NO. 57693-7-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,
v.

DAVID J. MCKIM

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner David McKim, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

McKim seeks review of the unpublished opinion of the Court of Appeals in cause number No. 57693-7-II, 2025 WL 400710, filed February 4, 2025. A copy of the decision is in Appendix A at pages A-1 through A-13.

C. ISSUES PRESENTED FOR REVIEW

1. Should this Court grant review where the evidence was insufficient to sustain a conviction for rape of a child where there was no substantial evidence of vaginal or anal penetration?

2. The trial court violates a defendant's right to present a defense when it bars the defendant from presenting evidence on the defendant's behalf. Here, the defense conceded it committed a discovery violation when the defendant's mother located a video a video showing and S.S. and her friend N. in their Halloween costumes, from the weekend of October 25, 2019, which

challenges the allegation by S.S. that his father sexually offended against him during that weekend, but the trial court excluded the video as the remedy for the discovery violation. Should this Court grant review where the trial court's order denying Mr. McKim the right to present a defense?

D. STATEMENT OF THE CASE

The State charged Jed McKim in an information November 20, 2029, with two counts of first degree rape of a child, and two counts of second degree rape of a child. Clerk's Papers (CP) at 7-9. The State filed an amended information in August, 2022, adding two counts of first degree child molestation, and two counts of second degree child molestation. CP at 127-31. The information alleged in all counts that the victim was the defendant's daughter, referred to as "N.S."[1]

On direct review McKim appealed his convictions for first

[1] Although originally referred to as N.S. in the charging documents, during the case N.S./S.S. has informed the prosecution and defense that he identifies as a male and has chosen the name S.S. CP at 302, n. 1. Out of respect, S.S. is referred to with the male pronoun and referred to as "S.S." in this petition for review.

and second degree child rape and first and second degree child molestation of SS, arguing that the State failed to prove that McKim penetrated SS. McKim also argued that the trial court erred by excluding a piece of video evidence that defense counsel produced to the State during trial after the State rested. ***State v. McKim,*** slip op. at 1.

By unpublished opinion filed February 4, 2025, the Court of Appeals, Division II, affirmed the convictions. See unpublished opinion, ***McKim,*** slip op. at 1 and 13. McKim relies on the facts as presented in the Court's Opinion and as contained in his Brief of Appellant at 5-20.

McKim petitions this Court for discretionary review pursuant to RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review because the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; is in conflict with a published decision of the Court of Appeals. RAP

13.4(b)(1), (2).

1. RESPECTFULLY, THE COURT SHOULD GRANT REVIEW WHERE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE THE ELEMENT OF PENETRATION, REQUIRED FOR CONVICTION FIRST AND SECOND DEGREE RAPE.

The due process clauses of the federal and state constitutions require that the State prove every element of a crime beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. I, § 3; ***In re Winship***, 397 U.S. 358, 363-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Sufficient evidence supports a conviction when, after reviewing evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 318-19, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

A challenge to the sufficiency of the evidence is a question of constitutional law that the court reviews de novo. ***State v. Rich***,

184 Wn.2d 897, 903, 365 P.3d 746 (2016).

In this case, the evidence regarding the necessary element of penetration was insufficient to support the convictions for rape of a child as charged in counts 1 through 4.

RCW 9A.44.073(1) provides that

> A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and the perpetrator is at least twenty-four months older than the victim.

RCW 9A.44.076(1) provides that

> A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.010(14)(a) provides in relevant part that the term "sexual intercourse"

(a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) [a]lso means any penetration of the vagina or anus however slight[.]

Courts have construed the ordinary meaning of sexual intercourse as penetration of the victim's vagina or anus. See ***State v. A.M.***, 163 Wn. App. 414, 420, 260 P.3d 229 (2013).

Rape, under the Washington code, encompasses the "vagina" or anus. The Washington criminal code does not define "vagina." Two Washington decisions hold that, for purposes of RCW 9A.44, "vagina" means "all of the components of the female sexual organ" and "the labia minora are part of the definition of vagina." ***State v. Delgado***, 109 Wn. App. 61, 66, 33 P.3d 753 (2001); ***State v. Montgomery***, 95 Wn. App. 192, 200, 974 P.2d 904 (1999). The definition also includes "all of the components of the female sexual organ." According to other decisions, "vagina" means all of the components of the female

sexual organ and not just the passage leading from the opening of the vulva to the cervix of the uterus. ***State v. Weaville***, 162 Wn. App. 801, 813, 256 P.3d 426 (2011).

