IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 67660-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
SEAN PATRICK RYAN,	)	
	)	
Appellant.	)	FILED: April 16, 2012

GROSSE, J. — A prosecutor's argument that "[t]he only way the State didn't meet its burden is if you believe [its witnesses] were not telling the truth," does not amount to reversible misconduct when, as here, there was no objection, the defendant fails to show that a curative instruction would not have obviated any resulting prejudice, and the jury instructions properly stated the burden of proof. Accordingly, we affirm.

FACTS

Samuel and Denni Nelson[1] are the parents of C.N.N. (C.N.) and C.J.N. (C.J.). C.N. was born in 1995 and C.J. was born in 1999. Denni and Samuel eventually divorced. The parenting plan gave custody to Samuel every other weekend and for a period of time in the summer. Sometime in 2004, Denni began dating Sean Ryan and he moved into an apartment where Denni was living with the girls.

In July 2007, while the girls were staying with Samuel, C.J. told him that Ryan was "hurting" her and her sister. When Samuel asked how he was hurting

[1] To avoid confusion, Samuel and Denni will be referred to by their first names.

them and whether he had hit them, C.J. was hesitant to answer, but then placed her hand over her "private parts" and said, "You know." Samuel then called his mother and sister and had them take the girls to Mary Bridge Children's Hospital.

At the hospital, Samuel told hospital personnel about the disclosure and the girls were examined by Dr. Jeffrey Blake. Dr. Blake did not find any indication of physical injury. Samuel also spoke with a police officer, who took his statement. Samuel was later contacted by Mary Bridge sexual assault unit and he scheduled follow up appointments with the girls at the hospital's Child Abuse Intervention Center.

On August 2, 2007, the girls met with Keri Arnold-Harms, who was a child interviewer from the prosecutor's office. She conducted a forensic interview with each girl separately and the interviews were recorded on a DVD (digital video disc). During that interview, C.J. described in detail acts of penetration to her anus and vagina. She said she would be lying on her stomach and Ryan would lie on top of her with his shorts or boxers pulled part way down to his knees. She said he would cover her face with a pillow so she could not see his "private" and then she would feel like something is "getting shoved" in her "number two place." She also said he would usually go "inside the number two place because it hurts in the number one," and that "he doesn't get this thing shoved in the number one place. He usually uses his finger," and "shoves it in there." She further stated that it hurt when it is in her "number two," but "kind of feels better when he gets out," and hurts afterwards if she goes to the bathroom and goes

"number two."

On August 7, 2007, the girls went to the Child Abuse Intervention Department and met with Michelle Breland, a pediatric nurse practitioner. Breland spoke with each girl separately and C.N. told her that she had been sexually assaulted by Ryan. She also said that when "he did it to me, it would hurt for a while because he would stretch my skin," but that "[t]he pain would go away in like two minutes." She also said that he would "do it to my bottom, not down in my privates." She said it last happened "a couple of weeks ago," the night before they went to her dad's. Breland then performed a physical evaluation and found no indication of injury.

C.J. told Breland that the reason she was there was because her dad told her. When Breland asked her if she had ever been to this building before, she said she had when she talked about "Sean." She then said that Sean was her mom's boyfriend and that he "got on me," and hurt "my privates." When asked to point to her "privates," she pointed to her genital area and her bottom. She also said that she noticed bleeding after something happened with Sean and that the bleeding occurred "[w]here I go number two." She also said, "It hurt to go poop and sometimes it stings when I go pee." An external physical exam revealed no visible injuries.

Both girls were also referred to Comprehensive Mental Health for counseling and met with Phoebe Mulligan at the Child Advocacy Center. Both told Mulligan they wanted to hurt themselves. C.N. told Mulligan that she and

her sister disclosed the abuse because they were afraid their mom would marry Ryan and then they would be abused forever. She also told Mulligan that she wanted Mulligan to tell her mom that she lied about "Lawrence," her mom's former boyfriend. She told Mulligan that she told her mom that Lawrence had been sexually abusing her, but that she only did so in an effort to scare Ryan into thinking that she would tell on him, too. When Mulligan asked her if the plan worked, she said that the abuse stopped briefly but resumed.

Mulligan eventually referred both girls for outside counseling and the two began therapy with Carlin Harris. During sessions with Harris, C.N. told her that Ryan had hurt her in the vaginal area with both his penis and his hands. C.J. told her that Sean said "it was normal to do the hurting."

The State charged Ryan with four counts of first degree rape of a child committed against C.J. and two counts of second degree rape of a child committed against C.N. Samuel testified at trial, as did both girls. C.N. testified that Ryan touched her in her "private parts," "between my legs," and later made her take off her clothes and touched her vagina with his fingers. She testified that he would put his fingers inside her vagina and her anus and also tried to put his penis inside of her vagina and anus. She testified that it hurt and he would rub Vaseline on her private parts or put it on his fingers so it did not hurt. She also testified that she did not disclose what he was doing because she worried he would be incarcerated or that her mother would be upset. She further testified that Ryan gave her money and treats so she would not tell.

