IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 66574-0-I
Respondent,	)	DIVISION ONE
v.	)	
KENNETH WILLIAM SWEET,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: July 23, 2012

Lau, J. — Kenneth Sweet appeals his convictions for four counts of first degree child rape, four counts of third degree child rape, and two counts of sexual exploitation of a minor. He argues for reversal of the child rape convictions based on erroneous admission of ER 404(b) bad acts evidence, prosecutor misconduct that deprived him of a fair trial, and failure to grant a mistrial motion. Finding no error, we affirm the child rape convictions. Because the State properly concedes that insufficient evidence exists to support his sexual exploitation of a minor convictions, we accept the concession and remand with instructions to dismiss both sexual exploitation of a minor convictions.

FACTS

Evidence at trial showed the following: Kenneth Sweet married Penny A in 2000. They lived in Sweet's Redmond house with A's four children, including LA, and three children that Sweet and A had together.

The sexual abuse began when LA was 10 or 11 years old. She described Sweet touching her and inserting his fingers in her vagina while they were watching a movie. This occurred once or twice a week throughout her fourth grade year and once or twice a month during her fifth grade year. Sweet also occasionally took showers with her and touched her breasts.

Sweet continued to sexually abuse LA during her sixth grade year. She finally told a schoolmate that her stepfather was raping her. The schoolmate's father, Seattle Police Officer Todd Wiebke, reported LA's disclosure to school authorities. She denied the allegations when police interviewed her, claiming she lied about it to her friends. To explain why she recanted the rape allegation, LA said she feared police would tell Sweet what she told her schoolmate.

In 2006, while LA was in sixth grade, Sweet stopped abusing her but resumed when the family moved into a larger home in Carnation. He installed surveillance cameras throughout the house, including the media room. He told family members that they were for security purposes. The cameras were linked to a computer system. The family later discovered hidden cameras in the house.

After the court ruled the evidence admissible, LA testified that Sweet and A often fought and yelled at each other in front of the children. She said Sweet physically

abused A and hit and yelled at her brothers in her presence. LA also testified that she was afraid when Sweet hit her brothers. She felt "scared that he was going to hurt [her]." Report of Proceedings (RP) (Nov. 2, 2010) at 492. LA also said she told no one about Sweet's sexual abuse because she feared getting in trouble if she told anyone. She was afraid Sweet would yell at her or hurt her, "[b]ecause that's just all that happened around [her] house." RP (Nov. 2, 2010) at 508.

Sweet favored LA over the other children. He took her shopping and bought her clothes. Since she was self-conscious about her skin and wanted tanning treatments, he purchased tanning spray and offered to apply it. LA was nude during many of these treatments. While he spray tanned LA, Sweet touched her body and put his mouth on her vagina.

When she was 15 years old, the sexual abuse escalated to sexual intercourse. Sweet first had sexual intercourse with LA in the Carnation house media room. They were watching a movie and Sweet placed LA's arm on his penis. LA had been asking for a spray tan and Sweet agreed to provide the treatment if LA had sex with him for 10 minutes. Sweet made LA use a spermicide after the intercourse. LA testified that Sweet also had sex with her in the family room, bathroom, and "very possibl[y]" another time in the media room. RP (Nov. 2, 2010) at 525. Before the family room incident, Sweet told LA that he would permit her to go out with some friends her mother disapproved of if she had sex with him. LA was afraid because the sex was occurring more frequently. She thought she should tell someone but feared doing so. When asked whether Sweet ever directly threatened her not to tell anyone, LA testified he

had not, but she knew a threat existed nonetheless. "I just knew – [by] the way he got mad and the way he yelled and hurt us, I just – I felt scared all the time." RP (Nov. 2, 2010) at 547.[1]

On February 8, 2009, Sweet drove LA and her friend Elise to meet two male friends in Bellevue.[2] The group went skating and then out to dinner. LA did not want to go home because she was afraid of Sweet. LA received text messages from Sweet throughout the evening. LA's phone battery later died, and she continued texting Sweet using Elise's phone. Elise and another friend of LA testified that they saw a message from Sweet stating he expected 30 minutes of sex from LA if he was going to pick her up later that night.[3] LA's friends asked what was going on, and she told them she had been forced to do sexual acts for a while. Sweet sent LA text messages that said if she told anyone, she and her mother would lose everything and her mother would be hurt if Sweet went to jail. Sweet threatened to kill himself if LA did not return home.

LA stayed at Elise's house that night. The next morning LA told her mother that Sweet raped her. LA went to the hospital for a sexual assault examination. The

---

[1] LA told a boyfriend about the sexual abuse in late 2007 or early 2008. He advised her to get the authorities involved, but LA did not immediately do so.

[2] Elise testified that during the ride, Sweet made several comments to LA. Sweet told LA she was pretty, all the guys would want her, and also commented about her bra.

[3] LA did not remember this message, and it was not recovered from the cell phone. Elise testified that LA deleted this message right after receiving it. LA testified that she did not delete any messages, but her friend might have deleted some of them.

examination indicated the presence of sperm cells on LA's vaginal swabs. DNA (deoxyribonucleic acid) taken from the swabs matched Sweet's DNA. Sarah Webber, a forensic scientist in the Washington State Patrol Crime Laboratory's DNA unit, testified that the estimated probability of the DNA coming from someone other than Sweet was 1 in 25 trillion.

Detective Casey Johnson searched the house and found computers in the crawlspace. Johnson delivered one computer's hard drive to computer forensics examiners for analysis. On the second examination of the hard drive, the forensics examiners found video clips from the media room and other areas of the house. Two video clips showed an adult male having sex with a female child in the media room. Detective Johnson viewed those clips and testified that the video showed Sweet having sexual intercourse with LA.