In this case, S.S. testified that McKim tried to put his hand inside his vagina and it hurt and he told him to stop and "he'd try to do it again." 4RP at 470. S.S. said that his father "tried to, like he tried to put his hands inside my vagina," and that it "hurt a lot" and that he told him to stop because it hurt and that he would try to do it again. 4RP at 470. S.S. said that he "didn't manage to get all of the way inside." 4RP at 471. S.S. said that his father "never got fully inside of me." 4RP at 479, 481. S.S. said that as time went on, "I started to remember a little more, and he never got fully inside of me, but, like partially." 4RP at 481.

S.S.'s testimony that it hurt could pertain to simply pinching or scratching his thighs and does not necessitate that he was penetrated. Similarly, his statement that that his hand was "partially" inside of him is vague and could pertain to between his

thighs.

Other than the testimony quoted above, there was no other evidence of penetration produced by the State. There was no medical or DNA evidence to corroborate S.S.'s account, and McKim vehemently denied that the alleged acts ever occurred.

Penetration is an essential element of sexual intercourse under RCW 9A.44.010(1)(a). S.S.'s vague testimony leaves open the possibility that there was no anal or vaginal penetration during the sex acts he described and that if any act occurred, McKim's hand went inside his buttocks or inside his thighs without penetrating his anus or vagina.

The State failed to establish through S.S.'s testimony or any other evidence that penetration of S.S.'s vagina or anus occurred. Surely, considering the holding in ***A.M.***, more is necessary for a conviction than a general assertion that the defendant's hand or went into his vagina. Even when the testimony is viewed in a light most favorable to the State, no rational trier of fact could find that

McKim committed the crime of rape of a child in the first and second degree beyond a reasonable doubt without additional evidence of penetration. See ***State v. Bencivenga***, 137 Wn.2d 703, 706, 974 P.2d 832 (1999).

2. RESPECTFULLY, THE EXCLUSION OF THE HALLOWEEN VIDEO WAS AN UNWARRANTED DEFENSE SANCTION FOR A DISCOVERY VIOLATION AND INFRINGED ON MCKIM'S CONSTITUTIONALLY PROTECTED RIGHT TO PRESENT A DEFENSE.

It is fundamental that an accused person has the constitutionally protected right to present a defense. U.S. Const. Amend. VI; ***Holmes v. South Carolina***, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); ***State v. Franklin***, 180 Wn.2d 371, 377, 325 P.3d 159 (2014); ***State v. Ellis***, 136 Wn.2d 498, 527, 963 P.2d 843 (1998). The Washington Constitution also provides for a right to present material and relevant testimony. Art. I § 22.

In this case, after the State rested on October 5, 2022,

Sandra McKim approached defense counsel and stated that she was going through her videos the previous night and that she had a video from the weekend of October 26, showing N. and S.S. in their Halloween costumes, and she showed the video to defense counsel during the lunch recess on October 5, 2022. 6RP at 870-71. Following the lunch recess on October 5, after the court denied the "halftime" motion, defense counsel notified the court had he met with Sandra McKim, who had found a video from the weekend in question showing N. And S.S. in their Halloween costumes. 6RP at 870-71. The State objected to the late disclosure and referred the motion in limine requiring the defense to present all evidence it intended to use under CrR 4.7. 6RP at 872. The State argued that S.S. and her mother had already both testified and were the process of leaving the state to return home. 6RP at 872-73. S.S. and her mother Ms. Spencer had both flew in from out of state and that they were about to be transported to the airport from their hotel. 6RP at 872, 880. The

State described the video as a TikTok video dated October 26, 2019 showing what could be S.S. with another person. 6RP at 873. The State argued that S.S. did not have an opportunity to testify regarding the video and circumstances under which it was recorded. 6RP at 873. The video was marked and played for the court. 6RP at 876. Counsel described the video as being made on Saturday, October 26 during a trip to the Point Defiance Park Aquarium in Tacoma, and which depicts S.S. and N. dressed in costumes for Halloween. 6RP at 876-77. Counsel argued that the video corroborated the anticipated testimony of Ms. McKim that N. and S.S. were at Sandra McKim's for the weekend, contrary to S.S.'s assertion. 6RP at 878.