C.J. testified that Ryan touched "her number one" spot with his hand and her "number two" spot with his "number one spot." She clarified that her number one spot was for "[g]oing pee" and her number two spot was for "[g]oing poop," and that boys' "number one" spots differed from girls. She also testified that he touched her with his number one spot more than once and that it hurt.

The State also called Dr. Blake, who opined that it is possible to have abuse without apparent injury and that the use of lubrication would decrease the probability of trauma from abuse. Arnold-Harms, Breland, Mulligan and Harris, also testified about their interactions with the girls. The court overruled Ryan's objections to their testimony about what the girls told them Ryan did to them.

Ryan testified and denied the allegations. His theory of the case was that the girls fabricated the allegations and Samuel coached the girls to make the allegations so he could have custody of them. He called Denni as witness, who testified that in 2005 she told Samuel that she and Ryan were going to get married and move to the east coast with the girls. Denni also testified to an incident when the school counselor told her that C.N. reported that "Lawrence," Denni's boyfriend at the time, had hit her with a belt. When Denni asked her about it, C.N. said that she had fallen off the swing set when Lawrence was pushing her on the swing and she was mad at him for that. But Denni also testified that there were times Ryan was alone with the girls and that she had both baby oil and Vaseline at home during the time he lived with her and the girls.

The jury found Ryan guilty of three counts of first degree rape of child committed against C.J. and one count of second degree rape of child committed against C.N. The jury did not reach a verdict on the remaining counts of first degree rape and second degree rape. Ryan was sentenced to 260 months confinement on the first degree rape charges and 210 months confinement on the second degree rape charge.

ANALYSIS

I. Double Jeopardy

Ryan first contends that his right against double jeopardy was violated when the jury instructions failed to require the jury to find that each identically charged count involved a separate and distinct act. We disagree.

After the filing of the briefs in this case, the Washington State Supreme Court issued its opinion State v. Mutch,[2] which held that there was no double jeopardy violation resulting from deficient "to convict" instructions that failed to instruct the jury that identically charged counts must be based on separate and distinct acts. The court explicitly disapproved of State v. Berg[3] and State v. Carter,[4] relied upon Ryan here, and disagreed that a double jeopardy violation in those cases automatically resulted from omitted language in the instructions.[5] Rather, the court recognized that the deficient instructions created only the "possibility" of a double jeopardy violation:

> [F]lawed jury instructions that permit a jury to convict a defendant of multiple counts based on a single act do not necessarily mean that the

[2] 171 Wn.2d 646, 245 P.3d 803 (2011).
[3] 147 Wn. App. 923, 198 P.3d 529 (2008).
[4] 156 Wn. App. 561, 234 P.3d 275 (2010).
[5] Mutch, 171 Wn.2d at 663-64.

> defendant received multiple punishments for the same offense; it simply means that the defendant *potentially* received multiple punishments for the same offense.[6]

The court disapproved of the limited review in Berg and Carter, which did not go beyond the instructions or engage in further inquiry, and reiterated that when considering a double jeopardy claim, an appellate court may review the entire record.[7] The court then acknowledged that such review is "rigorous and is among the strictest" and a double jeopardy violation only results when considering the evidence, arguments, and instructions, "it is not clear that it was '*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense' and that each count was based on a separate act."[8] Reviewing the record in that case, the court concluded that the deficient instructions did not actually effect a double jeopardy violation because it was manifestly apparent that the jury found him guilty of five separate acts of rape to support five convictions.[9] The court noted that the information charged five counts based on allegations that constituted five separate units of prosecution, the victim testified to five different episodes of rape, the State discussed all five episodes in closing argument, and the defense did not argue insufficiency of evidence for each count but argued instead that the victim consented and was not credible.[10]

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[6] Mutch, 171 Wn.2d at 663.
[7] Mutch, 171 Wn.2d at 663-64.
[8] Mutch, 171 Wn.2d at 664 (alternation in original) (quoting Berg, 147 Wn. App. at 931).
[9] Mutch, 171 Wn.2d at 665.
[10] Mutch, 171 Wn.2d at 665. The court also recognized that its holding would be the same if it held the instructions to be erroneous and then reviewed for

Here, the "to convict" instructions for each of the four counts of first degree rape all contained identical language stating that the jury had to find, "That on or about the period between the 2nd day of February, 2004 and the 27th day of July 2007, the defendant had sexual intercourse with [C.J.]" And Ryan is correct that they jury was not instructed that each count must be based on a separate and distinct act. But in closing argument, the prosecutor identified the specific acts that were testified to that formed the basis for each count:

> He's charged with four counts and the way it's broken down is pretty simple. [C.J.] told you on both DVD and direct examination that Mr. Ryan stuck his penis in her anus in her bedroom, right? That's Count I, in the bedroom. Count II, on the couch. Right? Did not he do it on the couch? Count III, in the mom's room. And then Count IV, Count IV is for the instance that she described in her bedroom right before she went to go see her dad when she was eight years old. She said, "Mr. Ryan gagged me with it." Right? Her word, "He gagged me with it." And Keri said, "What are you talking about? What do you mean he gagged you with it?" "You know, he gagged me with it." She said, "I don't know. What do you mean by that?" "He shoved it in and gagged me with it."
>
> And she says, "You are saying he gagged you. What are you talking about?" She said, "His number one. He stuck his number one inside my mouth with nothing on it, and he gagged me with it. And then he stopped when I gagged.
>
> Right? That is Count IV. Oral sex at that specific time is Count IV.

Thus, as in Mutch, a review of the record indicates that the deficient instructions did not effect a double jeopardy violation because it was manifestly apparent that the jury found him guilty of three separate acts of rape against C.J. to support the three convictions. C.J. testified to at least three different episodes of rape, the State discussed all of these episodes in closing argument and the defense did not argue insufficiency of evidence for each count, but asserted a

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harmlessness. Mutch, 171 Wn.2d at 664.

general denial and argued instead that C.J. was not credible and fabricated the allegations.

II. Prosecutorial Misconduct

Ryan next contends that the prosecutor committed reversible misconduct by telling the jury in closing argument that it was required to find that the girls were lying in order to acquit. We disagree.

Prosecutorial misconduct requires reversal when there is a substantial likelihood that improper argument affected the jury's verdict.[11] The defense bears the burden of establishing such prejudice.[12] Unless a defendant objected to the improper comments at trial, requested a curative instruction, or moved for a mistrial, reversal is not required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resulting prejudice.[13]

It is misconduct for a prosecutor to argue that in order to *believe* a defendant, a jury must find that the State's witnesses are lying.[14] Similarly it is misconduct to argue that, in order to *acquit* a defendant, the jury must find that the State's witnesses are either lying or mistaken.[15] As our courts have explained, such argument presents the jury with "a false choice between believing the State's witnesses or acquitting [the defendant],"[16] by misstating the

[11] State v. Barrow, 60 Wn. App. 869, 876, 809 P.2d 209 (1991)
[12] State v. Hughes, 106 Wn.2d 176, 195, 721 P.2d 902 (1986).
[13] State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990).
[14] State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996); State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995).
[15] Wright, 76 Wn. App. at 826.
[16] Wright, 76 Wn. App. at 825.

law and misrepresenting the jury's role and burden of proof:

> [I]t is misleading "to make it appear that an *acquittal* requires the conclusion that the [State's witnesses] are *lying*. The testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved. The testimony of two witnesses can be in some conflict, even though both are endeavoring in good faith to tell the truth."
> . . . .
>
> [A] jury need only find that the State has not proven its case beyond a reasonable doubt in order to acquit a defendant. A jury does not necessarily need to resolve which, if any, of the witnesses is telling the truth in order to conclude that one version is more credible or accurate than another.[17]

But our courts have also held that when a jury must necessarily resolve a conflict in witness testimony to reach a verdict, a prosecutor may properly argue that if the jury accepts one version of the facts, it must reject the other, as the court explained in Wright:

> Where, as here, the parties present the jury with conflicting versions of the facts and the credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other. This argument is well within the "wide latitude" afforded to the prosecutor "in drawing and expressing reasonable inferences from the evidence."[18]

Here, the prosecutor stated in closing argument:

> Now it wasn't really clear to me what the defense wants you to accept. You see, they offered all sorts of motivating factors for Mr. Nelson to coach these girls. Right? He didn't want them to get married, or didn't want them to move, or he didn't want to pay child support, or he wanted custody. One of many things.
>
> The problem with that approach and with that defense is: We haven't heard one piece of evidence indicating that Mr. Nelson coached them in any way. Right? Not one witness said they observed any sort of

[17] Wright, 76 Wn. App. at 824-25 (quoting State v. Casteneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991)).
[18] 76 Wn. App. at 825 (footnote omitted) (quoting State v. Hoffman, 116 Wn.2d 51, 95, 804 P.2d 577 (1991)).

> coaching.
>
> But you have to accept that version from them to find him not guilty. Because this case boils down to whether or not you believe what the little girls told you or whether you believe they were coached. Those are the options.

