

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RENE D. MANUEL,

Appellant.

No. 67139-1-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: July 25, 2011

Leach, A.C.J. — Rene D. Manuel appeals his convictions for second degree rape of a child, second degree child molestation, sexual exploitation of a minor, and possession of depictions of minors engaged in sexually explicit conduct. Manuel claims that his counsel was ineffective by improperly arguing for the admissibility of certain evidence under ER 803(a)(3). Manuel also argues that the trial court impermissibly commented on the evidence in a limiting instruction given to the jury and that his counsel was ineffective for failing to object to it. Manuel further contends that a community custody condition restricting his access to pornography is unconstitutionally vague under State v. Bahl.¹ Finally, Manuel raises several arguments in a statement of additional grounds, including violations of his Fifth and Sixth Amendment rights, ineffective assistance of counsel, and prosecutorial misconduct.

¹ 164 Wn.2d 739, 193 P.3d 678 (2008).

We accept the State's concession that the community custody condition is unconstitutionally vague and remand for modification of the judgment and sentence to delete the offending condition. Finding no merit in Manuel's remaining assignments of error, we otherwise affirm.

Background

In June 2007, 12-year-old H.M.C.² visited her mother, Mary Jane Manuel, and Mary Jane's husband, Rene Manuel, in Portland, Oregon. At the time, H.M.C. was living with a paternal aunt, Holly Correira, in Massachusetts and had previously had little contact with Mary Jane.³ H.M.C. had never met Manuel, even though he and Mary Jane had been married for five years. H.M.C. enjoyed the visit, and after returning briefly to Massachusetts, she decided to try living with Mary Jane and Manuel. H.M.C. moved to Portland in September.

H.M.C., Manuel, and Mary Jane moved frequently, and in June 2008, they began living with Manuel's parents in Mason County, Washington. Later in the summer, they moved to a house on Currie Way in Shelton.

During H.M.C.'s time in Washington, Manuel would enter her room at night to have sex with her one to three times per week. Manuel would also "grab" H.M.C.'s vagina when they were alone in the hot tub. The intercourse hurt H.M.C., and the piercings in Manuel's penis sometimes made her bleed.

In September 2008, Manuel kicked Mary Jane and H.M.C. out of the

² H.M.C. was born on October 7, 1994. Manuel was born on November 19, 1963.

³ We refer to Mary Jane Manuel by her first name to avoid confusion.

Currie Way house after an argument. H.M.C. did not want to go to a homeless shelter with her mother, so she called Correira in Massachusetts, who bought her a plane ticket. After H.M.C. moved back to Massachusetts, she sent Manuel several naked picture of herself at his request.

H.M.C. did not reveal to Correira what had happened between her and Manuel until over a month after she returned to Massachusetts, when she “broke down” one night while doing her homework. After H.M.C.’s disclosure, Correira took her to a “child advocacy center,”⁴ where she underwent a sexual assault examination. The State of Massachusetts then referred the case to the Mason County Sheriff’s Office.

After an investigation in Washington, the State charged Manuel with second degree rape of a child, second degree child molestation, sexual exploitation of a minor, and possession of depictions of minors engaged in sexually explicit conduct.

During trial, the court permitted the State to elicit testimony from H.M.C. that Manuel’s conduct began in Oregon. H.M.C. told the jury that the first incident occurred four months after she arrived in Portland, when she, Manuel, and Mary Jane were living temporarily with a friend named Kirstin. H.M.C. said that one night when she was asleep on Kirstin’s couch, Manuel touched her vagina. According to H.M.C., Manuel’s sexual advances escalated when they

⁴ Every county in Massachusetts has a “child advocacy center,” which operates under a closed referral system. Children requiring sexual assault interviews and examinations must have a referral from Child Protective Services, police, or a physician.

moved to Oregon City, where Manuel began having sex with her every night on the couch while Mary Jane slept. H.M.C. said she never told anyone in Oregon what was happening because “I was scared . . . [t]hat my mom wouldn’t want to be with me anymore, that I’d go to foster care ’cause I was so far away from my family. . . . I didn’t want my mom being alone with him either.”

