IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28151-5-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
RUDOLFO URIBE ACOSTA,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Kulik, C.J. — Rudolfo Uribe Acosta appeals his convictions for first degree child molestation and first degree rape of a child. He asserts that he was denied a fair trial by an impartial jury because, during deliberations, the court allowed the jury to view a forensic interview videotape of the child victim. We conclude there was no abuse of discretion. The trial court properly admitted the videotape, limited its use, and strictly controlled the playback to the jury.

Mr. Acosta also contends he was exposed to double jeopardy because the jury was not properly instructed. Mr. Acosta was not subject to double jeopardy when charged with two distinct crimes, based on separate acts, for which the court gave two separate "to

convict" instructions. Therefore, we affirm the convictions.

FACTS

In 1994, Rudolfo Acosta married Maria Acosta and became the step-grandfather to G.R., born January 18, 1998, and A.S., born August 10, 1994. The girls were ages 10 and 14 at the time of the trial. During 2006, the children's mother became seriously ill and the children began to spend considerable time at Mr. Acosta's home.

G.R. and her older sister A.S. were very close and sometimes played a "pinky swear" game where one girl would tell the other a secret in exchange for a secret from the other girl. Report of Proceedings (RP) (Mar. 25, 2009) at 42. In early 2006, during one of these games, G.R. told A.S. that Mr. Acosta had touched her at her "lower part." RP (Mar. 25, 2009) at 122. According to testimony given at trial, G.R. disclosed that inappropriate touching occurred approximately five times and that during the last incident, Mr. Acosta kissed G.R. "[i]n [her] private area." RP (Mar. 25, 2009) at 21.

The following day, after being told about the "kissing," A.S. informed the girls' mother, Francisca Bell, of the allegations. On January 31, 2007, Karen Winston of Partners with Family and Children conducted a forensic interview with G.R., a recording of which was eventually admitted as State's exhibit 6, and played for the jury.

Ultimately, law enforcement was notified of the allegations and began an

investigation of Mr. Acosta. Detective Janell Pogachar of the Spokane Police Department testified that she contacted Mr. Acosta asking him to give his side of the story. He voluntarily gave a statement at the public safety building.

During the interview with detectives, Mr. Acosta said that while he and G.R. were horsing around, his hand slipped under G.R.'s waistband but did not touch her vagina. Similarly, Detective Pogachar testified that Mr. Acosta stated that while he was attempting to blow on G.R.'s stomach, her pants came down exposing her vagina and that he might have made contact with her vagina with his mouth. Detective Pogachar testified that she asked Mr. Acosta directly if his mouth touched G.R.'s vagina. Mr. Acosta said "'yes,'" but that he was not aroused by the contact. RP (Mar. 25, 2009) at 175. Following the interview, Mr. Acosta was charged with first degree rape of a child and first degree child molestation.

G.R. testified at trial that the touching happened five times. According to her testimony, the first incident occurred while sitting on Mr. Acosta's lap, when he touched her on her "private area" above her clothes. RP (Mar. 24, 2009) at 253. G.R. remembered that the last time she was touched was around Christmas 2006 but could not remember the details. She stated that the touching was on her clothes on her private area.

Because G.R. could not remember her previous statements, she was permitted,

over defense objection, to refresh her memory by viewing a DVD recording of a forensic interview she had with Karen Winston in which G.R. described the abuse.

Ms. Winston testified regarding the forensic interview she conducted of G.R. on January 31, 2007. The court played the recording once for the jury with G.R. present. In addition to laying the foundation for the introduction of the recording, Ms. Winston also testified that although G.R. stated that she had only been touched by Mr. Acosta using his hand, a child of G.R.'s age, when asked "[w]hat did he touch you with," might distinguish between touching and kissing. RP (Mar. 24, 2009) at 307.

After watching the tape, in a hearing outside the presence of the jury, G.R. stated that she remembered that during the last incident, Mr. Acosta pulled down her pants and underwear, kissed her in her private area, and then asked her if it felt good. During this exchange, the prosecutor touched his beard or mouth while asking, "What, if any, contact." RP (Mar. 25, 2009) at 19. Defense counsel objected, stating, "[the prosecutor] made this motion (indicating) with his hand at his mouth." RP (Mar. 25, 2009) at 19. The prosecutor claimed that the motion was not done consciously. The judge warned the prosecutor not to give G.R. any signals, but allowed G.R. to answer and questioning to continue.