The State charged Sweet by third amended information with four counts of first degree child rape (counts 1–4), four counts of third degree child rape (counts 5–8), two counts of sexual exploitation of a minor (counts 9–10), and one count of fourth degree assault involving LA's brother JS (count 11). The State also alleged aggravating factors that Sweet used his position of trust or confidence to commit the crimes and a pattern of domestic violence and sexual abuse for the rape counts. Before trial, Sweet pleaded guilty to the assault charge involving JS. The jury convicted Sweet of the remaining counts as charged and found all the aggravating factors.

ANALYSIS

ER 404(b) Evidence

Sweet argues the trial court erroneously admitted ER 404(b) evidence of his "acts of ill temper and violence committed against persons other than the alleged victim, LA." Appellant's Br. at 1. The State counters that the court properly admitted the prior misconduct evidence to explain LA's state of mind—"to help the jury evaluate her recantations or delayed reports of abuse." Resp't's Br. at 1.

<u>Relevant Facts</u>

Before trial, the State moved to present evidence through LA, her mother, and her siblings about Sweet's prior bad acts and volatile temper to explain LA's recantation and delayed reporting. Sweet objected on relevance and prejudice grounds and said he did not intend to impeach LA with the recantation. The court then questioned him about whether he intended to elicit LA's recantation if the State did not:

> The Court: Well of course if [the prosecutor] doesn't bring it out, you are going to bring out the recantation, I assume?
> [Defense]: I don't know, Your Honor . . . depending on how it unfolds . . . .

RP (Oct. 26, 2010) at 69. After balancing the evidence's unfair prejudice against its probative value under ER 403, the trial court allowed LA to testify about Sweet's violent temper and threats to kill her. The court also allowed LA to describe Sweet's violence toward her mother.

During trial, the State renewed its request to allow LA's mother and brothers to testify about Sweet's temper to corroborate LA's testimony. The court ruled the testimony admissible under two limitations: (1) family members were not permitted to testify about specific instances of Sweet's misconduct and (2) they were permitted to testify only regarding facts that would have been known to LA. The court also admitted

the audio portion of a videotape (exhibit 21) retrieved from a security camera in the Carnation house depicting Sweet yelling at LA's brother, JS, for refusing to cooperate with making a birthday greeting on the computer.[4]

LA testified about her observations of Sweet's temper and physical abuse toward her mother and siblings. She testified that Sweet and her mother fought and yelled at each other every day and Sweet hurt her mother in front of the children. She observed Sweet yell at and hit her brothers and specifically testified that Sweet screamed at her brother JS when JS refused to cooperate with recording a birthday greeting on the computer. She said these incidents made her fear Sweet. LA repeatedly testified that she was afraid of Sweet because of the abuse she witnessed in the home and stated that her fear of Sweet caused her to submit to his requests for sex and deterred her from reporting the sexual abuse. She explained, "I would just feel like if I did anything, I would get yelled at, or I would get hurt, because that's just all that happened around my house." RP (Nov. 2, 2010) at 507-08. When she reported the sexual abuse in sixth grade, she was "extremely scared" and "felt like [she] was going to get in trouble." RP (Nov. 2, 2010) at 509-10. When asked why she recanted, she explained that she "was really scared that [the authorities] were going to go and tell [Sweet]." RP (Nov. 2, 2010) at 511. She testified, "I just knew -- [by] the way he got mad and the way he yelled and hurt us, I just -- I felt scared all the time." RP (Nov. 2, 2010) at 547.

LA's mother testified that she and Sweet often argued and yelled at each other

[4] The court admitted only the audio portion because LA was in an adjacent room when this incident occurred and thus did not see the confrontation—she only heard it.

in the children's presence. She stated that Sweet had an unpredictable temper and on at least one occasion was "explosively angry." RP (Nov. 2, 2010) at 383, 389-90, 410-12. LA's oldest brother, AA, testified that Sweet had a volatile temper and became angry without provocation. AA testified that Sweet's anger often escalated into physical violence and that LA witnessed Sweet's temper. LA's brother BA also testified that Sweet's temper was "out of control." RP (Nov. 2, 2010) at 452. He testified that Sweet yelled at the boys and used physical punishment in LA's presence. JS testified that Sweet and A yelled at each other in the children's presence and that Sweet yelled at him in front of LA.

After LA, her mother, and her siblings testified and the State played the audio portion of exhibit 21 in court, the court gave the jury a limiting instruction:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of an audio recording of an alleged altercation between the defendant and [JS], and other alleged acts of anger and nonsexual abuse.
>
> It may be considered by you only for the purpose of your considering the impact of those acts on [LA].
>
> You may not consider it for any other purpose.
>
> Any discussion of the evidence during your deliberations must be consistent with this limitation.

RP (Nov. 3, 2010) at 605-06.

Analysis

Under ER 404(b),

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

“This list of other purposes for which such evidence of other crimes, wrongs, or acts may be introduced is not exclusive.” State v. Baker, 162 Wn. App. 468, 473, 259 P.3d 270, review denied, 173 Wn.2d 1004 (2011).

A trial court must state its reasoning on the record when admitting ER 404(b) evidence. State v. Jackson, 102 Wn.2d 689, 693, 689 P.2d 76 (1984). “To justify the admission of prior acts under ER 404(b), there must be a showing (1) that the evidence serves a legitimate purpose, (2) the evidence is relevant to prove an element of the crime charged, and (3) the probative value outweighs its prejudicial effect.” State v. Magers, 164 Wn.2d 174, 184, 189 P.3d 126 (2008). We review a trial court’s decision to admit evidence under ER 404(b) for abuse of discretion. Baker, 162 Wn. App. at 473. A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Dixon, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006).