The trial court excluded the video on the basis that its late disclosure is unfairly prejudicial to the State and precluded Ms. McKim from mentioning the TikTok video in her testimony. 6RP at 882-83. Defense counsel subsequently argued that the TikTok video provided by Sanda McKim was relevant because it is a

picture of what S.S. looked like that day and the day after the allegation shat that she made regarding an assault. 7RP at 975. The court noted that the ruling was based on the late disclosure and prejudice to the state, not lack of relevance. 7RP at 977.

A trial court has broad discretion to determine the proper remedy for a discovery violation. CrR 4.7(h)(7). ***State v. Bradfield***, 29 Wn. App. 679, 682, 630 P.2d 494 (1981). The trial court abuses its discretion when it relies on untenable grounds or reasons or if its decision is manifestly unreasonable. ***State v. Barry***, 184 Wn. App. 790, 797, 339 P.3d 200 (2014).

Failure to produce evidence or identify witnesses timely may be "appropriately remedied by continuing trial to give the nonviolating party time to interview a new witness or prepare to address new evidence." ***State v. Hutchinson***, 135 Wn.2d 863, 881, 959 P.2d 1061 (1998), abrogated on other grounds by ***State v. Jackson***, 195 Wn.2d 841, 467 P.3d 97 (2020). Exclusion or suppression of evidence or dismissal for a discovery violation are

extraordinary remedies that the court should apply narrowly. ***Hutchinson***, 135 Wn.2d at 882; ***State v. Smith***, 67 Wn. App. 847, 852, 841 P.2d 65 (1992).

Typically, sanctions for discovery violations do not include exclusion of evidence. ***State v. Ray***, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). Exclusion is an "extraordinary remedy" under CrR 4.7(h) that "should be applied narrowly." ***Hutchinson***, 135 Wn.2d at 882. However, evidence may be excluded when that is the only effective remedy. ***Hutchinson***, 135 Wn.2d at 881.

"Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly." ***Hutchinson***, 135 Wn.2d at 882. "The appropriate remedy for late disclosure is typically to continue the trial to give the other party time to interview the new witness and prepare to address his or her testimony." ***State v. Kipp***, 171 Wn. App. 14, 31, 286 P.3d 68 (2012), rev'd on other grounds by 179 Wn.2d 718, 317 P.3d 1029 (2014).

The ***Hutchinson*** Court identified four factors that a trial court should consider when determining whether to exclude evidence as a sanction for a discovery violation. 135 Wn.2d at 882-83, citing ***Taylor v. Illinois***, 484 U.S. 400, 415 n. 19, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). Pursuant to ***Hutchinson***, the trial court should weigh: (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the witness's testimony will surprise or prejudice the State; and (4) whether the violation was willful or in bad faith. ***Hutchinson***, 135 Wn.2d at 882-83.

Here, trial court merely concluded the notice of intent to introduce the video was unfairly prejudicial to the prosecution, but the court failed to identify any reason why another remedy such as allowing S.S. and Ms. Spencer to testify telephonically or better yet via Zoom, Webex or any other video communication platforms were not an adequate remedy. 6RP at 882.

Application of the ***Hutchinson*** factors do not support the "extraordinary remedy" of exclusion here. ***Hutchinson***, 135 Wn.2d at 882.

Excluding the video undermined McKim's defense. There was no forensic evidence presented and S.S.'s accusation may very have been fomented by anger toward her father or by her mother's extreme anger toward McKim. The video would have significantly challenged the accusation that McKim abused S.S. the weekend prior to Halloween, as well as casting doubt on S.S.'s other accusations of prior abuse.

The trial court's rationale for excluding the video was untenable. The trial court placed too much emphasis on the fact the notice to the State was unfairly prejudicial without considering a lesser sanction, such as allowing the state to reopen its case and have the witnesses testify remotely. The court's ruling was particularly troubling given the weakness of the State's case and the severity of the punishment McKim faced if

convicted.

