IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CATREENA RAI MENDENHALL, Appellant.	No. 42120-8-II UNPUBLISHED OPINION

Johanson, A.C.J. — Catreena Rai Mendenhall appeals her jury trial conviction of second degree child molestation. She argues that the trial court violated her constitutional right[1] to be present at all critical stages of the proceedings by discussing jury instructions in her absence. Additionally, in her pro se statement of additional grounds for review (SAG), she argues that (1) statements she made to a deputy during a polygraph examination were not admissible because she had asked for a lawyer before making the statements; and (2) the State violated an order in limine prohibiting the parties from presenting evidence from Internet or computer sources. Because (1) Mendenhall has not shown that the trial court's review of the jury instructions in her absence addressed anything other than purely legal or ministerial issues, (2) Mendenhall agreed to the use

[1] *See* U.S. Const. amend. VI.; Wash. Const. art. 1, § 22.

of the evidence related to her statements during the polygraph examination as impeachment evidence, and (3) Mendenhall failed to preserve the issues related to the admissibility of computer/Internet related evidence, we affirm.

FACTS

After CC reported to a friend that Mendenhall, a family friend who was five years older than CC, had had repeated sexual contact with her when she (CC) was between the ages of 13 and 14, the State charged Mendenhall with second degree child rape, second degree child molestation, third degree child rape, and third degree child molestation. The case proceeded to a jury trial.

I. Admissibility of Internet/Computer Evidence

Before trial, the State moved in limine to exclude "any comment or reference to the Internet activities of the alleged victim, including My Space, Facebook profiles, e-mails, et cetera, in the presence of the jury without a hearing" to determine the information's "relevance." 2B VRP at 174-75. Mendenhall agreed to this limitation. 2B Verbatim Report of Proceedings (VRP) at 175.

Later, during its cross-examination of Mendenhall, the State questioned her about an Internet or computer communication that she had sent to CC. Mendenhall did not object.

II. Mendenhall's Polygraph Statements

Also before trial, the trial court held a CrR 3.5 hearing to determine the admissibility of statements Mendenhall made during a polygraph examination conducted by Deputy Rick Buckner. Deputy Buckner testified that before starting the polygraph test, he advised Mendenhall

of her *Miranda*[2] rights, Mendenhall did not ask for a lawyer until nearly two hours into the polygraph examination, and he immediately terminated the testing and ceased questioning Mendenhall when she requested counsel. Mendenhall did not testify at the CrR 3.5 hearing. The trial court found that Mendenhall had made the statements at issue after Deputy Buckner had advised her of her rights and that those statements were admissible; the court did not admit any statements that Mendenhall made following her request for an attorney because there were no such statements.

The next day, however, the State advised the trial court that the parties had reviewed a Digital Video Disc (DVD) recording of the polygraph examination and that there were "some statements in there that differ from what [Deputy] Buckner's testimony was" at the suppression hearing.[3] 3A VRP at 231. As a result, the State indicated that it did not intend to present any statements Mendenhall made during the polygraph examination or to call Deputy Buckner as a witness, unless it did so to rebut Mendenhall's testimony. Mendenhall's counsel responded, "Okay." 3A VRP at 231.

At trial, Mendenhall testified in her defense and denied any sexual contact with CC. But she admitted that she had, at one point, told Detective Thad W. Eakins that she had kissed CC because he was "badgering" her (Mendenhall) and she was upset and wanted him to leave her alone. 3B VRP at 458. But she continued to assert that she had not, in fact, ever kissed CC. On cross-examination, she also denied having told anyone that she had kissed CC more than once. In

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[3] The record does not show what discrepancies the DVD revealed.

response to that denial, the State cross-examined Mendenhall about what she had told Deputy Buckner, and she admitted that she had told him that she had kissed CC on the lips at least 50 times and that her arm may have draped over CC because they would sleep in the same twin bed when Mendenhall would sleep over at CC's home. Mendenhall did not object to any of the State's questions about her statements to Deputy Buckner.