The trial court also allowed H.M.C. to read portions of e-mails, letters, and internet chats between her and Manuel that were sexual in nature.

Ann Parsons Marchant, a pediatric sexual assault nurse examiner with the State of Massachusetts, testified that she examined H.M.C. in November 2008. She said H.M.C. expressed two concerns: that she had acquired a sexually transmitted infection⁵ and that she would no longer be able to have children. During the examination, Marchant observed “multiple changes to the genital area,” including a “complete transection” of H.M.C.’s hymen and several areas of hypopigmentation consistent with scarring. Marchant classified these changes as “indeterminate,” meaning, “there’s any number of reasons that they could be there. . . . So cause cannot be determined by their presence alone.” But Marchant further explained that “[i]ndeterminate changes are well known in child sexual abuse circles as those that when combined with a clear disclosure of abuse, support a disclosure of abuse.”

Detective Jack Gardner with the Mason County Sheriff’s Office was assigned Manuel’s case. He testified that during the investigation, he found

⁵ Specifically, herpes.

photographs of evidentiary value on Manuel's computer.⁶ During trial, the State introduced those photographs, which included images of H.M.C.'s breasts and vagina.

Manuel denied the allegations. He testified that H.M.C. and Mary Jane slept in the same bed at his parents' house and that he slept in a separate bedroom. Manuel also explained the presence of photographs of H.M.C. on his computer. He said that after he received a "weird" text message from H.M.C. one day, he went to the library, where he accessed H.M.C.'s cellular phone account and forwarded the messages to his cellular phone. Because his cellular phone was incapable of displaying picture text messages, he then forwarded H.M.C.'s text message to his e-mail account. Two-and-one-half months later, in December 2008, he forwarded the photographs to Mary Jane's e-mail account. He explained he had to wait to forward the photographs until he had internet access at home because of the library's child pornography policy.

Mary Jane testified that H.M.C. generally slept with her while they lived in Manuel's parents' house. She said that once they moved to the Currie Way house, H.M.C. slept in her own bedroom, and she and Manuel slept in the master bedroom on a noisy futon. According to Mary Jane, she would have woken up had Manuel gotten out of bed during the night.

During Mary Jane's testimony, defense counsel attempted to introduce evidence that H.M.C. called Mary Jane while she was visiting Correira in the

⁶ Gardner did not testify to the contents of the photographs.

summer of 2008 and threatened to say that Manuel had raped her if Mary Jane made her return to Washington. The State raised a hearsay objection, and defense argued the statement was admissible under ER 803(a)(3) to prove Mary Jane's state of mind. The trial court ruled that Mary Jane's state of mind was irrelevant and excluded the testimony.

Manuel's mother, Marie Heiser, also testified. She said that during the time H.M.C., Manuel, and Mary Jane lived with her, she slept in a chair in the living room due to a breathing problem requiring her to be on a ventilator at night. According to Marie, it would have been impossible for Manuel to leave his bedroom and go into H.M.C.'s without her noticing it because she is a "very light sleeper."

Manuel also sought to present the testimony of a Child Protective Services worker, Gwen Thompson, who had interviewed H.M.C. while she lived in Oregon. According to Manuel, Thompson would have testified that H.M.C. did not disclose the abuse to her. The trial court considered Thompson's report in chambers and denied Manuel's request because "I believe . . . by putting on the CPS worker, we'd have to establish context. And the context that the Court feels would be prejudicial to both parties."

Before deliberation, the trial court gave a limiting instruction informing the jury that evidence of the incidents occurring in Oregon was introduced for the limited purpose of showing Manuel's lustful disposition or a common scheme or plan. Neither party objected to the instruction's wording.

The jury convicted Manuel as charged. The court sentenced him to 280 months' confinement and imposed a community custody condition barring him from purchasing, possessing, or viewing pornographic materials.

Manuel appeals.

Analysis

Ineffective Assistance

Manuel claims his counsel was ineffective by improperly arguing for the admissibility of the evidence that H.M.C. threatened to disclose Manuel's abuse.