The first ***Hutchinson*** factor is the effectiveness of other possible sanctions. Here, the attorney was essentially beside himself by the late discovery and apologized profusely to the court and the prosecution, even though circumstances were entirely outside counsel's control. 6RP at 869-74. Under the unique circumstances of this case, sanctions were not warranted; counsel did not purposely fail to provide the video or otherwise engage in an intentional violation of CrR 4.7. The sanction of exclusion of evidence was draconian under the circumstances, particularly since it was foreseeable that the video would potentially come before a court again in the form of a motion for new trial or personal restraint petition.

The second ***Hutchinson*** factor involves the impact of excluding the evidence on the outcome of the trial. The video was critical for the defendant, it directly refuted S.S. allegation that he was molested by McKim on the weekend prior to Halloween. The

video was not only relevant, but would undoubtedly have had a large impact on the trial, casting doubt on S.S.'s credibility about not only his testimony regarding the weekend before Halloween, but his allegation of abuse going back two years. This factor weighs against the trial court's decision to exclude the testimony.

The third factor is whether the prosecution was surprised or prejudiced by the testimony. The prosecution and the court—and defense counsel—were all equally surprised by the sudden emergence of the video. The late disclosure could be remedied however by allowing he state to recall S.S. and Ms. Spencer to rebut the video. This factor too weighs against the court's exclusion ruling.

The final factor is whether the discovery violation was willful or in bad faith. Here, there can be no question that the defense was just as surprised as the prosecution by the video. Defense counsels' discovery violation was not a willful or bad faith violation of CrR 4.7.

All four of the ***Hutchinson*** factors weigh against the trial court's decision to exclude the video. The late disclosure in this case did not result in incurable prejudice to the State. The late disclosure was not due to bad faith by the defense. It was not contested that the video was in the control of a third party and that the video was not provided to counsel until after the state rested.

The trial court placed too much emphasis on the fact the notice to the State was tardy, without considering a lesser sanction.

An error is harmless "if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." ***State v. Jones***, 168 Wn.2d 713, 724, 230 P.3d 576 (2010), quoting ***State v. Smith***, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). The primary issue regarding each count was S.S.'s credibility. When his allegation of abuse prior to Halloween is refuted by the video, it is very possible that a

reasonable jury may have reached a different result and determined that S.S.'s testimony was not credible. The error was not harmless beyond a reasonable doubt. ***Jones***, 168 Wn.2d 724-25.

For the foregoing reasons, this Court should accept review and remand to the trial court with the direction to vacate the convictions or alternatively reverse and remand for new trial.

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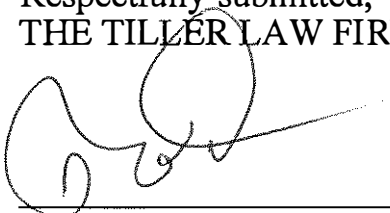
F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the court below that conflict with prior decisions of this Court and the courts of appeals.

Certificate of Compliance: This document contains 3088 words, excluding the parts of the document exempted from the word count by RAP 18.17.the petition exempted from the word count by RAP 18.17.

DATED: March 3, 2025.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE

The undersigned attorney for the Appellant hereby certifies this Response was e-filed to the Court of Appeals, Division 2, and Kristie Barham, Pierce County, Prosecuting Attorney, a copy was also mailed to David McKim, Appellant, by first class mail, postage pre-paid on May 13, 2024, at the Centralia, Washington post office addressed as follows:

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

February 4, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID JEDIDIAH MCKIM, Appellant.	No. 57693-7-II UNPUBLISHED OPINION

GLASGOW, J.—When SS was 12 years old, he told his mother that his father, David McKim, sexually assaulted him for several years. A jury found McKim guilty of two counts each of the following crimes: first and second degree child rape and first and second degree child molestation of SS. McKim appeals his four rape convictions, arguing that the State failed to prove that McKim penetrated SS. McKim also claims that the trial court erred by excluding a piece of video evidence that defense counsel produced to the State during trial after the State rested. The State cross-appeals, arguing that the trial court erred by excluding statements McKim made during a police interview.

