IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	DIVISION ONE
Respondent,	No. 65976-6-I
v.	UNPUBLISHED OPINION
GALMESA SHUBE ELEMO,	
Appellant.	FILED: June 11, 2012

Dwyer, J. — Galmesa Elemo appeals from his convictions of child molestation in the first degree and child molestation in the third degree arising from two incidents involving separate victims. He contends that his constitutional rights were violated when the prosecutor argued during closing that Elemo had tailored his testimony to conform to the evidence adduced at trial. Elemo did not object to this argument. Given that the prosecutor properly confronted Elemo regarding the issue of tailoring during cross-examination, Elemo has failed to demonstrate an entitlement to appellate review of this claim. Because Elemo's other contentions are also without merit, we affirm.

I

In 2005, 15-year-old N.A. arrived in the United States from Ethiopia. N.A., who could neither speak nor read English, was pregnant. Near the end of her pregnancy, N.A.'s stepfather, Galmesa Elemo, began to tutor her in English at the home they shared with N.A.'s mother, Asha Gobana.

After N.A. gave birth, Elemo began to sexually touch her during her lessons. On several occasions, Elemo touched N.A.'s breasts under her clothing. When Elemo became increasingly more insistent and forceful, N.A. spoke to her mother about Elemo's behavior. Gobana sided with Elemo, and N.A. thereafter left the home with her infant son.

In 2009, 11-year-old M.G. was living in the home of Gobana's mother, Nazifo Mohamed.[1] On September 19, M.G. and Mahamed spent the night at Gobana's house. M.G. slept downstairs in a bedroom that she shared with Gobana's daughter, H.I.

During the night, M.G. awoke. As she began to look for Mahamed, Elemo stopped her in the hallway. Elemo pulled M.G. into a downstairs bedroom. He removed M.G.'s nightgown and told her to get onto the bed. Elemo then lay down beside M.G., and rubbed his penis against her vagina. M.G. felt wetness on her upper thigh. Elemo told M.G. that he would kill her if she told anyone about the incident.

M.G. thereafter returned to her bedroom and told H.I. what had happened.

[1] M.G.'s biological mother lived in Africa. Her father was deceased.

M.G. also later described the encounter to 12-year-old E.N., a close friend and relative. On September 26, M.G. told Mahamed about the incident, and Mahamed took M.G. to Seattle Children's Hospital for a physical examination. M.G. was treated in the emergency room by a multidisciplinary team. M.G. told social worker Deborah King that Elemo had touched her "private parts" with his "hands and his private parts."

Elemo was thereafter charged with child molestation in the first, second, and third degrees (alternative counts) based upon the 2009 incident involving M.G.,[2] and child molestation in the third degree based upon the 2005 incident involving N.A. At trial, Gobana testified for the defense. She told the jury that Mahamed and M.G. had not stayed overnight at her house on September 19. She further testified that Elemo had slept only in her bed, and that she would have noticed if he had been gone for more than five minutes. Gobana also denied that her daughter, N.A., had ever told Gobana that Elemo had molested her.

Gobana's daughter, H.I., also testified for the defense. H.I. claimed that Mahamed had told her of a secret plot to frame Elemo for rape in 2006 or 2007. H.I. explained that, as part of this plan, M.G. was supposed to claim that she was raped. H.I. admitted that she had told the police that Mahamed and M.G. had spent the night at Gobana's house in September 2009,[3] but she denied that this

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[2] This count was charged in the alternative because there was dispute as to M.G.'s date of birth. It was left to the jury to resolve this factual issue.

[3] H.I. gave a statement to police shortly after the molestation of M.G. was reported.

had actually occurred. Gobana's son, J.A., also testified that neither Mahamed nor M.G. had spent the night at Gobana's house during September 2009.

Elemo testified on his own behalf. Elemo denied that he had ever inappropriately touched N.A. or M.G. He further denied that he had threatened to kill M.G. However, in contrast to the testimony of other defense witnesses, Elemo testified that he had not spent the night at Gobana's home on September 19. Instead, he told the jury that he had been praying at a mosque throughout the night. The defense rested after Elemo's testimony.