“[P]rior acts of domestic violence, involving the defendant and the crime victim, are admissible in order to assist the jury in judging the credibility of a recanting victim.” Magers, 164 Wn.2d at 186; see also Baker, 162 Wn. App. at 474-75 (prior acts of domestic violence between defendant and victim are admissible to assist jury in assessing credibility of victim who delays reporting, changes her story, or minimizes the degree of violence due to fear of the defendant); State v. Grant, 83 Wn. App. 98, 105–06, 920 P.2d 609 (1996) (evidence of defendant’s prior assaults against victim admissible under ER 404(b) if relevant and necessary to assess victim’s credibility as a witness and prove that the charged assault actually occurred). Further, evidence of

prior abuse that bears on a victim's credibility may include abuse of others that causes fear for the current victim. State v. Nelson, 131 Wn. App. 108, 114–16, 125 P.3d 1008 (2006).

Here, LA testified that she was reluctant to report Sweet's sexual abuse because she was afraid of him. She also testified that she recanted her 2006 disclosure because she was afraid. Her fear of Sweet stemmed from her observations of his temper and abusive conduct toward other family members. As the trial court properly found, this evidence was highly relevant to explain the reasons LA submitted to Sweet's sexual abuse, delayed in reporting, and recanted her prior disclosure. Further, the trial court limited the State's use of this evidence and gave the jurors a limiting instruction, quoted above, prohibiting them from using the evidence except to assess the impact of Sweet's temper on LA's state of mind. Jurors are presumed the follow the court's instructions. State v. Russell, 125 Wn.2d 24, 84-85, 882 P.2d 747 (1994).

Sweet relies primarily on State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009), to argue that "evidence of physical violence towards others is admissible only where the defense actually makes an issue of the delay." Appellant's Br. at 17. In Fisher, the defendant was charged with molesting his stepdaughter. Fisher, 165 Wn.2d at 733. The State sought to admit under ER 404(b) evidence of the defendant's prior physical abuse of his other children to explain the victim's delayed reporting. Fisher, 165 Wn.2d at 734. The trial court ruled that the prior misconduct was inadmissible unless the defense raised the delayed reporting. Fisher, 165 Wn.2d at 734. On appeal, the defendant argued that the ER 404(b) evidence's prejudicial effect outweighed its

probative value. Fisher, 165 Wn.2d at 744-46. Fisher held that given the circumstances, the trial court did not abuse its discretion by making the prior misconduct's admissibility contingent on the defense first making an issue of the victim's delayed reporting. Fisher, 165 Wn.2d at 746. The Supreme Court explained, "Only if defense counsel made an issue of [the victim's] delayed reporting did the physical abuse become relevant to the determination of whether sexual abuse occurred." Fisher, 165 Wn.2d at 746. But the court did not hold that such a contingent ruling was required as a matter of law. Further, the court noted that prior misconduct was relevant to prove the alleged victim's state of mind and cited to Nelson with approval. Fisher, 165 Wn.2d at 744–45 (citing Nelson for the proposition that evidence of past physical abuse is admissible "to demonstrate the victim's fear of the defendant and explain the apparent inconsistency of the victim not reporting the full extent of the abuse earlier").

Given the trial court's discretion to evaluate the circumstances and condition ER 404(b) admissibility on various factors, the trial court did not abuse its discretion in admitting evidence of Sweet's bad temper and misconduct without the defense first raising the issue of LA's recantation or delayed reporting. Unlike Fisher, here there was more than mere delay in reporting—LA also recanted her 2006 statement. Sweet was ambivalent about whether he intended to raise LA's recantation if the State did not. The State is entitled to anticipate matters of defense in its case in chief. State v. Anderson, 15 Wn. App. 82, 84, 546 P.2d 1243 (1976). We have recognized that the seemingly irrational or inconsistent conduct of a domestic violence victim implicitly

raises the issue of the victim's credibility. Grant, 83 Wn. App. at 106-09. As discussed above, prior abuse evidence that assists the jury in evaluating a victim's credibility is highly relevant and therefore admissible. Magers, 164 Wn.2d at 186; Baker, 162 Wn. App. at 474-75; Nelson, 131 Wn. App. at 114-16; Grant, 83 Wn. App. at 109. Because the record demonstrates that the trial court took care to balance the evidence's probative value against the potential for prejudice and instructed the jury to consider the evidence only for the purpose of assessing LA's credibility, we conclude the court properly admitted the ER 404(b) evidence.

Harmless Error

Even assuming the trial court abused its discretion in allowing LA's mother and brothers to testify about Sweet's temper, the error was harmless as to two third degree rape convictions.[5] We review erroneous admission of evidence under ER 404(b) under the nonconstitutional harmless error standard. State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). Reversal is required only if there is a reasonable probability that the outcome of the trial was materially affected by the error. Ray, 116 Wn.2d at 546. The jury saw video clips of Sweet having sex with LA, and his DNA matched that found in LA's vagina. Witnesses testified about Sweet's text messages demanding sex from LA and his threats to kill himself if she told anyone. There is no reasonable probability that the contested evidence materially affected the verdict as to two of the third degree rape convictions.

[5] Sweet's reply brief acknowledges, "the videos and DNA evidence related to, at most, two charges . . . ." Appellant's Reply Br. at 1.

Prosecutorial Misconduct

Sweet argues that the prosecutor committed misconduct in failing to limit his use of Sweet's prior misconduct to show LA's state of mind. The State counters that the record shows the prosecutor properly used the evidence to show LA's state of mind.