We conclude that the evidence was sufficient to demonstrate that McKim penetrated SS, which is an essential element of first and second degree child rape. We also conclude that the trial court did not err by excluding the defense's untimely video evidence. We thus affirm McKim's convictions. Because we affirm, we need not address the State's cross-appeal.

FACTS

I. BACKGROUND

David McKim is SS's father. SS was born female in 2007 and later identified as male.[1] SS lived primarily with his mother but spent every other weekend and some school vacations with McKim. McKim mostly lived with his mother, SS's paternal grandmother, except for a brief period when he lived with his now ex-wife.

During his visits with McKim, SS spent the majority of his time with his paternal grandmother. While at his grandmother's house, SS sometimes played video games with McKim in the sunroom. SS slept in his own bedroom at his paternal grandmother's house. When McKim lived with his ex-wife, SS stayed at her house a couple of times.

When SS was 12 years old, SS's mother noticed that SS seemed depressed, was not showering, and was generally not acting himself. SS's mother asked SS's maternal grandmother to speak with him. In November 2019, SS told his maternal grandmother that McKim was sexually assaulting him. SS then told his mother about the abuse.

SS's mother immediately took SS to the hospital, where SS spoke to a triage nurse and a physician assistant. SS told both medical professionals that McKim had sexually assaulted him "rectally and vaginally" for several years. 4 Verbatim Rep. of Proc. (VRP) at 587. SS also saw a pediatrician, but declined a physical sexual assault exam. SS spoke with a police forensic interviewer and again disclosed the sexual assaults.

[1] Prior to and throughout trial, SS identified as male. This opinion uses male pronouns and SS's current initials.

The State charged McKim with eight total crimes: two counts of first degree child rape, two counts of second degree child rape, two counts of first degree child molestation, and two counts of second degree child molestation.[2]

Before trial, the trial court excluded statements that McKim made in a police interview under CrR 3.5, concluding the State failed to establish McKim's statements were voluntary.

II. TRIAL

A. SS's Testimony

McKim's case proceeded to a jury trial. During the trial, SS testified that McKim started to touch him inappropriately when he was in fourth or fifth grade and approximately 9 or 10 years old. According to SS, the first time McKim assaulted him was at McKim's ex-wife's house. SS said he was watching television with McKim when McKim "started touching all over my body," and "touching my stomach and my back and my chest and down there too, sometimes," indicating his vagina. 4 VRP at 460-61. SS said that after this first time, McKim told him to keep the encounters a secret.

SS stated that McKim touched him this way every time he went to McKim's ex-wife's house. The alleged abuse also occurred at SS's paternal grandmother's house in the sunroom, in SS's bedroom, and once on the couch. SS testified that McKim would use his hands and his penis to touch SS's body. SS said that his clothes stayed on most of the time, but sometimes McKim would "pull my pants and my underwear down, and he'd also pull his down and rub his penis on my butt. And a couple times, he'd rub it on my vagina." 4 VRP at 470.

The State asked SS about the extent of McKim's touching:

[2] The molestation charges were not in the initial charging document but were added later.

Q: Did he ever try to put his hands or anything else inside of you?
A: Yeah, he did. He tried to, like, he tried to put his hands inside my vagina.
Q: What happened?
A: Well, it hurt a lot. So I'd tell him to stop because it hurt, and he'd stop, but then, again, he'd try to do it again.

4 VRP at 470. SS later clarified that McKim "didn't manage to get all the way inside" him because McKim would stop after SS said it hurt. 4 VRP at 471. SS described the pain as "a sharp pain" that felt like McKim was "touching something or pushing against something that was not meant to be touched." 4 VRP at 558. SS stated that the pain would linger for a few seconds and then go away. At one point during SS's testimony, defense counsel pointed out that in a prior interview, SS said McKim "never got inside of me." 4 VRP at 481. SS replied, "As time went on, I started to remember a little more, and he never got fully inside of me, but, like, partially," using his hands. *Id.*

SS testified that the last time McKim assaulted him was the Friday before Halloween, October 25, 2019. SS said that he was lying on the couch at his paternal grandmother's house with McKim when McKim started touching him. SS stood up and went to his bedroom, but McKim followed him and began "grinding" on SS's buttocks with his penis, eventually pulling SS's pants down and rubbing against his bare skin. 4 VRP at 473. SS testified that his friend, "N," was not at SS's grandmother's house that weekend, but his cousins and uncle were staying in the upstairs bedroom.