The prosecutor also addressed the defense argument that the girls were coached by their dad to make up the allegations and pointed out all the reasons why this didn't make sense:

> Why would they do all of those things and forego seeing their mother for almost nine months? They saw their mom one time. One time for four hours on a supervised visit over nine months. The person they told you that they loved. The person they told you they wanted to protect. And yet the defense wants you to believe they stayed away from her for nine months to perpetuate a story that their dad told them to say.
>
> But you have to accept that from the defense perspective to find Mr. Ryan not guilty.

Ryan objected as improper burden shifting. The court ruled that the jury would refer to their instructions as to what their role is in the case and noted that "this is closing argument."

The prosecutor then continued, "To accept the proposition that he is asking you to accept, you have to believe they did all that stuff just to satisfy their dad." The prosecutor then went on to point out how that did not make sense and argued:

> Defense wants you to believe that they're so married to this story, these girls are so wanting to make their dad happy, they are willing to forego all of these things. Defies common sense. Defies common sense when you are talking about these two little girls. But you would have to accept that version to find Mr. Ryan not guilty.

The prosecutor further argued:

> But in the end, it's a pretty simple case, right? Because you're left with one decision. Did they tell the truth or did they make this up? Because if

> they told the truth, if what they said what was true on the DVD you saw and on the stand, then he's guilty. There's no doubt. If what they told you happened happened, then he's guilty. If they made it up, then he's not guilty.
> . . . .
> The only way he's not guilty, the only way the State didn't meet its burden is if you believe that they were not telling the truth. That's really the only issue for you to decide. Because if they are telling the truth, he's guilty. And if they weren't, he's not guilty. It's pretty simple. . . .
> . . . .
> So you are left with: Do you believe them? Do you believe them? And are you presented with any evidence that what she said was not true? That's your job. If you believe them, he's guilty. If you do not believe them, then he's not guilty.

Ryan did not object.

The initial comments to which Ryan objected did not amount to improper argument. Rather, the prosecutor was simply arguing that because the case was essentially a credibility contest, if the jury accepted one version of events, it necessarily had to reject the conflicting version. The later argument to which there was no objection, i.e., "The only way he's not guilty, the only way the State didn't meet its burden is if you believe that they were not telling the truth," amounts to misconduct. But it does not amount to reversible misconduct because Ryan fails to show that a curative instruction would not have obviated any resulting prejudice. Indeed, the jury instructions properly stated the burden of proof, informed the jurors that the law is contained in the court's instructions, and instructed the jury to disregard any comments by the lawyers that are not supported by the law. The jury is presumed to follow the court's instructions.[19]

III. Opinion Testimony

[19] State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983).

Ryan next contends that the court erred by allowing two State's witnesses to give improper opinion testimony. We disagree. Generally, no witness may offer testimony in the form of an opinion relating to the defendant's veracity.[20] Impermissible opinion testimony about the defendant's guilt may be reversible error because allowing such evidence violates the defendant's constitutional right to an independent determination of the facts by a jury.[21] To determine whether statements are impermissible opinion testimony, a court considers the circumstances of the case, including the following factors: "'(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.'"[22] But "[a]dmission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a 'manifest' constitutional error. [Rather,] '[m]anifest error' requires a nearly explicit statement by the witness."[23]

Ryan first challenges the testimony of Arnold-Harms, the child interviewer from the prosecutor's office. Ryan moved to exclude any of her testimony that related to "techniques" she used to determine if improper suggestion had occurred with the girls because it conveyed her opinion that the girls were not coached. The court denied the motion but granted Ryan a standing objection. At trial, Arnold-Harms testified that she used a particular technique with children called the "funnel" technique because "[t]here's concerns with kids about

[20] State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).
[21] Demery, 144 Wn.2d at 759.
[22] State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (internal quotation marks omitted) (quoting Demery, 144 Wn.2d at 759).
[23] Kirkman, 159 Wn.2d at 936.

suggestibility." She described the technique as one that started with open ended questions and then following up with more focused and direct questions to clarify responses. She further testified about certain things she looks for to determine whether or not a child is susceptible to suggestion and stated that she did not see any indicators of suggestibility in her interviews with the girls.

As the State contends, such testimony does not contain a statement that Arnold-Harms believed the girls, believed that either girl was telling the truth, or believed that Ryan was not truthful. Thus, she did not express an opinion of the guilt or veracity of a witness or the defendant, as Ryan claims. Rather, her testimony was about the protocol she used in child victim interviews, which our courts have held "only provides context for the interview of a child and does not improperly comment on the truthfulness of the victim."[24]

Ryan also challenges the testimony of Billie Reed-Lyyski, the Child Protective Services (CPS) social worker who handled the girls' placement once the allegations against Ryan had been made. Her testimony was offered to rebut Denni's claim that she was told by CPS that she would not get the girls back if she did not believe the allegations against Ryan. She testified that if there was a concern that Denni might have known what was happening to the girls, Denni might have been found to have been neglectful, but that in fact she did not believe Denni was neglectful, stating, "I determined that [neglect] was unfounded, that I did not believe she knew what was happening to her children at the time." The prosecutor then asked when Reed-Lyyski made this