Relevant Facts

During opening remarks, the prosecutor addressed the violence in LA's home. He described LA's "memories of the volatile relationship between her mother and her stepfather, the defendant, Kenneth Sweet -- memories of yelling, fighting, and memories of physical violence." RP (Oct. 28, 2010) at 102-03. He also stated that LA "remembers the violence and the yelling . . . violence towards her mother that would spill over, spill over to her brothers and herself" and that Sweet's "temper would actually go from 0 to 60 with the slightest provocation." RP (Oct. 28, 2010) at 104-05. Neither of those statements was immediately linked to recantation or delayed reporting. But near the end of his opening statement, the prosecutor linked the violence to LA's delayed reporting, stating, "[LA], who continued to witness the defendant's violence towards her mother, continued to witness the defendant's violence towards her brother and sister, did not come forward right away." RP (Oct. 28, 2010) at 109. The defense did not object to any of these statements.

During closing remarks, the prosecutor again referred to Sweet's temper. He stated that LA's home "was a place where violence was common, yelling and screaming was the norm. It was a place where her trust was violated . . . . She couldn't tell anyone at home, because the one thing that she had learned is that home just was

not safe." RP (Nov. 4, 2010) at 715. He stated, "We presented evidence that [LA] saw [Sweet] as a volatile and physically and verbally abusive man - - abusive to her mother and her three brothers" and shortly followed that statement with "[LA] lived in fear of that abuse every single day, from when she was 10 years old until she finally found the courage to come forward in February 2009. And she did come forward, and she did tell." RP (Nov. 4, 2010) at 717. The prosecutor later discussed "yelling and screaming in the house." RP (Nov. 4, 2010) at 720. The prosecutor then explained why LA recanted in 2006:

> Well, ladies and gentlemen, she is 12 and she is scared, and she repeatedly saw her brothers and her mother brutalized by this man, and she constantly lived in fear. She told him every - - she told you everyone in the house lived in fear, and you heard for yourself an audio recording.
>
> Look what happened to little [JS] when all he did was not say happy birthday to his stepsister? What kind of rage would a 12-year-old girl be facing from this man when she tells somebody that he is touching her? She knew the kind of rage that she would be facing. Even though she told Ashley Roethke, her young friend in sixth-grade, she told her not to tell. . . . But as soon as the police, the principal, and CPS descended on her, she said it didn't happen. She felt interrogated. She felt scared, as if she had done something wrong . . . . She knew the rage of the defendant. That's why she recanted.

RP (Nov. 4, 2010) at 722-23. The prosecutor also explained LA's delayed reporting:

> Now you might be thinking with these counts of rape and the multiple occasions of him putting his mouth on her vagina for the spray tanning, why didn't she tell the second time? Why did she get the courage, a little bit of courage in 2006, but then it started again in 2009, and why not report it?
>
> Well again, she was only 15, and she has told you she was afraid, and her mother was still oblivious.

RP (Nov. 4, 2010) at 727. The defense did not object to any of these closing remarks.

During rebuttal argument, the prosecutor again referenced Sweet's rage as it related to LA's fear of him. He stated that due to Sweet's "explosive temper," LA chose

not to stand up to him and instead attempted suicide.[6] The defense did not object other than to claim the prosecutor was appealing to the sympathies of the jury.

Analysis

Prosecutorial misconduct requires a showing that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Hughes, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). A defendant alleging prosecutorial misconduct bears the burden of first establishing "the prosecutor's improper conduct and, second, its prejudicial effect." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).[7] We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005). Where the defense fails to timely object to an allegedly improper remark, the error is deemed waived unless the remark is "so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

To the extent Sweet argues the prosecutor committed misconduct by introducing ER 404(b) evidence of Sweet's temper and physical violence toward LA's family before the defense challenged LA's credibility, we address this contention above. The ruling

[6] LA previously attempted suicide by overdosing on ibuprofen.

[7] In this context, "prejudicial effect" means that there was a "substantial likelihood" that the challenged comments affected the verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

in limine did not require the State to wait until the defense raised the issue. Relying on Fisher, Sweet also argues the prosecutor failed to link the ER 404(b) evidence to LA's recantation or delayed reporting as required by the court's ruling. Fisher is distinguishable. There, the prosecutor introduced the physical violence evidence in violation of the court's ruling in limine that prohibited introduction of the evidence until the defense raised the issue. Fisher, 165 Wn.2d at 747-48. No limiting instruction informed the jury how to use the evidence. Fisher, 165 Wn.2d at 734. The prosecutor also argued that the prior abuse of others made it more likely that Fisher sexually abused the victim, thus "contraven[ing] the trial court's pretrial ruling by impermissibly using the physical abuse evidence to demonstrate Fisher's propensity to commit the crimes." Fisher, 165 Wn.2d at 737-39, 748-49. The prosecutor also improperly argued that the jury was obligated to seek justice for the prior abuse victims. Fisher, 165 Wn.2d at 737-38, 748-49. The Fisher case relied solely on the victim's credibility. The State admitted irrelevant evidence that the defendant physically abused his current stepchildren.

In contrast, here, the trial court did not limit the prosecutor's use of the evidence to rebuttal. The court gave a limiting instruction, and the prosecutor did not use the evidence to argue propensity. Our review of the record reveals that the prosecutor's arguments about prior abuse were properly limited to explaining LA's delayed reporting and recantation. Even if some of the prosecutor's comments were not immediately followed by a link to those topics, they laid the foundation for the prosecutor's later statements that provided the critical link. These remarks did not constitute

misconduct.[8]

Mistrial Motion

Sweet argues for a new trial because the State elicited testimony from the social worker that he had been previously arrested for child abuse. The State responds that Sweet (1) failed to move in limine to exclude the testimony, (2) failed to object at trial, and (3) the trial court properly instructed the jury to disregard the testimony.