B. New Video Evidence

After the State's witnesses testified, the State rested its case in chief and McKim moved to dismiss the child rape counts, claiming insufficient evidence of penetration. The trial court denied the motion to dismiss, citing SS's testimony.

After the lunch break that day, McKim's defense counsel informed the court that SS's paternal grandmother provided new evidence over the lunch break. The new evidence was a TikTok video that allegedly showed SS and his friend, N, in Halloween costumes together at the aquarium on Saturday, October 26, 2019. Defense counsel acknowledged that the late disclosure of the video during the trial violated discovery guidelines and apologized. However, defense counsel argued that the video should be admitted because it contradicted SS's testimony that N was not with him the weekend before Halloween. The video instead would support SS's paternal grandmother's anticipated testimony that she picked up SS and N from school on Friday, October 25 and N spent the weekend with SS.

The State argued that the video should be excluded because SS did not have an opportunity to testify about when the video was taken or authenticate the contents of the video. SS and his mother were scheduled to fly out of the state that evening.

The trial court first commented that the video only showed the children in a public place, so the "video itself doesn't actually prove that [N] was [at SS's grandmother's house] for the weekend or there beyond the 30 seconds of this video." 6 VRP at 879. The trial court then discussed the factors for excluding evidence that violates discovery rules. These factors are the effectiveness of less severe sanctions than exclusion, the impact of exclusion of the evidence on the outcome of the case, the extent to which the evidence would surprise or prejudice the State, and whether the violation was willful or in bad faith.

When determining whether less severe sanctions—like allowing the State to reopen its case-in-chief and recall witnesses—were appropriate, the trial court noted that the State's witnesses already testified and were about to leave the state. It also expressed concern about being

able to retain all of the jurors if the trial continued for several additional days, thereby risking a mistrial. Regarding the video's impact on the outcome of the case, the trial court stated that the video went to a collateral issue, and not "the direct issue of whether or not [McKim] committed these crimes." 6 VRP at 881. The trial court also concluded that SS's paternal grandmother could still testify about whether N was with SS the weekend before Halloween without referencing the video. The trial court acknowledged that defense counsel did not purposefully withhold this evidence, but still concluded that the video was "exceedingly late" and thus unfairly prejudicial to the state. *Id.* Ultimately, the trial court concluded that based on its balancing of the relevant factors, the video would not be admitted as evidence.

C. Testimony on Behalf of McKim

SS's paternal grandmother testified about the events of the weekend before Halloween. She recalled that she picked up SS and N from school on Friday, October 25, 2019, and N slept over that night. On Saturday, October 26, SS's grandmother took SS and N to the aquarium in their Halloween costumes and drove N home at 9:00 p.m. that evening.

McKim also testified that N was at his mother's house that weekend and left on Saturday evening. McKim denied ever touching SS inappropriately.

D. Trial Outcome and Appeal

After closing arguments, the trial court instructed the jury that sexual intercourse, an essential element of first and second degree rape, includes "any penetration of the vagina or anus however slight, by an object, including a body part." Clerk's Papers at 449. McKim did not object to this instruction.

The jury found McKim guilty on all 8 counts. The trial court sentenced McKim to 285 months to life with lifetime community custody. McKim appeals.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

McKim argues that the State did not present sufficient evidence that McKim penetrated SS, so it failed to satisfy the "sexual intercourse" element of first and second degree child rape. Br. of Appellant at 22. We disagree.

In a challenge to the sufficiency of the evidence, our review is "highly deferential to the jury's decision." *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). We do not consider "questions of credibility, persuasiveness, and conflicting testimony." *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011). We instead ask whether, taking the State's evidence as true and drawing all reasonable inferences in the State's favor, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Altman*, 23 Wn. App. 2d 705, 710, 520 P.3d 61 (2022). Circumstantial evidence and direct evidence are equally reliable under this standard. *State v. O'Neal*, 159 Wn.2d 500, 506, 150 P.3d 1121 (2007).