[24] Kirkman, 159 Wn.2d at 934.

determination, and she testified as follows:

> A: After the children's forensic interviews, the children stated that --
> [DEFENSE COUNSEL]: Your Honor, I would object. It calls for hearsay.
> [PROSECUTOR]: Well, it is not offered for the truth
> THE COURT: Not offered for the truth. Goes to establish the date.
> [DEFENSE COUNSEL]: So if it's asking for a date, Your Honor, then I would ask she state what date that was.
> [PROSECUTOR]: If she could answer the question, maybe she could.
> THE COURT: Go ahead.
> [PROSECUTOR] Q: Go ahead.
> A: The children had their forensic interview on August 2nd. At that time the children disclosed that they had not told their mother.

"Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a 'manifest' constitutional error."[25] Rather, to be reviewable for the first time on appeal as a manifest error, it must be "a nearly explicit statement by the witness that the witness believed the accusing victim."[26] Ryan concedes he did not object to this testimony as improper opinion testimony and fails to show that it amounts to "a nearly explicit statement" that Reed-Lyyski believed the girls. She simply testified that she determined Denni was not neglectful, that she "did not believe [Denni] knew what was happening to her children at the time," and that this determination was made after the forensic interviews. Thus, Ryan has waived this issue for review.

IV. Expert Testimony

Ryan further contends that the trial court erred by allowing Arnold-Harms and Breland, the nurse practitioner, to give certain expert testimony because it lacked sufficient foundation. We disagree.

[25] Kirkman, 159 Wn.2d at 936.
[26] Kirkman, 159 Wn.2d at 936.

Expert testimony is admissible under ER 702, which requires that "the witness be qualified as an expert, any opinion testimony must be based on a theory generally accepted by the scientific community, and the testimony must be helpful to the fact finder."[27] Education and practical experience may serve to qualify a witness as an expert.[28] The "Frye" rule requires that an expert's scientific or technical testimony must be based upon a scientific principle or explanatory theory that has gained general acceptance in the scientific community.[29] But "if expert testimony does not concern novel theories or sophisticated or technical matters, it need not meet the stringent requirements for general scientific acceptance."[30] Rather, "[t]estimony may be based on training, experience, professional observations, and acquired knowledge."[31]

Ryan contends that Arnold-Harms was not properly qualified as an expert in child memory and there was no foundation showing that her opinions were based upon techniques and theories generally accepted in the scientific community. Arnold-Harms testified that she was trained as a child interviewer dealing with memory or memory retainment, and explained the training and literature with which she was familiar as follows:

> The training and literature is, while in a broad spectrum, it is all part of child development and about their ability to store memory, what details are stored. As their memory develops, their ability to recall those details, again, kind of, you know, over a time line as memory develops. And what is, as an interviewer, then you hope to elicit information from children so

[27] State v. Jones, 71 Wn. App. 798, 814, 863 P.2d 85 (1993).
[28] Jones, 71 Wn. App. at 814.
[29] State v. Black, 109 Wn.2d 336, 342, 745 P.2d 12 (citing Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)).
[30] Jones, 71 Wn. App. at 815.
[31] Jones, 71 Wn. App. at 815.

that they are able to verbalize their -- what they can recall about an event. She was then asked how memory development is important when interviewing a child and how she uses it when asking questions or determining whether or not to ask questions, and responded:

> Yes, it is important in interviewing. One way that that may be important is, well, there are ways that it can be visible in a child's statement. There are what's called lying a script memory. A script memory is something that --

Ryan objected that she lacked foundation to testify about different forms of memory because she was not qualified as an expert in psychology or received education in that area. The court overruled the objection, ruling that "she can answer, within the extent that she's been trained in this area, her understanding of the terms and the reason why it's important." She then went on to describe "script memory," which relates to things that happen frequently, and testified that

> children may be able to provide more detail about something that is a script memory than they may about a one-time incident because it's something that's happened repeatedly, it's happened in, you know, very similar format. And so their ability to recall, and as an interviewer, the ability to cue that recall is simplified.