Relevant Facts

The State called in its case in chief social worker Vicki Waddleton, who was on duty when LA arrived at the hospital for a sexual assault exam. Before testifying, Waddleton noticed that the medical records and notes the prosecutor sent her to review for trial were incomplete. Waddleton obtained from Overlake Hospital a copy of her handwritten notes that summarized her interaction with LA. She brought the notes—a single page containing two handwritten paragraphs—to court on the day she testified. The prosecutor gave defense counsel a copy of these notes and offered to let her discuss them with Waddleton. Instead, the defense moved to exclude Waddleton's

[8] Even if the remarks constituted misconduct, Sweet did not object or request a curative instruction at the time. Where the defendant does not object, even if the prosecutor's conduct is improper, reversal is appropriate only if the statements were so flagrant and ill intentioned that their prejudicial effect could not have been cured by the trial court's instruction to the jury. Russell, 125 Wn.2d at 86. "[T]he absence of an objection by defense counsel 'strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.'" State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)). We are confident that a timely objection and instruction would have cured any perceived prejudice, particularly because the court instructed the jury regarding the purpose of the ER 404(b) evidence. Under the facts here, we conclude there is no substantial likelihood that the challenged comments affected the jury's verdict.

testimony, arguing tardy disclosure of the notes. Finding no defense prejudice, the court denied the motion and briefly recessed the trial to allow defense counsel to interview Waddleton about the notes.

During Waddleton's testimony, the prosecutor disclosed that he intended to read the notes into the record as a recorded recollection under ER 803(a)(5).[9] Sweet did not object. Waddleton read her notes, indicating that Sweet sexually assaulted LA multiple times, LA did not want to return home, and Sweet threatened to kill himself if she told anyone. Waddleton also read the following passage:

> [Sweet] tried to do stuff around age 10, 11. He began by talking . . . (gross to her) and wouldn't stop when she asked him to.
> She reports he has been in and out of jail a couple of times for child abuse. She -- and she had rescinded her story feeling pressured, but she had not been lying.

RP (Nov. 1, 2010) at 319 (emphasis added). Sweet did not object. When Waddleton completed her testimony, Sweet did not object or request a mistrial. RP (Nov. 1, 2010) at 324. At the end of the trial day, defense counsel did not address Waddleton's testimony.

The next morning, defense counsel moved for a mistrial, arguing the "child abuse" reference "[was] violative of the motions in limine with respect to [ER] 404(b)

---

[9] ER 803(a)(5) provides an exception to the hearsay rule for: "Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party."

and 609 evidence," was unsupported by the evidence and prejudiced Sweet. RP (Nov. 2, 2010) at 343-44, 345. Defense counsel claimed surprise over the "child abuse" testimony and sought to avoid highlighting it to the jury by not objecting. The court noted that if Sweet had earlier challenged the statement, he would have precluded it. The court denied the motion for a mistrial and orally instructed the jury as follows:

> Yesterday during social worker Vicki Waddleton's testimony, she read to you what she says [LA] said to her.
>
> Part of what she read to you involved a claim that the defendant had previously been arrested. There will be no evidence to suggest that he has been arrested, and you are to disregard that entirely. It should not prejudice him. As I say, there will be absolutely no evidence in this trial to support that, and it is to be disregarded.

RP (Nov. 2, 2010) at 357.

Analysis

We review a trial court's ruling on a motion for a mistrial for abuse of discretion. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A court abuses its discretion where its decision is manifestly unreasonable or based on untenable grounds. State v. Depaz, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). A mistrial is proper only when a trial irregularity is so prejudicial that it renders the trial unfair and nothing short of a new trial can ensure that the defendant will be tried fairly. State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986); State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008).

> In determining whether a trial irregularity deprived a defendant of a fair trial, [we] examine[] several factors: (1) the seriousness of the irregularity; (2) whether challenged evidence was cumulative of other evidence properly admitted; and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.

Babcock, 145 Wn. App. at 163. A decision of whether the alleged misconduct exists and is prejudicial is a matter within the discretion of the trial court. Richards v. Overlake Hosp. Med. Cen., 59 Wn. App. 266, 271, 796 P.2d 737 (1990).

The parties dispute whether Waddleton's comment violated the court's ruling in limine precluding evidence of prior bad acts except to explain LA's delay in reporting or recantation. We need not decide this question because even if the comment violated the ruling in limine, the court gave a strongly worded limiting instruction and the comment warrants no mistrial as discussed below.

Sweet cites two cases in arguing that Waddleton's "child abuse" statement was grounds for a mistrial. In State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987), the

defendant was convicted of second degree assault with a deadly weapon. The trial court granted the defendant's motion to exclude any reference to the fact that he had previously been convicted of the same crime. Escalona, 49 Wn. App. at 252. During cross-examination, the victim stated that on the day of the stabbing, he was nervous when he saw the defendant because the defendant already had a record and had stabbed someone. Defense counsel moved for a mistrial, but the trial court denied the motion and instructed the jury to disregard the remark. Escalona, 49 Wn. App. at 253. The Court of Appeals reversed the conviction, reasoning that (1) the irregularity was extremely serious, (2) it was not cumulative, since the trial court had already ruled that evidence of the prior crime could not be admitted, and (3) the trial court's instruction to the jury could not have cured the prejudice caused by the remark. Escalona, 49 Wn. App. at 254, 257. Regarding the prejudice caused by the remark, the court stated:

> [D]espite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past.