A person commits first degree child rape "when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim." Former RCW 9A.44.073(1) (1988). A person commits second degree child rape "when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." Former 9A.44.076(1) (1990). Under

these statutory definitions, "sexual intercourse" includes "any penetration of the vagina or anus however slight, by an object . . . except when such penetration is accomplished for medically recognized treatment." Former RCW 9A.44.010(1) (2007).

Under Washington law, "vagina" encompasses "all of the components of the female sexual organ and not just '[t]he passage leading from the opening of the vulva to the cervix of the uterus.'" *State v. Montgomery*, 95 Wn. App. 192, 200, 974 P.2d 904 (1999) (quoting THE AMERICAN HERITAGE DICTIONARY 1970 (3d ed. 1992)). This definition includes the labia minora, which are the inner folds of the vagina. *Id.* at 201. Penetration of the vagina thus occurs when a defendant breaches "'the lips of the victim's sexual organs.'" *State v. Delgado*, 109 Wn. App. 61, 65, 33 P.3d 753 (2001) (quoting *State v. Bishop*, 63 Wn. App. 15, 19, 816 P.2d 738 (1991)), *rev'd on other grounds*, 148 Wn.2d 723, 63 P.3d 792 (2003).

McKim argues that SS's testimony is not sufficient to show beyond a reasonable doubt that McKim penetrated SS. He contends that SS's testimony was vague and could refer to McKim "simply pinching or scratching [SS's] thighs." Br. of Appellant at 27.

SS testified that McKim abused him from when SS was approximately 9-to-12-years-old. Though SS testified that McKim never got "fully inside" him, SS also stated that McKim's hands got "partially" inside his vagina and that this caused a "sharp pain" like McKim was "pushing against something that was not meant to be touched." 4 VRP at 481, 558. From this testimony, a jury could reasonably infer that McKim's hands at least entered the lips of SS's vagina, getting "partially" inside him and pushed against the opening of SS's vulva, causing SS pain. *Id.* at 481. Under the broad definition of "vagina" in Washington law, which is not limited to the vaginal canal, McKim's actions would constitute penetration. Thus, taking SS's testimony as true; a

rational jury could conclude that McKim penetrated SS's vagina and the State proved the sexual intercourse element of first and second degree rape beyond a reasonable doubt. We hold that there was sufficient evidence that McKim committed two counts of first degree rape of a child and two counts of second degree rape of a child.

II. EXCLUSION OF EVIDENCE

A. Discovery Violation

McKim argues that the trial court abused its discretion by excluding the video evidence discovered during trial. He claims the video would have refuted SS's claim that McKim assaulted him the weekend before Halloween and would have cast doubt on SS's credibility more generally. McKim also contends that the trial court did not appropriately consider whether to reopen the State's case and have SS testify about the video over Zoom. Finally, McKim argues that because the defense did not know about the video, exclusion was a "draconian" and untenable sanction. Br. of Appellant at 37. We disagree.

Under CrR 4.7(b)(2)(x), the trial court may order a criminal defendant to disclose their evidence before trial. If during trial, a party discovers additional evidence that has not been disclosed, the party must promptly notify opposing counsel and the trial court of the undisclosed evidence. CrR 4.7(h)(2). If a party fails to comply with a trial court's discovery order, the trial court can "permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action[,] or enter such other order as it deems just under the circumstances." CrR 4.7(h)(7)(i). Defense counsel conceded below that the late disclosure of the video in question was a discovery violation.

We review a trial court's decision to exclude evidence as a sanction under CrR 4.7 for an abuse of discretion. *State v. Hutchinson*, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998), *abrogated on other grounds by State v. Jackson*, 195 Wn.2d 841, 467 P.3d 97 (2020). A trial court abuses its discretion when it makes a decision on untenable grounds or for untenable reasons. *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). Generally, failure to produce evidence in a timely manner is appropriately remedied by continuing trial so that the nonviolating party can address the new evidence. *Hutchinson*, 135 Wn.2d at 881. Exclusion of evidence is "an extraordinary remedy and should be applied narrowly." *Id.* at 882. The trial court must consider four factors when deciding whether to exclude evidence:

> (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith.