III. Credibility Testimony and Review of Jury Instructions

Additionally, during Mendenhall's cross-examination of Detective Eakins, Mendenhall questioned the detective twice about his having called Mendenhall "a liar" during his interview with her and whether he thought she was a liar because he did not believe her. 3B VRP at 424, 427. Detective Eakins confirmed that that he called Mendenhall "a liar" because he did not believe her when she told him that all she ever did was "kiss and cuddle" with CC. 3B VRP at 427.

When Detective Eakins again referred to his calling Mendenhall a liar, the State objected. After the jury had left the courtroom, the trial court acknowledged that this testimony violated a defense pretrial motion prohibiting witnesses from expressing opinions about the truthfulness of another witness and noted that Mendenhall had herself solicited this testimony. When the court suggested that this might be some kind of "strategic choice" by Mendenhall, her counsel responded that it was not a strategic choice and that he simply was not thinking. 3B VRP at 428. The court then told defense counsel that it would give him the opportunity to discuss the possibility of a limiting instruction with Mendenhall. During counsel's direct examination of Mendenhall, Mendenhall herself mentioned that Detective Eakins had raised his voice and "called

[her] a liar" during one of their conversations. 3B VRP at 459. The State asked the court to strike this statement. The trial court did not respond to this motion.

After the parties rested, the trial court announced that it would meet with counsel "in the jury room" to "go over" the jury instructions and that Mendenhall was free to leave. 3B VRP at 472-73. The court indicated that they would "take up any formal record with respect to that in the morning, so the defendant doesn't need to remain present here this afternoon." 3B VRP at 473. There is nothing in the appellate record describing exactly what occurred during the meeting in the jury room.

The next morning, the trial court stated on the record that it had met with counsel the previous evening and that they had "discussed an additional instruction which is now proposed No. 20, which was provided by the State and then revised by the Court this morning." 4 VRP at 476. Instruction 20, which appears to be in response to Detective Eakins's "liar" testimony, provided:

> You may have heard evidence relating to one witness's opinion on the credibility of another witness. You are not to consider one witness's opinion of another witness's credibility. You are the sole judges of the credibility of the witness.

Clerk's Papers at 25. The court also noted that Mendenhall had provided five additional instructions that morning relating to a proposed "lesser included offense of assault in the fourth degree." 4 VRP at 476. The court then invited further discussion, stating,

> I provided a set of the proposed instructions as discussed last evening to counsel and this would be the opportunity for further discussion on the record and any taking of any exceptions, corrections, et cetera, to the . . . proposed instructions.

4 VRP at 476.

The State objected to Mendenhall's five newly proposed instructions. Mendenhall objected to several instructions, not including instruction 20, and argued in favor of her newly proposed fourth degree assault instructions. The parties did not raise any issues related to proposed instruction 20, and the trial court gave this instruction to the jury.

The jury found Mendenhall guilty on one count of second degree child molestation. Mendenhall appeals.

ANALYSIS

Mendenhall argues that the trial court violated her constitutional right to be present at all critical stages of her trial by reviewing the jury instructions with counsel outside of her presence. In her SAG, she also argues that (1) any statements she made to Deputy Buckner during her polygraph examination were not admissible because she had asked for a lawyer before making the statements, SAG (Additional Ground 1), and (2) the State violated an order in limine prohibiting the parties from presenting evidence from Internet or computer sources. We reject each of these arguments.

I. Right to Presence

Mendenhall first argues that the trial court violated her constitutional right to be present at all critical stages of her trial by considering the jury instructions outside of her presence.[4] Whether the trial court's actions have violated a defendant's constitutional right to be present is a question of law that we review de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796

[4] Mendenhall does not argue that the jury instruction conference violated her or the public's public trial right.

(2011) (citing *State v. Strode*, 167 Wn.2d 222, 225, 217 P.3d 310 (2009)).