Trial did not resume until six days later due to defense counsel's brief hospitalization. Defense counsel then asked to reopen his case to allow additional testimony from Elemo. The trial court permitted the defense to do so. In contrast to his prior testimony, Elemo now told the jury that he had, in fact, returned to Gobana's home on the night of September 19. He testified that he returned from the mosque at approximately 11:30 p.m. Consistent with the testimony of the other defense witnesses, Elemo now testified that it was M.G. who was not at Gobana's home on the night of the alleged incident.

The jury convicted Elemo of child molestation in the first degree based upon the 2009 incident involving M.G. and child molestation in the third degree based upon the 2005 incident involving N.A. The trial court sentenced Elemo within the standard range.

Elemo appeals.

II

Elemo first contends that the prosecutor violated his rights under article I, section 22 of the Washington Constitution by arguing during closing that Elemo tailored his testimony to match that of other defense witnesses. We disagree.

As an initial matter, Elemo misstates the record in making this claim. Elemo asserts that the prosecutor did not confront him regarding the subject of tailoring prior to arguing during closing that Elemo had crafted his testimony to conform to the evidence at trial. However, contrary to Elemo's assertion, the prosecutor specifically confronted Elemo during cross-examination regarding this subject. The record demonstrates that, after Elemo reopened his case following the six-day break in the trial, Elemo retook the witness stand and modified his story regarding the September 2009 incident involving M.G. In contrast to his prior claim that he had not been at Gobana's house that night, Elemo instead asserted that he had, in fact, returned to the house by 11:30 p.m. He then told the jury, in conformance with the testimony of other defense witnesses, that it was M.G. who had not been at Gobana's home on the night in question.

Following this testimony by Elemo, the prosecutor posed the following questions on cross-examination:

> So Mr. Elemo, you were here when your wife Asha testified, right?
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> . . .
>
> And you heard her say, [M.G.] wasn't at the house, so this couldn't

> have happened, right? You heard her testify to that?
>
> . . .
>
> And J.A. is living at your home?
>
> . . .
>
> You heard him testify, well, she wasn't there, [M.G.]?
>
> . . .
>
> And then you got up and testified and you got it wrong, didn't you?
>
> . . .
>
> You said, I wasn't there?

Having noted the discrepancy between Elemo's original testimony and that of the other defense witnesses, the prosecutor then focused on the intervening time between this testimony and Elemo's subsequent decision to reopen his case and modify his story:

> So Mr. Elemo, you've had almost a week to think about this, haven't you?
>
> . . .
>
> So you've had almost a week to think about what you were going to say this morning, right, how you were going to answer these questions?
>
> . . .
>
> How many days and nights have you had to think about how you are going to answer these questions, answer me that? How many days? Count them, count them up.
>
> . . .

> We're talking about your first saying that you weren't there, now you're saying you were there at the house. I'm asking you how many days and nights did you have to think about that?

Elemo cannot contend that this questioning by the prosecutor during cross-examination was improper. As our Supreme Court has explained, "where the credibility of the defendant is key, it is fair to permit the prosecutor to ask questions that will assist the finder of fact in determining whether the defendant is honestly describing what happened." State v. Martin, 171 Wn.2d 521, 536, 252 P.3d 872 (2011). Accordingly, where a defendant's own testimony suggests tailoring, "the State [does] not violate article I, section 22 by posing questions during cross-examination that [are] designed to elicit answers indicating whether [the defendant] tailored his testimony." Martin, 171 Wn.2d at 536.[4] Where a defendant has changed his or her testimony in accordance with information that is learned at trial, such conduct opens the door to cross-examination regarding tailoring. See State v. Hilton, 164 Wn. App. 81, 96, 261 P.3d 683, 272 P.3d 852 (2011).