Escalona, 49 Wn. App. at 256 (emphasis added). The appellate court concluded that the trial court abused its discretion in denying the motion for a mistrial. Escalona, 49 Wn. App. at 256.

Similarly, in State v. Wilburn, 51 Wn. App. 827, 755 P.2d 842 (1988), superseded on other grounds, Adams v. Dep't of Labor & Indus., 128 Wn.2d 224, 905 P.2d 1220 (1995), we reversed a defendant's rape conviction when, in violation of a motion in limine, a witness testified that the defendant told her, "'Yes, I did it again, and

I need treatment.'" Wilburn, 51 Wn. App. at 832. Defense counsel objected to the statement but declined the court's offer to give a limiting instruction. Wilburn, 51 Wn. App. at 832. We found it "perfectly clear from the record that the court and counsel considered the word 'again' as a reference to earlier criminal acts or convictions" and determined that a curative instruction would not have helped. Wilburn, 51 Wn. App. at 832.

Escalona and Wilburn are distinguishable. In those cases, the improper statements indicated that the defendants had committed crimes similar or identical to the crimes for which they were on trial. "Thus, the statements were extremely prejudicial because it was likely that jurors would conclude that the defendant had a propensity for committing that type of crime." State v. Condon, 72 Wn. App. 638, 649, 865 P.2d 521 (1993) (discussing Escalona and Wilburn). Also, in Escalona, the reference to the prior conviction was particularly serious because of the "paucity of credible evidence against Escalona." Escalona, 49 Wn. App. at 255–56.

In contrast, here Waddleton's "child abuse" remark was not specifically relevant to the child rape charges. The remark was isolated and not repeated. And while the remark had the potential for prejudice, its force was negligible compared to the strength of the State's evidence against Sweet.[10] Unlike in Escalona, there was no "paucity of credible evidence" here. Escalona, 49 Wn. App. at 255–56. The trial court weighed all

[10] LA's testimony was not substantially impeached regarding the first or third degree child rape charges. Regarding at least two of the third degree rape charges, video recordings and the sexual assault exam findings corroborated LA's testimony.

of the factors outlined in Babcock and found that while Waddleton's remark was serious, it had previously allowed evidence of past violence of which LA was aware and noted the "child abuse" remark was partially cumulative given the other evidence of Sweet's temper.[11] The record fails to establish that Sweet was so prejudiced that nothing short of a new trial could ensure him a fair trial. We presume jurors follow instructions to disregard improper evidence. Russell, 125 Wn.2d at 84-85. The trial court did not abuse its discretion by denying Sweet's motion for mistrial, particularly in light of its strongly worded curative instruction prohibiting the jury from considering Waddleton's remark.[12]

Sexual Exploitation of a Minor

Sweet argues, and the State concedes, that the evidence was insufficient to support his convictions for sexual exploitation of a minor under RCW 9.68A.040(1)(c).[13]

---

[11] As discussed above, the jury heard testimony from LA and her family regarding Sweet's violent temper.

[12] Sweet also mentions prosecutorial misconduct and ineffective assistance of counsel relating to Waddleton's testimony. But he provides no argument aside from his bare mention of those theories. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." Palmer v. Jensen, 81 Wn. App. 148, 153, 913 P.2d 413 (1996); see also State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992).

[13] RCW 9.68A.040(1)(c) provides that a person is guilty of sexual exploitation of a minor if the person, "[b]eing a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance." The State alleged that Sweet, "being a legal guardian/parent of L.A. (d.o.b. 9-20-93), a person under 18 years of age, did permit the said person to engage in sexually explicit conduct, knowing that the conduct would be photographed." In State v. Chester, 133 Wn.2d 15, 940 P.2d 1374 (1997), our Supreme Court held that RCW 9.68A.040(1)(c)'s language should be interpreted "to prohibit the parent's knowing failure or refusal to protect his or her child

We accept the concession and remand to the trial court with instructions to dismiss the sexual exploitation convictions.

Statement of Additional Grounds (SAG)

Sweet raises several issues in his pro se SAG. First, he argues the State never provided him with a "mirror image" of the original hard drives containing video files used against him at trial. He claims this failure deprived him of his "5th, 6th and 14th Amendment rights to due process, effective assistance of [counsel] and a fair trial" under the United States and Washington constitutions. SAG at 19. To properly preserve an alleged discovery violation for appeal, the defendant must make a timely objection and request a remedy from the trial court. RAP 2.5(a); State v. Howell, 119 Wn. App. 644, 653, 79 P.3d 451 (2003); State v. Wilson, 56 Wn. App. 63, 66, 782 P.2d 224 (1989). Our review of the record indicates that at a pretrial hearing on July 20, 2010, the court granted Sweet a continuance to enable defense counsel to "obtain a computer forensics expert to help us with this process" and to sift through the 4,000 video files at issue. RP (July 20, 2010) at 44, 46-47. At no other time did the defense request a continuance based on the video evidence or argue that the State failed to provide the evidence. And the defense did not object when the State offered the video

---

from sexual exploitation by another." Chester, 133 Wn.2d at 23-24 (emphasis added). The court held that if a parent or guardian were actively involved in causing the exploitation, he or she would be more appropriately charged under subsections (a) or (b) of the statute. Chester, 133 Wn.2d at 23. Here, Sweet recorded himself sexually abusing LA using the Carnation home's video surveillance system. No evidence shows he permitted LA to be sexually abused by another. Under Chester, Sweet cannot be charged under subsection (c) of the statute and, thus, the evidence is insufficient to support his convictions for sexual exploitation of a minor under that subsection.