Contrary to Ryan's argument, Arnold-Harms did not testify as an expert in child memory and her testimony did not require a Frye foundation. Rather, she testified that she was employed as a child interviewer and received training in memory. Her only testimony about memory was in the context of explaining how she formed her questions and follow up questions. Thus, her testimony did not concern "novel theories or sophisticated or technical matters," and was therefore not subject to Frye standards.[32] It was "based on training, experience,

[32] Jones, 71 Wn. App. at 815.

professional observations, and acquired knowledge," and therefore properly admitted.[33]

Breland testified that she was familiar with "studies related to findings in cases of sexual assaults on children" and described those studies as follows:

> There's a large body of literature in the area of child and sexual abuse. Some of them have looked at what you might see normally in kids' habits that have not been abused. They have also looked at cases where kids have been abused and they have tried to confirm that these children have actually been abused, either through confessions or sometimes there's been videotaped evidence, and looked at what the physical exam findings are in those children.

Ryan objected, stating that "this goes to a Frye issue." The court overruled the objection and ruled that she could properly testify about her knowledge of the studies and how she relied on that knowledge.

Breland was then asked about the literature relating specifically to injuries from sexual assault and testified:

> [S]ome of the studies, they looked at kids more acutely or when the injuries are fresh, and they have also looked at kids who have not disclosed for some amount of time so when there has been time for injuries to heal and what those findings might look like, how they might be different based on the time frame.

When the prosecutor asked, "Is time from last incident significant in whether or not they find injuries based on your training and experience?" Ryan objected, as calling for improper opinion testimony. The court overruled the objection and she continued to testify that "the studies have shown the more time that has elapsed since the last contact, the less likely you are to find anything on the exam."

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[33] Jones, 71 Wn. App. at 815.

She further testified about her familiarity with the literature about anal injury, stating, "[W]hat they discovered and what my own experience has been is that anal findings are very, very unusual. The study was around one percent of kids who have been sexually abused have anal findings. So it is very unusual." She also testified about her familiarity with studies about male prostitutes and injury, stating, "[T]hey've done medical evaluations on boys who are prostitutes where they're saying there has been anal penetration, and there's very, very few sort of anal injuries or scars or any sort of medical findings regarding that." Finally, she testified that in her experience in having dealt with 2,000 or so claims of sexual abuse, only five percent showed healed or acute injury.

As the State contends, this testimony was not subject to the Frye standard because it did involve "any new methods of proof or new scientific principles from which conclusions are drawn."[34] Rather, it was an expression of expert medical opinions relating to the cause of an injury, and it "showed a familiarity with the relevant literature consistent with her opinions."[35] It was therefore properly admitted as expert testimony.

V. Statements of Medical Diagnosis

Ryan further challenges as inadmissible hearsay, statements the girls made to Breland and therapists, Mulligan and Harris. He contends that they were not admissible as statements made for "purposes of medical diagnosis or treatment" under ER 803(a)(4) because there was no testimony by Breland,

[34] State v. Young, 62 Wn. App. 895, 906, 802 P.2d 829 (1991).
[35] Young, 62 Wn. App. at 906.

Mulligan or Harris that they explained to the girls the importance of telling them the truth because their recovery depended upon it. We disagree.

> ER 803(a)(4) provides an exception to the hearsay rule for
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> [s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to diagnosis or treatment.

This exception applies to statements made to a therapist in child or sexual abuse cases.[36] The proponent of such statements must show that (1) the declarant's apparent motive is consistent with receiving treatment, and (2) the statements relate to information upon which the medical provider reasonably relies to make a diagnosis.[37]

Young children are not presumed to lack the ability to understand that certain statements they might make are for the purposes of getting help for sickness, pain, or emotional discomfort.[38] In M.P., the court held that statements a child to made to a sex abuse counselor were admissible because "the trial court could reasonably conclude that [the child] understood the purpose of her meetings with [the counselor] well enough to appreciate [that the counselor] was there to help her deal with the fears caused by her father's contacts with her."[39] Courts have also recognized that "[s]tatements attributing fault to a member of

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[36] In re Dependency of M.P., 76 Wn. App. 87, 92-93, 882 P.2d 1180 (1994).
[37] State v. Kilgore, 107 Wn. App. 160, 182-83, 26 P.3d 308 (2001).
[38] M.P., 76 Wn. App. at 93.
[39] 76 Wn. App. at 94 (counselor initially explained to child that she was seeing her because her mother was concerned about her being unhappy and child told counselor about her fear of her father and that it was "more better" now that she only visited her dad by telephone).

the victim's immediate household may be reasonably pertinent to treatment and are thus admissible because it is 'relevant to the prevention of recurrence of injury.'"[40]

But in State v. Carol M.D.,[41] the court held that a 9-year-old girl's statements to her therapist were inadmissible under the medical diagnosis exception to the hearsay rule because the record did not affirmatively establish that the child had a treatment motive for making her statements. As the court concluded:

> [I]n the case of a child who has *not* sought medical treatment, but makes statements to a counselor procured for him or her by a state social agency, the State's burden under ER 803 is more onerous. The record must *affirmatively demonstrate* the child made the statements understanding that they would further the diagnosis and possible treatment of the child's condition.[42]
> . . . .
>
> In this case, [the counselor] testified only that her standard practice is to tell children who she is and what she does. She did *not* testify that she explained to M.D. her successful treatment depended upon her providing truthful and accurate information about what had happened to her. Absent such testimony, we will not assume that this nine-year-old was motivated to tell the truth by her self-interest in obtaining proper medical treatment.[43]

Breland testified that she performed medical evaluations on children who have allegedly suffered abuse so that she may diagnose and treat any medical problems and that she saw both girls for this purpose. She testified that when

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[40] State v. Ackerman, 90 Wn. App. 477, 482, 953 P.2d 816 (1998) (child's statements to therapist that defendant fondled child in the home for over a year relevant in the context of clinical goal to reunify the family) (quoting State v. Butler, 53 Wn. App. 214, 221, 766 P.2d 505 (1989)).
[41] 89 Wn. App. 77, 948 P.2d 837 (1997).
[42] M.D., 89 Wn. App at 86.
[43] M.D., 89 Wn. App at 87.

she asked C.N. if she knew why she was in the hospital seeing a nurse, C.N. replied, "I was sexually assaulted." Breland also testified that she "wanted to be clear with her that she knew she was here for a checkup," and explained the checkup to her. During the exam, C.N. told Breland that she had some pain and that the skin around her anus had stretched.

Breland also testified that initially 8-year-old C.J. told her she was there "[b]ecause my Dad told me," but also indicated that she knew she was at a doctor's office. Breland also explained to C.J. that "she had come to see me for a checkup" and that she explained the checkup to her. C.J. then told her that Ryan had hurt her "privates" and that she had bleeding around the anus.

While Ryan characterizes Breland as a "therapist," the record is clear that she is a nurse practitioner, charged with medical diagnosis and treatment of physical injuries, rather than counseling or providing diagnosis and treatment for psychological or emotional conditions. The record sufficiently establishes that the girls' statements were made during Breland's exam, the purpose of which was to diagnose the girls' condition and determine whether there were any physical injuries consistent with the abuse allegations. Thus, the statements were properly admitted under ER 803(a)(4).

The State contends that Ryan's challenges to statements made to Mulligan and Harris are not properly preserved for review because he did not object to those statements as hearsay. According to the record, Ryan objected to their testimony before they were called to testify, but objected on relevancy

grounds, not as hearsay. He repeatedly argued that this evidence was "premature" rebuttal evidence and any relevance was outweighed by prejudice. But in response, the State raised the medical diagnosis hearsay exception and contended that they were admissible under ER 803(a)(4). The court also addressed the admissibility of the statements under ER 803(a)(4) and in fact excluded several statements that did not fall within the hearsay exception. Thus, the issue was before the trial court and sufficiently preserved for review.

Ryan challenges testimony by Harris that C.N. told her that she gotten "hurt" by her mom's boyfriend, that the hurting happened in her vaginal area with Ryan using his hands and penis, that she had bad dreams and nightmares, she was concerned Ryan might come and find her because she told, she had dreams about Ryan hurting her and her family, that one of the dreams involved him shooting the girls and their mother, that she was anxious and fearful about seeing Ryan in person at the trial, and that she was not going to look at him at trial. Ryan also challenges testimony from Harris that C.J. told her that Ryan scares her and come to get her, that Ryan was "putting his body on us," that she was having trouble sleeping and with bad dreams and nightmares and scary thoughts during the day, that she did not trust people and feared they would hurt her, that she had flashbacks where her body hurt, that she thought her mom did not want to be with them, that she felt sick whenever she thinks of Ryan and the trial, and that she was fearful of seeing Ryan's face at trial but was not going to look at him because "she's the boss of her [own] eyes." Ryan does not identify

any specific challenged testimony by Mulligan.

The record contains sufficient evidence to provide a proper foundation for admitting the girls' statements to the counselors about what happened with Ryan. Both girls testified that they understood why they were seeing the therapists and their statements related to diagnosis and treatment of any emotional or psychological condition they were suffering as a result of the abuse. C.N. testified that Harris was a counselor and that she was in counseling with her because she "got hurt by [her] mom's boyfriend," physically and sexually, and that Harris helped her address her feelings. C.N. also testified that Mulligan was a "mental health counselor" and "wanted to see if I was emotionally healthy." She further testified that Mulligan was "one of those people I could express my feelings to," and with whom she could talk about "what happened." C.J. testified that Harris and Mulligan were counselors and that she saw them "[t]o make us feel better" because Ryan was hurting her and her sister.