Here, Elemo opened the door to questions regarding tailoring by altering

[4] Article I, section 22 affords a defendant the right to "appear and defend in person," the right to "testify in his own behalf," and the right to "meet the witnesses against him face to face." Wash. Const. art. I, § 22. Our Supreme Court has determined that these provisions provide a defendant with greater protection against arguments of tailoring than do the corresponding provisions of the Sixth Amendment. Martin, 171 Wn.2d at 535-36; cf. Portuondo v. Agard, 529 U.S. 61, 64, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000) (holding that generic accusations of tailoring, lodged for the first time during closing argument, do not violate the Sixth Amendment). Nevertheless, the court has determined that "suggestions of tailoring . . . during cross-examination [are] compatible with the protections provided by article I, section 22." Martin, 171 Wn.2d at 535-36.

his account of the night of the incident following a six-day break in trial proceedings. The modified version of events described by Elemo conformed to the testimony of the other witnesses for the defense. Accordingly, it was proper for the prosecutor to cross-examine Elemo regarding these changes in his story and his opportunities to prepare those changes. See Hilton, 164 Wn. App. at 98. Elemo cannot contend that such questioning violated his rights under article I, section 22. Martin, 171 Wn.2d at 536.

Nor is Elemo entitled to appellate review of his contention that his constitutional rights were violated by the prosecutor during closing argument. Elemo did not object to the prosecutor's remarks at trial. In general, we will not entertain a claim of error that was not raised in the trial court unless the claim involves a manifest error that affects a constitutional right. RAP 2.5(a)(3). The appellant must demonstrate both that the purported error is of constitutional magnitude and that the error is "manifest." State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). A "manifest" error is one that is "so obvious on the record that the error warrants appellate review." State v. O'Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009). As our Supreme Court has explained, the appellant must "'show how the alleged error actually affected the [appellant]'s rights at trial.'" O'Hara, 167 Wn.2d at 98 (alternation in original) (quoting State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)). The appellant must make a "plausible showing . . . that the asserted error had practical and

identifiable consequences in the trial of the case." Kirkman, 159 Wn.2d at 935.

Here, Elemo has made no effort to demonstrate how the alleged error during closing argument was manifest. Given that Elemo changed his testimony to better conform his story to the testimony of other defense witnesses, we find it difficult to imagine that the jury would not have inferred tailoring without any suggestion by the prosecutor. Moreover, as our courts have long held, a prosecutor is entitled to draw reasonable inferences from the evidence admitted at trial and to argue those inferences to the jury.[5] See, e.g., State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). Here, because the prosecutor properly questioned Elemo regarding the changes in his testimony during cross-examination, the prosecutor's argument during closing was reasonably drawn from the evidence admitted at trial. Hoffman, 116 Wn.2d at 95; see also Hilton, 164 Wn. App. at 98 (determining that no error occurred during closing argument where prosecutor directly tied argument of tailoring to defendant's testimony during cross-examination). Accordingly, Elemo cannot meet his burden of showing that the alleged error had practical and identifiable consequences in his trial. Elemo has not demonstrated an entitlement to appellate review of this claim of error.

III

Elemo next contends that the trial court erred by declining to instruct the

[5] Elemo does not assert a claim of prosecutorial misconduct. Nevertheless, we note that where a defendant does not object to the prosecutor's remarks, reversal is unwarranted unless the prosecutor's conduct was so "flagrant and ill intentioned that no curative instructions could have obviated the prejudice." State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

jury to ignore an out-of-court statement by M.G. that identified Elemo as the perpetrator of the crime. Because the trial court properly instructed the jury regarding the permissible use of M.G.'s statement, we disagree.

In criminal trials involving sex offenses, the State may present evidence that the alleged victim complained to someone after the assault.[6] State v. Ferguson, 100 Wn.2d 131, 135-36, 667 P.2d 68 (1983); State v. Alexander, 64 Wn. App. 147, 151, 822 P.2d 1250 (1992). Pursuant to the "fact of complaint" doctrine, such evidence is "not hearsay because it is introduced for the purpose of bolstering the victim's credibility and is not substantive evidence of the crime." State v. Bray, 23 Wn. App. 117, 121, 594 P.2d 1363 (1979); see also State v. Pugh, 167 Wn.2d 825, 842, 225 P.3d 892 (2009) ("The fact that a complaint was made was considered to be original evidence, not hearsay."). However, "[e]vidence of the details of the complaint, including the identity of the offender and the specifics of the act, is not admissible." Alexander, 64 Wn. App. at 151. Such details are admissible only if allowed by other rules of evidence.