Claims of ineffective assistance involve mixed questions of fact and law that we review de novo.⁷ To prevail on a claim of ineffective assistance, a defendant must satisfy a two-prong test.⁸ If a defendant fails to establish either prong, we need not inquire further.⁹ First, a defendant must show a deficiency in counsel's representation.¹⁰ Counsel's representation is deficient if it falls below an objective standard of reasonableness.¹¹ Second, a defendant must demonstrate that the deficient performance resulted in prejudice.¹² Prejudice occurs when it is reasonably probable that, but for counsel's errors, "the result of the proceeding would have been different."¹³ A strong presumption of

⁷ In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

⁸ Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

⁹ State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

¹⁰ State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

¹¹ Stenson, 132 Wn.2d at 705.

¹² Stenson, 132 Wn.2d at 705-06.

¹³ State v. Lord, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991) (quoting Strickland, 466 U.S. at 694).

effective assistance exists, and a defendant has the burden of demonstrating that there was no legitimate strategic or tactical reason for the challenged conduct.¹⁴ We evaluate counsel's performance in the context of the entire record.¹⁵

ER 803(a) excludes certain statements from the bar of the general hearsay rule, regardless of the declarant's availability, including "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)."¹⁶

Manuel asserts that counsel was deficient by arguing the evidence was admissible to show Mary Jane's state of mind, which was irrelevant, instead of H.M.C.'s state of mind. Manuel argues that the evidence was admissible under ER 803(a)(3) as a then existing statement of H.M.C.'s intent or plan to accuse Manuel of rape.

We agree that counsel was deficient for failing to explain correctly why the evidence was admissible. However, Manuel has failed to demonstrate that the result of the trial would have been different had the statement been admitted. First, the evidence against Manuel was substantial and included H.M.C.'s

¹⁴ State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

¹⁵ Strickland, 466 U.S. at 695-96 ("[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. . . . [A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."); McFarland, 127 Wn.2d at 335 ("Competency of counsel is determined based upon the entire record below.").

¹⁶ ER 803(a)(3).

testimony, the correspondence between Manuel and H.M.C., and Marchant's observations during H.M.C.'s physical exam, which supported H.M.C.'s disclosure. Second, the proffered evidence was not exculpatory. According to Manuel, H.M.C. told Mary Jane that she would accuse Manuel of raping her if Mary Jane made her return to Washington. However, when H.M.C. returned to Washington against her wishes, she did not carry out this apparent threat. Only after H.M.C. left Washington permanently to resume living with her paternal family, did H.M.C. "break down" and tell her aunt about Manuel's abuse. Under these circumstances, Mary Jane's proffered testimony would have done little to tarnish H.M.C.'s credibility and would not have affected the outcome of the trial. We therefore reject Manuel's ineffective assistance claim.

Judicial Comment on the Evidence

Manuel next claims that the court's limiting instruction was an unconstitutional comment on the evidence. We review jury instructions de novo and in the context of the instructions as a whole.¹⁷

Article IV, section 16 of the Washington State Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision prohibits a judge from "conveying to the jury his or her personal attitudes toward the merits of the case" or instructing a jury that "matters of fact have been established as a matter of law."¹⁸ The court's personal feelings on an element of the offense need not be

¹⁷ State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

¹⁸ State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

expressly conveyed; it is sufficient if they are merely implied.¹⁹ “Thus, any remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment.”²⁰ Because the constitution expressly prohibits any judicial comment on the evidence, a claimed error based upon such a comment involves a manifest constitutional error that may be challenged for the first time on appeal.²¹

Here, the instruction read,

Evidence has been introduced in this case that the defendant engaged in sexual intercourse and/or had sexual contact with [H.M.C.] in the State of Oregon. This evidence has been admitted for the limited purpose of presenting evidence relating to the defendant's lustful disposition or common scheme or plan. You must not consider this evidence for any other purpose.

(Emphasis added.) Manuel argues that the emphasized portion “was tantamount to instructing the jury that it need not find whether the contested facts had even occurred, for they had been established as a matter of law.”

Division Two's decision in State v. Dewey²² is instructive. There, the State charged Dewey with third degree rape.²³ At trial, the court admitted evidence under ER 404(b) that Dewey previously had forced another woman, A.N.R., to have sexual intercourse with him.²⁴ The trial court instructed the jury,

¹⁹ State v. Jackman, 156 Wn.2d 736, 744, 132 P.3d 136 (2006).