On cross-examination, G.R. indicated that when the prosecutor touched his mouth,

it helped her remember what had happened to her. Defense counsel asked for dismissal and moved for a mistrial, based on prosecutorial misconduct. After argument by both parties, the court ruled that because the jury was not present, there was no mistrial. Furthermore, the court indicated:

> I allowed her to look at the video to see if it refreshed her memory. . . . [S]he did remember some of the stuff that she had forgotten. And what she said is "It did help me remember."
>
> . . . .
>
> . . . I'm going to allow her to testify as to what her memory was.

RP (Mar. 25, 2009) at 30.

G.R. then testified in front of the jury that the DVD had helped her remember that during the last incident, Mr. Acosta had started touching her in her private area and that she moved away from him. According to G.R., Mr. Acosta then moved closer to her, pulled her pants and underwear down, began kissing her in her "private area," and then asked G.R. if it "felt good." RP (Mar. 25, 2009) at 34. G.R. testified that she told her sister about the abuse during a "pinky swear" game where they exchanged secrets, except that this time she told her sister to tell somebody. RP (Mar. 25, 2009) at 42.

Francisca Bell, G.R.'s mother, testified that she was told of the abuse by her daughter A.S. in January 2007. Ms. Bell called Maria Acosta, G.R.'s grandmother, to have her bring G.R. home immediately. Ms. Bell testified that G.R. told her that Mr.

Acosta had hurt her; that he kissed her "'down there.'" RP (Mar. 25, 2009) at 79.

A.S., G.R.'s 14-year-old sister, testified that sometime in 2006, G.R. told her that Mr. Acosta had touched her "'down there'" referring to her vagina. RP (Mar. 25, 2009) at 105. According to A.S., G.R. told her about five different incidents of touching more than once. A.S. also testified that G.R. told her that Mr. Acosta had kissed her once "'down there'" and that it was this disclosure that ultimately prompted her to tell her mother the next day. RP (Mar. 25, 2009) at 106.

Florentina Sanchez, Francisca Bell's sister and aunt to G.R. and A.S., testified that she was with G.R. and Maria Acosta when Ms. Bell called Ms. Acosta to have her return G.R. She testified that once they all returned to Ms. Bell's home, Ms. Bell asked G.R. if this abuse had really happened and G.R. became very emotional and nodded, indicating that she had been molested by Mr. Acosta.

Maria Acosta, G.R.'s grandmother, and the defendant's wife since 1994, also testified. She stated that when Ms. Bell contacted her to bring G.R. home after being told of the allegations, Ms. Acosta asked G.R., "did Grandpa Rudy do something to you" and G.R. nodded her head. RP (Mar. 26, 2009) at 319. Ms. Acosta also testified that later that day, she pulled G.R. aside into the bathroom and asked her, "Did grandpa touch you" and G.R. nodded. RP (Mar. 26, 2009) at 323. Ms. Acosta then asked, "Where" and G.R.

stated "'down there.'" RP (Mar. 26, 2009) at 323.

Detective Janell Pogachar of the Spokane Police Department testified regarding statements made by Mr. Acosta. According to Detective Pogachar, she contacted Mr. Acosta and left a message informing him that there was an investigation involving him and that she wanted to get his side of the story. Mr. Acosta called back, stating he wanted to get the matter taken care of right away and offered to come to the public safety building within 30 minutes. During this interview, Mr. Acosta stated that he would often tickle G.R. and that during one of these tickle games, while G.R. was sitting on his lap, Mr. Acosta's hand slid under G.R.'s waistband because of her squirming. Later, when Detective Pogachar asked Mr. Acosta if his hand touched G.R.'s private part when his hand went under her waistband, he answered, "'No. Never.'" RP (Mar. 25, 2009) at 177.

Detective Pogachar also testified that Mr. Acosta stated that during another game, while he was blowing on G.R.'s stomach, G.R. squirmed and her pants came down below her crotch. According to Detective Pogachar, she then asked Mr. Acosta if his mouth made contact with G.R.'s vagina, and he replied, "'It might have.'" RP (Mar. 25, 2009) at 175. Detective Pogachar then immediately asked the same question a second time and Mr. Acosta said, "'Yes.'" RP (Mar. 25, 2009) at 175. Detective Pogachar testified that

Mr. Acosta denied being aroused by the contact.

Mr. Acosta testified, denying all charges. He stated that he never did anything to hurt G.R., he never touched his lips or mouth to G.R.'s vagina, and he never inappropriately touched G.R. with his hand. Furthermore, Mr. Acosta testified that he never admitted any of this to law enforcement. Rather, he testified that the police officers had asked him questions he did not understand.