Here, 12-year-old E.N. testified at trial that M.G. told her that "Galmesa had raped her." Elemo contends that M.G.'s statement, which the State had moved *in limine* to admit pursuant to the fact of complaint doctrine, exceeded the limitations of the doctrine by including Elemo's identity.

[6] This rule is grounded in the feudal assumption that, in forcible rape cases, the absence of evidence of a timely complaint creates an inference that the victim's testimony has been fabricated. See State v. Bray, 23 Wn. App. 117, 121-22, 594 P.2d 1363 (1979). Thus, to overcome the inference, "it became essential to the state's case-in-chief to prove affirmatively that [the victim] made timely hue and cry." State v. Murley, 35 Wn.2d 233, 237, 212 P.2d 801 (1949).

Elemo is correct that his identity was not admissible as substantive evidence pursuant to the fact of complaint doctrine. Alexander, 64 Wn. App. at 151. Nor does the State contend that Elemo's identity—as conveyed in M.G.'s statement—was admissible pursuant to any other rule of evidence. Accordingly, it would be impermissible for a jury to convict Elemo based upon a determination that the matters asserted in M.G.'s statement were true; this evidence could not be used to find that it was Elemo who had molested M.G. Elemo is also correct that in the absence of a limiting instruction, the risk existed that the jury might use M.G.'s statement for this improper purpose.

Here, however, following defense counsel's timely objection to E.N.'s testimony, the trial court issued the following instruction to the jury:

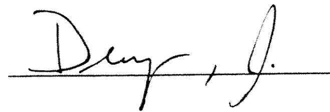
> Ladies and gentlemen, I want to give you an instruction at this time. Evidence concerning a statement made to this witness by [M.G.] has been admitted to show that a complaint was made. It is not to be considered by you for the truth of the matter asserted.

Counsel did not request any additional instruction regarding this matter.

This instruction was both proper and sufficient. The instruction obviated any potential misuse of M.G.'s statement by the jury. ER 105 provides that "[w]hen evidence which is admissible . . . for one purpose but not admissible as to . . . another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Here, the trial court's instruction informed the jury that M.G.'s statement could not be considered for the improper purpose of establishing Elemo's identity or the

details of the offense. Rather, M.G.'s statement could be used only to demonstrate the existence of a timely complaint, thus bolstering M.G.'s credibility and refuting the inference of fabrication.[7] The jury is presumed to follow the trial court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). Because the trial court properly instructed the jury regarding the limited purpose for which M.G.'s statement could be used, there was no error.

Affirmed.[8]



[7] Elemo was identified as the perpetrator by other properly admitted evidence at trial. A separate statement by M.G. identifying Elemo was admitted without objection as a statement made for the purpose of medical diagnosis or treatment. ER 803(a)(4). Statements to medical providers that attribute fault to a member of the victim's immediate household may be pertinent to treatment because such statements are relevant to preventing further injury to the victim. State v. Ackerman, 90 Wn. App. 477, 482, 953 P.2d 816 (1998).

Moreover, there was no contention at trial that a different person was responsible for the molestation of M.G. Instead, Elemo argued that M.G. had fabricated her story. Even where no limiting instruction has been given, we have determined that the improper admission of a perpetrator's identity is harmless in such circumstances. Ferguson, 100 Wn.2d at 136.

[8] Elemo asserts a variety of claims in two separate statements of additional grounds. Elemo asserts: (1) a violation of his right to speedy trial; (2) an impermissible ex parte communication in which the judge informed the jury of scheduling changes; (3) a violation of the right to due process where, Elemo asserts, several witnesses gave false testimony leading to his conviction; (4) the improper admission of lay opinion testimony; (5) the improper qualification of the State's experts; (6) prosecutorial misconduct; (7) a violation of the Fourth Amendment based upon the search of Elemo's bedroom; (8) a discovery violation based upon the admission of several photos at trial; (9) ineffective assistance of counsel; and (10) a violation of double jeopardy based upon the existence of a concurrent dependency proceeding during Elemo's criminal trial. Having reviewed each of Elemo's contentions, we determine that they are without merit.

No. 65976-6-I/13

We concur:

Spearman, A.C.J.

Schindler, J.