²⁰ Levy, 156 Wn.2d at 721.

²¹ Levy, 156 Wn.2d at 719-20.

²² 93 Wn. App. 50, 966 P.2d 414 (1998), overruled on other grounds by State v. DeVincentis, 150 Wn.2d 11, 21, 74 P.3d 119 (2003).

²³ Dewey, 93 Wn. App. at 51-52.

²⁴ Dewey, 93 Wn. App. at 53.

“Evidence has been introduced in this case, on the subject of the rape of [A.N.R.] in June of 1994, for the limited purpose of showing if”²⁵ On appeal, the court held that the instruction was an improper comment on the evidence because the use of the term “rape” allowed the jury to infer that the judge personally believed A.N.R.’s testimony.²⁶

In contrast, the instruction here did not allow the jury to infer the court’s beliefs about the evidence introduced. The judge’s instruction did not vouch for the evidence or convey that the court personally believed the evidence was accurate. Rather, the court instructed the jury that it was “to determine which facts have been proved in this case from the evidence produced in court.” The court’s instruction stating that certain evidence had been introduced did not usurp the jury’s duty to determine whether facts asserted had been proved, nor did it indicate that any fact had been established as a matter of law. Under these circumstances, the instruction was not an improper comment on the evidence.²⁷

Manuel also argues that his trial counsel provided ineffective assistance by failing to object to the limiting instruction. Because we hold that the instruction was proper, we reject Manuel’s claim.

Community Custody Condition

²⁵ Dewey, 93 Wn. App. at 58 (alteration in original).

²⁶ Dewey, 93 Wn. App. at 58-59.

²⁷ Manuel also asserts that the instruction constituted a directed verdict, but he presents no argument in that regard. Without argument, an appellant waives his assignment of error. RAP 10.3(a)(6). We therefore decline to consider the issue further.

Manuel contends, and the State concedes, that the community custody condition prohibiting him from purchasing, possessing, or viewing pornographic material is unconstitutionally vague under Bahl. In Bahl, our Supreme Court held that a community custody condition restricting access to pornographic materials is unconstitutionally vague because it does not provide ascertainable standards as to the meaning of “pornography.”²⁸ We therefore accept the State’s concession and remand for modification of the judgment and sentence consistent with this opinion.²⁹

Cumulative Error

Manuel contends that cumulative error deprived him of a fair trial. Because Manuel otherwise failed to establish error, we disagree.

Statement of Additional Grounds

Manuel raises several pro se arguments. None have merit.

First, Manuel asserts that the chain of custody for evidence taken from his computer was broken when detectives allowed Mary Jane to assist them in accessing the files relevant to the charges against him. The chain of custody rule provides that an exhibit is admissible once it has been sufficiently identified and declared to be in the same condition as at the time of its initial acquisition.³⁰ Manuel argues that there was no evidence that “precautions were taken to prevent the loss or addition of evidence to the computers.” But Manuel did not

²⁸ Bahl, 164 Wn.2d at 757-58.

²⁹ See Bahl, 164 Wn.2d at 762.

³⁰ State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984).

raise the issue of the computer evidence's admissibility at trial. He does not now present a manifest error of constitutional magnitude that we will consider for the first time on appeal.³¹

Second, Manuel contends that the trial court erred in admitting Marchant's testimony because it was inadmissible under Frye.³² Again, because this issue was not raised at trial, we decline to consider it on appeal.³³

Third, Manuel claims that portions of Gardner's testimony violated his Fifth Amendment right against self-incrimination. At trial, Gardner testified that Manuel's demeanor was "cavalier" and "smug" both prearrest and during a postarrest interview. The Fifth Amendment prohibits comments on a defendant's silence.³⁴ "[A] mere reference to the defendant's silence by the government is not necessarily a violation of this principle."³⁵ Rather, "[a] comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt."³⁶

Here, Manuel did not exercise his right to remain silent. Gardner testified that when he executed the search warrant of Manuel's home, Manuel said he

³¹ RAP 2.5(a)(3).

³² Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923).