Id. at 883.

Here, the trial court analyzed each of the four *Hutchinson* factors before deciding to exclude the video. First, it noted that the video was provided to the State after it had rested, which was "exceedingly late." 6 VRP at 881. The trial court then stated that less severe sanctions would not be appropriate because each option would require the State to reopen its case and make SS testify again after flying back to his home state. The court expressed concern that the resulting delay would risk loss of jurors and a mistrial. These concerns would still be relevant if SS testified again remotely. Additionally, defense counsel did not ask the trial court to arrange for SS to testify remotely after he arrived home.

As to the video's impact on the outcome of the case, the court acknowledged that the video may be relevant to SS's credibility, but it only proved a collateral issue: SS and N were at the

aquarium at some point the weekend before Halloween. This contradicts SS's testimony that he did not spend time with N that weekend, but it does not go to the ultimate question of whether McKim raped SS. And McKim and SS's paternal grandmother were still permitted to testify that N stayed at SS's grandmother's house that Friday night, so there were other means to demonstrate N's presence that weekend in contrast with SS's testimony.

The court recognized that the defense did not know about the video before the trial, so it did not willfully keep the video from the court. But ultimately, the delay and disruption prejudiced the State, which had already rested its case on the existing evidence.

Based on its analysis of the *Hutchinson* factors, the trial court did not abuse its discretion by excluding the video. The trial court's decision was not untenable because all but one factor weighed for excluding the evidence. Of particular note are the video's collateral nature and the potential impact of delays on the State's witnesses and the jury.

B. Constitutional Right to Present a Defense

McKim argues that exclusion of the video evidence violated his constitutional right to present a defense. We disagree.

A criminal defendant has a constitutional right to present a defense. *State v. Jennings*, 199 Wn.2d 53, 63, 502 P.3d 1255 (2022); *see* U.S. CONST. amend VI; WASH. CONST. art. I, § 22. This right "does not extend to irrelevant or inadmissible evidence." *State v. Wade*, 186 Wn. App. 749, 764, 346 P.3d 838 (2015). However, when evidence is relevant, a "reviewing court must weigh the defendant's right to produce relevant evidence against the State's interest in limiting the prejudicial effects of that evidence to determine if excluding the evidence violates the defendant's constitutional rights." *Jennings*, 199 Wn.2d at 63 (citing *State v. Hudlow*, 99 Wn.2d 1, 16, 659

P.2d 514 (1983)). Generally, exclusion of evidence that is prejudicial to the State, only minimally probative, and can be shown through other testimony does not violate a defendant's right to present a defense. *Id.* at 63-67. In *Jennings*, the Washington Supreme Court distinguished between "evidence that merely bolsters credibility and evidence that is necessary to present a defense." *Id.* at 66-67.

Here, the extremely late discovery of the video evidence—after the State had rested—prejudiced the State. The trial court found that if it admitted the evidence, the State would have had to change the flights of its two key witnesses and risk a mistrial due to the delay.

Regarding McKim's right to present a defense, the video evidence was only minimally relevant. The video allegedly shows SS and N together at a public location on the Saturday before Halloween. Although it may have corroborated McKim's version of events that weekend and bolstered his credibility, ultimately the video did not answer the central question of whether McKim raped SS. The video simply confirmed whether N was with SS at all that weekend; it did not show whether N spent the Friday night at McKim's mother's house. Additionally, even if N did spend Friday night and Saturday afternoon with SS, the alleged abuse could have occurred on Saturday night or Sunday when N was not present. Finally, both McKim and McKim's mother were still able to testify about N's presence that weekend.

Because the video was prejudicial, minimally probative, and its contents could be advanced through testimony, the trial court did not violate McKim's constitutional rights by excluding it. We affirm.

III. EXCLUSION OF POLICE INTERVIEW

The State brings a cross-appeal arguing that McKim's statements during a police interview should not have been excluded. Because the jury found McKim guilty on all charges and we affirm McKim's convictions, we need not reach this issue.

CONCLUSION

We affirm McKim's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

GLASGOW, J.

We concur:

CRUSER, C.J.

CHE, J.

THE TILLER LAW FIRM

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