After the trial ended, the jury was instructed and began deliberating. The jury submitted a written request stating, "May we watch the DVD of the interview with Dr. Winston that was included in the evidence? (Need player, please)." Clerk's Papers (CP) at 109. Following argument by both parties, and over defense counsel's objection, the court allowed the DVD to be played one time by the bailiff.

The jury subsequently found Mr. Acosta guilty of first degree rape of a child and first degree child molestation. Furthermore, the jury returned a special verdict finding that Mr. Acosta committed the crime of child molestation as part of an ongoing pattern of sexual abuse of the same victim under the age of 18 manifested by multiple incidents over a prolonged period of time. He was sentenced to a standard range minimum term of 144 months and 89 months, respectively, as well as a maximum term of life for each conviction. He now appeals his conviction and sentence.

ANALYSIS

Replay of Video/Audio Recording. CrR 6.15 allows the jury to take all of the exhibits admitted into evidence to the jury room during deliberations. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). A jury may have access to a recorded exhibit during deliberations if, "'in the sound discretion of the trial court, the exhibits are found to bear directly on the charge and are not unduly prejudicial.'" *Id.* at 98 (quoting *State v. Frazier*, 99 Wn.2d 180, 189, 661 P.2d 126 (1983)). A court may permit the replaying of admitted exhibits but should do so in a "way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence." CrR 6.15(f)(1). The court's decision to replay an electronically recorded exhibit, which is properly admitted for the jury at trial, is reviewed for an abuse of discretion. *Frazier*, 99 Wn.2d at 190-91. This court finds an abuse of discretion only if no reasonable person could have taken the view chosen by the trial court. *Castellanos*, 132 Wn.2d at 97.

Mr. Acosta claims that the interview did not bear directly on the charge because it was neither a confession nor physical evidence. His argument is not persuasive. The forensic interview replayed for the jury bore directly on the charges against Mr. Acosta. The focus of the interview was G.R.'s recollection of incidents of sexual abuse by Mr.

Acosta. Both the factual assertions submitted by G.R. in the interview, as well as her demeanor and memory of the events, are highly probative of G.R.'s credibility and Mr. Acosta's guilt.

Mr. Acosta further asserts that this recording was unduly prejudicial because it was "'likely to stimulate an emotional response rather than a rational decision.'" Appellant's Br. at 8 (quoting *Castellanos*, 132 Wn.2d at 100). This is the same inquiry used by the court in determining the initial admissibility of the evidence; that is, whether the danger of undue prejudice substantially outweighs the probative value of such evidence. *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995) (citing ER 403). Interviews with child victims have been admitted in cases such as these despite their prejudicial nature. *See e.g.*, *State v. Dunn*, 125 Wn. App. 582, 105 P.3d 1022 (2005). The fact that the subject of child molestation and rape is "abhorred by our society," as Mr. Acosta candidly admits, does not automatically foreclose the possibility that jurors would make a rational decision when confronted with evidence supporting charges of sexual abuse. Appellant's Br. at 11.

In this case, the court properly admitted the DVD recording of G.R.'s forensic interview and then published the DVD exhibit to the jury, taking special care to do so in a manner that did not overly emphasize the evidence. The trial court strictly controlled

how the DVD was replayed for the jury by limiting the location of the playback and the number of times it could be viewed. Also, the replay was supervised, and the parties were present during the replay. The court precluded any further comment or argument. The court did not abuse its discretion by replaying the properly-admitted exhibit of the forensic interview of G.R. for the jury.

Double Jeopardy. "'The right to be free from double jeopardy . . . is the constitutional guaranty protecting a defendant against multiple punishments for the same offense.'" *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008) (quoting *State v. Borsheim*, 140 Wn. App. 357, 366, 165 P.3d 417 (2007)). This court reviews challenges to jury instructions de novo, within the context of the jury instructions as a whole. *Id.*

Mr. Acosta claims that because the court did not instruct the jury that its instruction defining sexual contact was limited to sexual molestation, the definition also applied to the instruction that defined sexual intercourse. And, therefore, the State had to prove that the rape of a child was for the purpose of gratifying sexual desires of either party. Since the intent element is the essential difference between the charges of first degree rape of a child and first degree child molestation, the State assumed the burden of proving a specific intent for the child rape, and the jury could have used the same act as a the factual basis for both of Mr. Acosta's convictions.