³³ In re Det. of Post, 145 Wn. App. 728, 755-56, 187 P.3d 803 (2008) (holding that a failure to seek a Frye hearing in the trial court waives the evidentiary challenge for review on appeal).

³⁴ State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

³⁵ State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008).

³⁶ State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

was expecting the detectives, and he acted “very quiet . . . almost smug.” And Manuel testified that after Gardner read him his rights, he agreed to talk with him. Because Manuel did not exercise his right to remain silent, the Fifth Amendment is not implicated, and Gardner’s statements were proper.³⁷

Fourth, Manuel claims that the trial court violated his Sixth Amendment rights by considering a presentence report prepared by Missy Farr, a Department of Corrections Community Corrections Officer. In the report, Farr referenced Manuel’s refusal to speak to her without an attorney present. Manuel relies on State v. Everybodytalksabout.³⁸ There, our Supreme Court determined that Everybodytalksabout was entitled to an attorney at his presentence interview because his statements, made without his attorney present, were later used for the adversarial purpose of convicting him in a second trial.³⁹ Therefore, the presentence interview was a critical stage in the proceeding.⁴⁰ Consequently, the court held that Everybodytalksabout’s statements could not be used to convict him in a retrial.⁴¹ Here, Manuel has not demonstrated that his presentence interview was similarly a critical stage in the proceedings.

³⁷ Manuel also claims that Gardner was not qualified to give his opinion on Manuel’s demeanor. Being able to experience and discuss a person’s demeanor, however, does not require expert training. Therefore, the testimony was proper under ER 701.

³⁸ 161 Wn.2d 702, 166 P.3d 693 (2007).

³⁹ Everybodytalksabout, 161 Wn.2d at 710-11.

⁴⁰ Everybodytalksabout, 161 Wn.2d at 710-11.

⁴¹ Everybodytalksabout, 161 Wn.2d at 714 (“We hold the State violated Everybodytalksabout’s Sixth Amendment right to assistance of counsel because the presentence interview constituted a critical stage of the proceedings and [the Community Corrections Officer] deliberately elicited Everybodytalksabout’s statements.”).

Therefore, we find his argument unpersuasive.

Fifth, Manuel claims that H.M.C. provided inconsistent testimony, raising the issue of witness credibility. But credibility determinations are for the trier of fact and are not reviewed on appeal.⁴² We will not disturb the jury's determination that H.M.C. was credible.

Next Manuel advances several reasons why he believes his trial counsel provided ineffective assistance. First, Manuel claims that his attorney should have objected to the introduction of photographs of his piercings. Manuel claims that the photographs were taken at a salon in Portland rather than by the police. Even if that is so, Manuel does not explain why counsel's failure to make this distinction affected the outcome of his trial.

Manuel argues that his counsel failed to call certain "essential" witnesses. "The decision to call a witness is generally a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel."⁴³ The presumption of competence can be overcome by showing counsel failed to subpoena necessary witnesses.⁴⁴ However, to the extent that Manuel makes this claim, it involves matters outside the record that we cannot address in a direct appeal.⁴⁵

Manuel next claims that his counsel should have privately interviewed two jurors who indicated during voir dire that they had a friend or close relative

⁴² State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

⁴³ State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981).

⁴⁴ In re Pers. Restraint of Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004).

⁴⁵ McFarland, 127 Wn.2d at 338.

involved in a sex offense. Every criminal defendant has the right to a fair and impartial jury.⁴⁶ Here, the same jurors also said during voir dire that they could be impartial despite their experiences. Therefore, Manuel's counsel was not deficient for not inquiring further.

Manuel contends that his attorney should have objected when the State mentioned in opening argument that H.M.C. was interviewed by forensic interviewer Jillian Rowback in Massachusetts. Because Rowback did not testify, Manuel argues "any reference [to Rowback] would have been hearsay." Counsel's mention of Rowback's name, however, was not "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."⁴⁷ Manuel's argument fails.

Manuel claims that counsel was deficient by failing to question H.M.C. regarding her sexual history. Generally, evidence of the victim's past sexual behavior is inadmissible on the issues of credibility and consent.⁴⁸ Manuel does not explain why this general rule is inapplicable here. Therefore, he fails to explain why counsel was deficient.