VI. Community Custody Conditions

Finally, Ryan challenges several conditions of community custody as unauthorized by statute or unconstitutionally vague. He first challenges the following conditions set forth in Appendix H:

> 14. Do not possess or peruse pornographic materials. Your Community Corrections Officer will consult with the identified Sexual Treatment Provider to define pornographic material.
> . . . .
> 24. You shall not have access to the Internet without childlocks in place.
> . . . .
> 26. Obtain a Chemical Dependency Evaluation by a state-certified Drug and Alcohol Counselor and comply with follow-up treatment.
> 27. Obtain a Mental Health Evaluation by a state-certified Mental Health

Provider and comply with all follow-up treatment to include medications. The State appears to concede that conditions 26 and 27 are not crime related and in fact there is no basis in the record to support imposition of such conditions. Accordingly, they must be vacated.

Ryan also contends that the Internet prohibition is not crime related because there was no evidence that the crime involved access to the Internet. The record supports this contention. While the State contends that this prohibition was related to the unchallenged condition that he comply with any sexual deviancy treatment recommendations, the condition does not specify a crime-related restriction on Internet access, e.g., contacting minors via the Internet or viewing child pornography; it simply restricts internet access "without childlocks in place." Thus, the condition must be vacated.

Ryan further contends that pornography prohibition should be vacated as unconstitutionally vague. The State argues that inclusion of the provision, "Your Community Corrections Officer [(CCO)] will consult with the identified Sexual Deviancy Treatment Provider to define pornographic material," saves it from a vagueness challenge. Indeed, this approach was suggested by the court in State v. Sansone, which struck a condition as unconstitutionally vague because it simply delegated to the CCO the authority to define "pornography":

> We note that our holding is limited to the circumstances at hand. A delegation would not necessarily be improper if Sansone were in treatment and the sentencing court had delegated to the therapist to decide what types of materials Sansone could have. In such a circumstance, the prohibition is not necessarily static – it is a prohibition that might change as the probationer's treatment progressed and is thus best left to the discretion of the therapist.[44]

But in the Washington Supreme Court's more recent opinion in State v. Bahl, the court struck as unconstitutionally vague a condition that prohibited the defendant from possessing "sexual stimulus material for your particular deviancy as defined by the supervising [CCO] and therapist except as provided for therapeutic purposes."[45] The court concluded that what most rendered this condition vague was the provision that the sexual stimulus material must be for the defendant's own deviancy.[46] The court noted that such a condition could not identify materials that might be sexually stimulating for a deviancy when no deviancy has been diagnosed and the record did not show that any deviancy had yet been identified. Accordingly, the court concluded, "the condition is utterly lacking in any notice of what behavior would violate it."[47] Likewise here, there had been no diagnosis of sexual deviancy nor any record as to how the counselor was to define "pornography" as it applied to Ryan's particular situation. Thus, the condition lacks sufficient notice of what behavior would violate it and must be stricken.

In fact, the condition here is even less specific than in Bahl, and did not limit the prohibited materials to those related to the defendant's particular deviancy. It simply prohibited Ryan from possessing any pornographic materials as defined by the sexual deviancy therapist. This seems to suffer the same vagueness problems created by a condition that simply delegates to the CCO to

[44] 127 Wn. App. 630, 643, 111 P.3d 1251 (2005).
[45] 164 Wn.2d 739, 761, 193 P.3d 678 (2008).
[46] Bahl, 164 Wn.2d at 761.
[47] Bahl, 164 Wn.2d at 761.

define the scope of the prohibition, which Bahl also struck as unconstitutional, concluding, "The fact that the condition provides that Bahl's [CCO] can direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement."[48]

Ryan's remaining vagueness challenges to the following conditions set forth in Appendix F of the Judgment and Sentence are without merit:

> The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by the [Department of Corrections].
> The Court may also order any of the special conditions:
> . . .
> (III) The offender shall participate in crime-related treatment or counseling services;
> . . .
> (VI) The offender shall comply with any crime-related prohibitions.

As the State argues, when read in context, the specifics of these general conditions are identified in Appendix H.[49] For example, condition 11 requires Ryan to submit to a psychosexual evaluation and comply with any recommended treatment by a sexual deviancy counselor and condition 18 requires him to submit to a polygraph and plethysmograph testing as deemed appropriate by the CCO or therapist. Appendix H also lists several specific crime-related prohibitions, including prohibiting Ryan from contacting the victims, holding a position of authority or trust involving minor children, initiating or prolonging physical contact with any minor children, going to places where children

[48] Bahl, 164 Wn.2d at 758.
[49] Appendix H states, "The court having found the defendant guilty of offense(s) qualifying for Community Custody, it is further ordered as set forth below."

congregate, possessing pornography, and accessing the Internet without childlocks. Thus, Ryan's vagueness challenge to these conditions is without basis.

We affirm the conviction and remand for the trial court to vacate certain conditions of community custody consistent with this opinion.

Grosse, J.

WE CONCUR:

Dwyer, J.

Becker, J.