The issue of defective jury instructions is a manifest error affecting a constitutional right which may be raised for the first time on appeal. *Berg*, 147 Wn. App. at 931. However, even if an error rises to a constitutional magnitude, a party may still be barred from raising the alleged error if error was invited by the party. *City of Seattle v. Patu*, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002). A party cannot claim error in an instruction which was proposed by that party and accepted by the trial court. *Id.* at 721 (quoting *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999)).

Here, Mr. Acosta argues that instruction 12 should have included a disclaimer expressly limiting it to the preceding "to convict" instruction for child molestation or, in the alternative, that instruction 12 should not have been given. However, the court's instruction 12 was identical to Mr. Acosta's proposed instruction 1, and the court's "to convict" instruction was substantively identical to Mr. Acosta's proposed instruction 2.

An invited error must be based upon an affirmative, knowing, and voluntary act. *In re Pers. Restraint of Call*, 144 Wn.2d 315, 328, 28 P.3d 709 (2001). Mr. Acosta gave a full set of instructions to the court which showed that he believed them to be a proper statement of the law. His proposed instructions 1 and 2 did not materially differ from the court's instructions 11 and 12; therefore, the invited error doctrine bars Mr. Acosta from alleging double jeopardy based upon instruction 12.

Mr. Acosta also asserts that it was error for the court to *not* include a "separate and distinct" instruction based upon *Borsheim's* mandate that such an instruction be given when multiple identical counts are alleged to have occurred within the same charging period. Appellant's Br. at 15.

Jury instructions "'must more than adequately convey the law. They must make the relevant legal standard "manifestly apparent to the average juror."'" *Borsheim*, 140 Wn. App. at 366 (quoting *State v. Watkins*, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). Therefore, when an instruction does not make it manifestly clear that the State is not seeking to punish the defendant multiple times for a single act, the defendant may be exposed to double jeopardy. *Id.* at 367.

In this case, Mr. Acosta was charged with first degree rape of a child and first degree child molestation—two distinct crimes. The court gave separate and distinct "to convict" instructions for each count because the elements of the charges differed, and the crimes were based on different acts. Additionally, the court instructed the jury that "[a] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other count." CP at 94.

Because Mr. Acosta was charged with only one count each of two distinct crimes, it was unnecessary for the court to give a "separate and distinct" instruction. The

instructions made the relevant legal standard manifestly apparent to the average juror.

Mr. Acosta was not exposed to double jeopardy.

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Mr. Acosta asserts he was denied due process when the prosecutor allegedly made improper gestures when questioning G.R. outside of the presence of the jury. Specifically, the prosecutor touched his hand to his face. Mr. Acosta asserts this action prompted G.R. to answer that Mr. Acosta had touched her private area with his mouth. The court denied Mr. Acosta's motion for a mistrial.

To prevail on a claim of prosecutorial misconduct, Mr. Acosta must show that the prosecutor's conduct was improper and that there is a substantial likelihood that the misconduct affected the verdict. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). A trial court has discretion to grant a new trial based upon prosecutorial misconduct when the defendant's right to a fair trial was prejudiced. *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). And the trial court is in the best position to determine whether the defendant has been deprived of a fair trial. *Id.* We review the trial court's ruling—that there was no prosecutorial misconduct and consequent denial of a motion for a mistrial—for an abuse of discretion and the ruling is entitled to some deference. *State v. Borg*, 145 Wn.2d 329, 335, 36 P.3d 546 (2001).

Mr. Acosta argues that the prosecutor's hand gestures coached G.R. The trial court denied the objection to the alleged gestures made by the prosecutor by touching his face and/or beard, based in part on the judge's observation that the prosecutor had been touching his face and/or beard in a similar manner throughout the trial. The court stated in reply to defense counsel's objection and motion for a mistrial that:

> [A]t this point, I don't see how those—you're saying that he's doing it on purpose. I didn't see it so I can't tell you. The jury is not here so there's not a mistrial at this point.

RP (Mar. 25, 2009) at 29.

In this case, the trial court considered the allegedly improper conduct in the context of the entire trial. The court noted that the prosecutor had been touching his face similarly throughout the trial. G.R.'s allegedly improper refreshed memory was consistent with her previous statements, and the testimony given by several family members, as well as being plausible under Mr. Acosta's theory of the incidents.

These facts also pass the constitutional harmless error test. There was overwhelming evidence of Mr. Acosta's guilt, including his own statements. We conclude that the court did not abuse its discretion when it denied the motion for a mistrial.

We affirm the convictions.

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

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Kulik, C.J.

WE CONCUR:

_____ _____
Brown, J. Siddoway, J.