Next Manuel asserts that counsel should have objected when Marchant stated that the vagina is one of the least understood parts of the female body. He contends that this was improper opinion testimony. An expert witness, such as Marchant, is permitted to offer an opinion as long as it meets the

⁴⁶ Wash. Const. art. I, § 22.

⁴⁷ ER 801(c).

⁴⁸ RCW 9A.44.020(2).

requirements of ER 702 and 703. Manuel does not explain why Marchant's testimony did not meet these standards. Therefore, we reject his argument.

Manuel claims that counsel was deficient for failing to object when the State asked H.M.C. whether she was married to Manuel. Whether or not a defendant and the victim are married is an element of second degree child rape, which the State was required to prove.⁴⁹ The State's question was therefore highly relevant, and the trial court would have overruled an objection. Therefore, Manuel fails to demonstrate that defense counsel was deficient.

Manuel next contends that after H.M.C. testified she had herpes, his attorney should have asked Manuel and Mary Jane whether they had herpes. But a determination of whether counsel was deficient would depend on facts outside of the record, i.e., whether Manuel was herpes negative. And even if Manuel would have testified that he was herpes negative, that testimony would not have made it less probable that the charged conduct occurred. Therefore, Manuel cannot demonstrate prejudice.

Manuel claims that his counsel was ineffective for failing to correctly argue for the admissibility of certain testimony during Marie Heiser's direct examination. Our review of the record, however, shows that defense counsel successfully argued that the testimony be admitted. Therefore, we reject this contention.

⁴⁹ RCW 9A.44.076(1).

Finally, Manuel argues that his counsel was unprepared for trial. He complains that counsel (1) did not know what Gwen Thompson would testify to, (2) was unfamiliar with the rules of evidence, and (3) did not use earmarked funds to obtain medical and computer experts. These arguments fail. First, while the record demonstrates that defense counsel was unsure exactly what Gwen Thompson would say if called to testify, it also demonstrates that his lack of knowledge was reasonable. The Oregon Attorney General's Office required the trial court to conduct an in-chambers review of Thompson's report, for which the trial court did not allow either party to be present. After that review, the trial court ruled that Thompson's testimony was inadmissible. Counsel was not deficient for not knowing the contents of a report that he had no access to.

Appellate counsel briefed Manuel's second argument, and we do not discuss it any further here.

Third, Manuel does not explain how counsel's failure to call medical and computer experts affected the outcome of his trial.

Because Manuel has failed to show either deficiency or prejudice with respect to his many claims of ineffective assistance, he has failed to meet Strickland's requirements.

Manuel also claims that the prosecutor committed several instances of misconduct. A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the prosecutor's conduct was both improper and prejudicial.⁵⁰

“[F]ailure to object to an improper remark constitutes a waiver of error 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.”⁵¹

First, Manuel claims that the prosecutor committed misconduct when she told the court that H.M.C. was concerned about the lack of security at the courthouse, in light of Manuel’s history of violent conduct. Manuel claims that the prosecutor’s statement “could have put the thought into the court’s mind that Manuel is a violent person[,] which could have made the court rule differently on other objections.” We do not find the comment improper. And Manuel’s speculation on how the trial court perceived this information, in the absence of any evidence of bias on the part of the trial court, is insufficient to meet his burden to show that the prosecutor’s statement affected the jury’s verdict.

Manuel next claims that the prosecutor prevented him from preparing a proper defense by withholding evidence during discovery, amending the information the day before trial, and failing to disclose witnesses.

Pretrial amendments are “liberally allowed, and the defendant may, if necessary, seek a continuance in order to adequately prepare to meet the charge as altered.”⁵² The State may amend an information at any point before it rests as long as there is no prejudice to the defendant.⁵³ The defendant has the

⁵⁰ State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

⁵¹ State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

⁵² State v. Pelkey, 109 Wn.2d 484, 490, 745 P.2d 854 (1987).

⁵³ CrR 2.1(d); State v. Schaffer, 120 Wn.2d 616, 620-21, 845 P.2d 281

burden of showing prejudice from an amendment.⁵⁴ Here, the State informed Manuel's counsel of its intention to amend the information at a hearing conducted two weeks before trial. And counsel did not move for a continuance on that basis. Manuel cannot show that the amendments prejudiced him.