Although "[a] criminal defendant has a fundamental right to be present at all critical stages of a trial," Washington courts have repeatedly held that a defendant does not have a constitutional right to be present at proceedings involving purely legal or ministerial matters, including proceedings related to jury instructions, unless those matters require the resolution of disputed facts. *Irby*, 170 Wn.2d at 880-81 (citing *Rushen v. Spain*, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983)); *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 483-84, 965 P.2d 593 (1998); *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835, *clarified on other grounds*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). Any potential violation can, however, be cured if the trial court later apprises the defendant of the matter and hears the matter on the record and in the defendant's presence. *See Pirtle*, 136 Wn.2d at 484. The appellant has the burden of providing an adequate record of the challenged proceeding to allow us to determine whether the proceeding addressed purely ministerial issues or involved discussion or resolution of disputed facts or legal issues. *See State v. Bennett*, 168 Wn. App. 197, 206 n.9, 275 P.3d 1224 (2012).

The record here does not show that the trial court and counsel addressed anything beyond purely legal or ministerial matters outside of Mendenhall's presence; nor does it show that they addressed any matters that required a resolution of disputed facts or of legal issues. Additionally, the trial court (1) initially advised Mendenhall's counsel to discuss the possibility of a limiting instruction consistent with the defense strategy, allowing Mendenhall the

opportunity to discuss any limiting instruction with counsel; and (2) invited the parties, in Mendenhall's presence, to place their objections and present argument about the jury instruction on the record the day after the jury instruction conference it held in the jury room. Neither party objected to instruction 20. Mendenhall has failed to show, based on this record, that the trial court violated her right to presence and the trial court cured any potential error. Accordingly, this argument fails.

II. Mendenhall's Polygraph Statements

In her SAG, Mendenhall argues that statements she made during her polygraph examination were not admissible because she had asked for a lawyer before making the statements. The record shows that (1) the State admitted that a DVD recording of the polygraph examination somehow contradicted Deputy Buckner's CrR 3.5 hearing testimony; (2) the State advised the court that it would not introduce evidence related to the polygraph examination unless it was attempting to impeach Mendenhall's testimony, and (3) the State asked and Mendenhall answered some questions about her responses to the polygraph examination during the State's cross-examination of her. Defense counsel agreed to impeachment use of the statements. At trial the State did not use statements from the DVD except to impeach Mendenhall. Defense did not object. There was no error. Accordingly, based on this record, this argument has no merit.

III. Internet/Computer Evidence

Finally, Mendenhall asserts in her SAG that the State violated an order in limine prohibiting the parties from presenting any kind of evidence from Internet or computer sources. She appears to be referring to the State's introduction during its cross-examination of Mendenhall of a computer or Internet message Mendenhall sent to CC. [5]

Before trial, the parties agreed to the State's motion in limine to exclude "any comment or reference to the Internet activities of the alleged victim, including My Space, Facebook, profiles, e-mails, et cetera, in the presence of the jury without a hearing" to determine the information's "relevance." 2B VRP at 174-75. Mendenhall is correct that there was no hearing on the admissibility of this Internet/computer communication. But Mendenhall has waived this issue because she failed to object. *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006) (when the trial court has granted the motion in limine, a party must object to any potential violation of the order in limine in order to preserve the error for appeal) (adopting approach in *State v. Sullivan*, 69 Wn. App. 167, 171-72, 847 P.2d 953, *review denied*, 122 Wn.2d 1002 (1993)), *cert. denied*, 551 U.S. 137 (2007). Accordingly, Mendenhall is not entitled to relief on this ground.

[5] To the extent Mendenhall may be referring to other references to computer/Internet use in the record, her argument is too vague to allow us to identity those references. *See* RAP 10.10(c) (appellant must inform the court of "the nature and occurrence of alleged errors").

We affirm.

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

Johanson, A.C.J.

We concur:

Quinn-Brintnall, J.

Penoyar, J.