as exhibit 6. Nothing in the record supports Sweet's claim that the defense never received a mirror image copy of the video.[14]

Sweet argues that "discovery was not complete and State witnesses were not interviewed by the defense as of October 12, 2010. This discovery situation did not improve by time of jury selection on October 27, 2010." SAG at 8. As discussed above, the defendant must timely object and request a remedy from the trial court to preserve an alleged discovery violation for appeal. RAP 2.5(a); Howell, 119 Wn. App. at 653. At the omnibus hearing on October 8, the defense requested a continuance because it had not yet interviewed several State witnesses. The court denied the motion without prejudice and instructed the State to comply with defense requests for witness interviews. At the next pretrial hearing on October 26, the defense did not mention incomplete discovery. The defense failed to object on this basis for the remainder of trial. Nothing else in the record supports Sweet's claim that he lacked adequate time to prepare.

Sweet claims the State failed to present the original hard drive from his computer and thus failed to properly identify or authenticate the video files admitted at trial. "Error may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and . . . a timely objection or motion to strike is made . . . ." ER 103(a)(1); Faust v. Albertson, 167 Wn.2d 531, 547, 222 P.3d 1208

[14] Sweet cites State v. Grenning, 169 Wn.2d 47, 234 P.3d 169 (2010), State v. Boyd, 160 Wn.2d 424, 158 P.3d 54 (2007), and State v. Dingman, 149 Wn. App. 648, 202 P.3d 388 (2009) for the proposition that the defendant must receive a "mirror image copy" of original hard drives. SAG at 19. As discussed above, nothing in the record supports Sweet's claim that the State did not provide the defense with such a copy.

(2009). While exceptions exist, including for manifest errors implicating a constitutional right under RAP 2.5(a)(3), no such error exists here. Sweet failed to object to admission of the video files as exhibit 6 and never raised his authentication argument below. He failed to preserve the issue for appeal. ER 103(a)(1); RAP 2.5(a).

Sweet argues he "did not receive a fair trial when the trial court failed to excuse [jurors 11 and 35] for cause who were clearly biased . . . ." SAG at 20. The decision to deny a juror challenge for cause lies within the trial court's discretion and will not be overturned absent a manifest abuse of discretion. State v. Johnson, 42 Wn. App. 425, 428, 712 P.2d 301 (1985). Even if a trial court abuses its discretion in denying a challenge for cause, the defendant's use of a peremptory challenge to remove the challenged juror cures that error. State v. Roberts, 142 Wn.2d 471, 517, 14 P.3d 713 (2000). Here the defense used a peremptory challenge to remove juror 35, so the error—if any—in denying Sweet's challenge for cause pertaining to that juror was cured. Regarding juror 11, Sweet argues the juror stated a bias in favor of police officers. The defense did not challenge juror 11 for cause.[15] A party accepting a juror without exercising its available challenges cannot later challenge that juror's inclusion. State v. Reid, 40 Wn. App. 319, 322, 698 P.2d 588 (1985); Ottis v. Stevenson-Carson Sch. Dist. 303, 61 Wn. App. 747, 760, 812 P.2d 133 (1991). Sweet waived his right to challenge by failing to challenge juror 11 for cause when he had that opportunity.[16]

---

[15] To the extent Sweet argues he was denied a peremptory challenge to excuse juror 11 because he was forced to use it on juror 35, his argument lacks merit. The forced use of a peremptory challenge is merely an exercise of a challenge, not its deprivation or loss. State v. Fire, 145 Wn.2d 152, 162-63, 34 P.3d 1218 (2001).

Sweet next argues the trial court failed to adequately inquire about (1) defense counsel's conversation with a colleague outside the jury room door and (2) an alleged sexual assault victim's threats to jump from the courthouse roof during Sweet's trial. On November 4, 2010, defense counsel informed the court that she had discussed Sweet's case with a colleague in the hallway outside the jury room and noticed that the door to the jury room was open during the conversation. The court brought the jury in and inquired:

> While you were gathering this morning in the jury room, the outside door to the hallway was open and we did it that way so you didn't come into the court, because we were doing some issues of law on this case.
>
> There may have been a discussion in the hallway by other people regarding this case.
>
> Is there any jurors who heard or thinks they heard any discussion about this case this morning while you were entering the jury room or in the jury room? Please raise your hand.
>
> Okay, the record will reflect there is no response, so . . .

RP (Nov. 4, 2010) at 689 (emphasis added).

The court read the jury instructions and the jury began deliberating. Later that day, a sexual assault victim from another case threatened to jump from the courthouse roof. The next morning defense counsel brought the incident to the court's attention:

---

[16] Even if Sweet had challenged juror 11, the trial court would have been within its discretion to deny the challenge. Sweet relies on State v. Gonzales, 111 Wn. App. 276, 45 P.3d 205 (2002), where we held that the trial court erred in rejecting the defendant's cause challenge to a juror who admitted that she would have a very difficult time disbelieving a police officer and that she was not sure she could afford the defendant a presumption of innocence if an officer testified. Gonzales, 111 Wn. App. at 282. But we also noted, "A prospective juror's expression of preference in favor of police testimony does not, standing alone, conclusively demonstrate bias." Gonzales, 111 Wn. App. at 281. In Sweet's case, although juror 11 stated that he would "tend to believe an officer who's testifying" and "would tend to give more weight to an officer than someone else," he also said he would afford the defendant a presumption of innocence and be fair and impartial. RP (Oct. 28, 2010) at 261-63. Neither party challenged juror 11. This record reveals no bias requiring dismissal for cause.