Manuel next claims that the prosecutor violated CrR 4.7 by failing to definitively inform Manuel that it would be calling Marchant as a witness until the day before trial. CrR 4.7(a)(1) requires the State to "disclose to the defendant . . . material and information within the prosecuting attorney's possession or control no later than the omnibus hearing," including, among other things, the names and addresses of witnesses, documents, statements, and photographs it intends to use at trial. The rule does not require a definite witness list, only an intended witness list. Here, Marchant was on the State's witness list, and Manuel had access to her report nearly a year before trial. Therefore, the State met its obligations under the rule.

Manuel also asserts that the prosecutor violated CrR 4.7 by withholding the results of H.M.C.'s test for sexually transmitted diseases. But Manuel fails to show that the State had access to her results. In fact, Marchant stated during her testimony that H.M.C.'s pediatrician performed those tests, and she did not know the results. The prosecutor was not obligated under CrR 4.7 to share with Manuel information she did not have.

(1993).

⁵⁴ State v. Gutierrez, 92 Wn. App. 343, 346, 961 P.2d 974 (1998).

Manuel also asserts that the trial court committed several errors. First, he claims the trial court violated his right to a public trial by privately questioning potential jurors. To protect a defendant's right to a public trial under article I, section 22 of the Washington State Constitution, a trial court must apply and weigh five factors before closing a portion of a criminal trial.⁵⁵ Here, the trial court interviewed venire members who wished to talk privately in the public courtroom, while the remainder of the venire waited in the hallway. Because no closure occurred, Manuel's public trial right was not violated.

Next, Manuel claims that the trial court abused its discretion by selecting 13, instead of 14, jurors. While a criminal defendant has a right to be tried by a 12-person jury, it is within the court's discretion to determine the number of alternate jurors.⁵⁶

Manuel also contends that the trial court assumed that the acts in Oregon actually occurred. But the record demonstrates that the court called the Oregon evidence "alleged" incidents, thereby acknowledging the evidence had not been proved. We therefore disagree with Manuel that the trial court assumed the incidents actually occurred.

Manuel claims that the trial court abused its discretion when it stated it would discuss a matter with defense counsel off the record.⁵⁷ But Manuel does

⁵⁵ State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).

⁵⁶ CrR 6.5.

⁵⁷ The trial court stated, "If you want to make a separate offer of proof at the time you have your witnesses here, we can discuss that off the record and

not indicate whether this off-the-record discussion ever occurred. Therefore, he fails to demonstrate error. Moreover, “[a] defendant does not . . . have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts.”⁵⁸

Manuel next claims that the trial court abused its discretion by excluding Gwen Thompson’s testimony. In order to make its ruling, the trial court considered Thompson’s report in chambers and concluded that the information was not relevant and was prejudicial to both parties. That report was not included in the appellate record. Because we do not consider matters occurring outside the record on direct appeal, Manuel’s argument fails.

Manuel argues that the trial court erred by failing to disclose the dollar amount of legal financial obligations it imposed on Manuel. However, Manuel’s judgment and sentence clearly states that he owes \$6,480.72 in legal financial obligations.

Finally, Manuel claims “[t]he Court abused its discretion when it put in place the ‘Rape Shield’ which prevented Manuel from his constitutional right to confront witnesses.” Manuel’s general statement is insufficient for us to appraise the merits of the alleged error. And our search of the record does not reveal that Manuel was prevented from cross-examining H.M.C. based on the rape shield statute. We will not consider an appellant’s argument in a statement

the Court will then decide whether or not the Court needs to have an actual hearing where we put on each witness.”

⁵⁸ State v. Sadler, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008).

of additional grounds for review if it does not inform the court of both the nature and occurrence of the alleged error.⁵⁹ Because Manuel fails to explain his assertion, we are not able to review it.

Conclusion

We affirm Manuel's convictions but remand for modification of the judgment and sentence to delete the offending condition.

Leach, A.C.J.

WE CONCUR:

Appelwick, J.

Grosse, J.

⁵⁹ RAP 10.10(c).