, defendant, had repeatedly raped her. CP 289; 4RP 74-6. Ms. Taylor notified the police of the disclosure and reported that E.A. had said defendant sexually penetrated her and caused her to watch pornographic films while he masturbated. CP 289.

Defendant began to sexually abuse E.A. around the age of 5 or 6. CP 289. On numerous occasions defendant would cause E.A. to watch pornographic films with him while he masturbated, at times requiring E.A. to touch his penis during the act. 5RP 36-8, 40, 52-3. On more than one occasion, defendant withheld spending money from E.A. until she performed sexual favors on him to include touching his penis while defendant masturbated. 5RP 40, 46-7. Defendant would enter E.A.'s room to touch and penetrate her with his penis and hands. 5RP 58-9, 80-3. During certain stretches of time this nighttime abuse would happen on a daily or weekly basis. *See e.g.*, 5RP 50-2, 54-60, 66-8, 70. E.A. asked defendant to

stop, but he did not. 5RP 76. The abuse continued until approximately one week before E.A. reported the abuse. 5RP 81. Defendant filed timely appeal. CP 283.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY ADMITTING THE EXPERT TESTIMONY ON DELAYED DISCLOSURE BECAUSE THE EVIDENCE WAS HELPFUL TO THE JURY IN ASSESSING VICTIM'S CREDIBILITY.

ER 702 governs the admissibility of expert testimony:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Under this rule, expert testimony is admissible when (1) the witness qualifies as an expert, (2) the expert's opinion is based on a theory generally accepted in the scientific community, and (3) the testimony is helpful to the trier of fact. *State v. Graham*, 59 Wn. App. 418, 423, 798 P.2d 314 (1990) (citing *State v. Allery*, 101 Wn. 2d 591, 596, 682 P.2d 312 (1984)). The trial court enjoys broad discretion in determining whether to allow expert testimony, and appellate courts do not disturb this discretion absent manifest abuse. *Graham*, 59 Wn. App. at 425.

Once the credibility of a witness is at issue, evidence tending to corroborate the testimony may be obtained from an expert witness. *State v.*

Petrich, 101 Wn. 2d 566, 575, 683 P.2d 173 (1984). It is generally permissible for a jury to hear expert testimony explaining why delayed disclosure does not necessarily mean the victim lacks credibility. *Id.* at 575–76; *State v. Holland*, 77 Wn. App. 420, 427, 891 P.2d 49, *review denied*, 127 Wn. 2d 1008 (1995). Defense counsel focused the bulk of his argument at undermining E.A.’s credibility as a witness. 7RP 64-6, 68-9, 71. Therefore, the credibility of E.A. was clearly at issue.

In its case-in-chief, the State called Keri Arnold who conducted a forensic interview of E.A. on February 19th, 2014. 7RP 6, 15. Arnold is a child interview specialist at the Pierce County Prosecutor’s Office who has conducted over 2,000 forensic interviews of children. 7RP 7. Arnold explained the concept of delayed disclosure based on her professional familiarity derived from extensive training in Washington State certified protocols and other professional experience. 7RP 10-11, 16.

Arnold explained that delayed disclosure is the understanding that people do not always disclose immediately after an event of abuse. 7RP 16. She explained that children will often wait for a period of time after an abusive event before disclosing it. 7RP 16. Arnold testified that delayed disclosure is very common and the majority of her interviews involve delayed disclosure. *Id.* Defense counsel then cross-examined Arnold, particularly focusing on a psychological study that questions the notion of delayed disclosure. 7RP 17-8.

Arnold's testimony was helpful to the jury. To an average juror, a child's delay in reporting sexual abuse may strongly indicate that the alleged event never happened. *Graham*, 59 Wn. App. at 425 (citing *State v. Madison*, 53 Wn. App. 754, 765, 770 P.2d 662 (1989)). The jury heard evidence that E.A. did not disclose defendant's abuse until several years after the abuse began. *See* 4RP 76-7, 5RP 35, 40-3. In closing, defense counsel highlighted possible opportunities where E.A. could have disclosed but did not. *See*, e.g., 7RP 65-66.

One of defense counsel's primary strategies in this case was attempting to diminish E.A.'s credibility. During defense's cross-examination of E.A., counsel challenged the veracity of E.A.'s testimony by suggesting the victim was motivated to fabricate a story about her father's abuse because he spent more time with E.A.'s brother and would not let her play with friends. 5RP 96-7. He also attempted to delegitimize E.A.'s story by questioning whether the abuse could have taken place under the conditions described by the victim. 5RP 92-5.

Case law expressly permits expert testimony regarding delayed disclosure to rebut an attack on credibility of child victims. *Graham*, 59 Wn. App. at 425. Thus, just as in *Petrich* and *Graham*, the trial court did not abuse its discretion in this case by finding that the expert testimony would assist the trier of fact in understanding the evidence. *See Petrich*, 101 Wn. 2d at 575; *Graham*, 59 Wn. App. at 425.

2. THE STATE HAS NOT REQUESTED AN AWARD OF APPELLATE COSTS AND THIS COURT HAS THE DISCRETION TO AWARD THEM IF A COST BILL IS FILED.

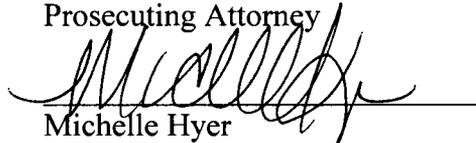
The State has not yet requested an award of appellate costs. The State agrees with defendant that this court has the discretion to grant or deny a request for appellate costs once a cost bill has been filed. *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). Should the State prevail in this appeal and file a cost bill, defendant may object to the cost bill. The decision of whether to award appellate costs is the prerogative of this court in the exercise of its discretion under RCW 10.73.160 and RAP 14.2.

D. CONCLUSION.

For the foregoing reasons the State respectfully requests defendant's conviction be affirmed.

DATED: June 8, 2016.

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Certificate of Service:

The undersigned certifies that on this day she delivered by US 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.

08.16 Therese Kar
Date Signature

PIERCE COUNTY PROSECUTOR

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