> Your Honor, just in an abundance of caution, there was, as the Court is aware, a jumper on the roof last - - at the courthouse last night, and apparently she is a victim in a case, a sex case where she was about [to] have to testify and she didn't want to testify, and given that the victim in our case had a prior suicide attempt, I thought, maybe in an abundance of caution, the Court might want to inquire of the jury as to whether or not they heard any news stories that may have impacted the jury deliberation process.
>
> The Court instructed them not to, but it is kind of hard to avoid the news when it is right at the courthouse doors.

RP (Nov. 5, 2010) at 745. The State objected, and the court denied the defense's request for an inquiry. The court asked the bailiff what he told the jurors upon sending them home after the incident, and the bailiff replied:

> When I sent [the jurors] home, I told them that I was letting them go early because the building was - - surrounding streets were closing because there was somebody on the roof, <u>but it had nothing to do with this case</u>.
>
> . . . .
>
> <u>And that if they saw something that they were to know it had nothing to do with this case</u>.

RP (Nov. 5, 2010) at 747 (emphasis added).

Sweet argues that the trial court failed to make adequate inquiries regarding the above incidents. Regarding the hallway conversation, no jurors responded when the court inquired whether they had overheard the conversation. The court instructed the jury that the only evidence it should consider was the witness testimony and exhibits admitted in court. As discussed above, jurors are presumed to follow instructions. <u>Russell</u>, 125 Wn.2d at 84-85. Sweet otherwise fails to show that any juror heard the conversation. Regarding the roof incident, Sweet relies on <u>United States v. Waters</u>, 627 F.3d 345 (9th Cir. 2010), where the Ninth Circuit found that the district court's inadequate inquiry into adverse publicity during jury deliberations was reversible error.

In Waters, news stories covered a crime committed by a group with which the defendant was allegedly affiliated and expressly mentioned the defendant's name. Waters, 627 F.3d at 363. In contrast, here, the news story pertained to an entirely different case and the bailiff told the jurors the incident did not relate to Sweet's case. Furthermore, the Seattle Times article Sweet attaches as appendix 2 to his SAG describes the roof incident and names the defendant in that case as Salvador Cruz. Thus, Sweet fails to show any risk of prejudice resulting from the incident.

Sweet argues that several instances of prosecutorial misconduct denied him a fair trial. First, he claims the prosecutor failed to introduce at trial or provide defense with the original hard drives or a mirror copy of the video files. As discussed above, nothing in the record supports this contention. Next, Sweet argues that the prosecutor asserted false facts through direct examination of Detective Mike Mellis. He specifically challenges the following exchange:

> [Prosecutor]: Did you at any point separate the defendant from his wife and talk to him, for example, about the threat to kill [LA]?
>
> [Detective Mellis]: No.
> . . . .
> Q: Okay. When you met with [LA], and you were talking to her about what she had told her friends, do you know if the specific word "rape" came up?
> A: I don't recall. I don't believe it did.

RP (Oct. 28, 2010) at 135-36. The prosecutor asked again whether Mellis used the word "rape" with LA, and he responded, "I don't think that word came up in our conversation." RP (Oct. 28, 2010) at 138. Sweet claims these were intentional misstatements because "[t]he prosecutor knew perfectly well that there was no 'threat

to kill [LA]' and that [LA] did not report rape to her friends." SAG at 40. But Sweet failed to object to the above questions. Where the defendant does not object, even if the prosecutor's conduct is improper, reversal is appropriate only if the statements were so flagrant and ill intentioned that their prejudicial effect could not have been cured by an instruction to the jury. Russell, 125 Wn.2d at 86. Even if the above comments were improper, they were not repeated and Sweet fails to show that these isolated questions were flagrant and ill intentioned. A timely objection and instruction would have cured any perceived prejudice.

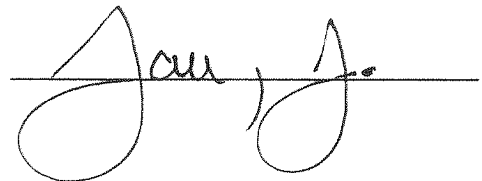
Next, Sweet argues that the audio recording of him yelling at JS was unduly prejudicial and the prosecutor committed misconduct in failing to link the recording to LA's recantation or delay in reporting when he presented it in the State's rebuttal closing remarks. As discussed above, the court limited admission of the recording to the audio portion and gave a limiting instruction. The court did not abuse its discretion in admitting the recording. And the record does not support Sweet's contention that the prosecutor failed to link the recording to LA's recantation or delay in reporting. The prosecutor stated during rebuttal, "Another thing, this explosive temper. What is a 10-year-old going to do when she sees that, day in and day out? Is she going to stand up to this guy? No." RP (Nov. 4, 2010) at 740. The record indicates that the prosecutor played the audio recording and linked Sweet's explosive temper to LA's delayed reporting.

Finally, Sweet argues that his due process rights were violated when Detective Johnson identified him as the person in exhibit 21 (the audio recording) yelling at JS

and as the person in two sex video clips in exhibit 6. Sweet failed to object on this basis below and thus waives the argument on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). And no manifest error implicating a constitutional right exists here. RAP 2.5(a)(3).

CONCLUSION

Because (1) the trial court properly admitted ER 404(b) evidence regarding Sweet's temper and abusive behavior toward LA's mother and brothers, (2) no prosecutorial misconduct occurred, and (3) the trial court properly denied Sweet's motion for a mistrial, we affirm Sweet's first and third degree child rape convictions. We accept the State's concession that the evidence is insufficient to support Sweet's sexual exploitation of a minor convictions and remand for dismissal of those convictions.



WE CONCUR: