Supreme Court No. ~~100~~658-6
(COA No. 81949-6-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RANDY KEITH,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Randy Keith, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Keith seeks review of the Court of Appeals decision dated January 18, 2022, which is attached.

C. ISSUES PRESENTED FOR REVIEW

1. Did the trial court preclude Mr. Keith from his opportunity to present a defense when it prevented him from introducing motive evidence to explain why the complainant fabricated her story?

2. Was Mr. Keith prejudiced by the trial court's decision to allow hearsay evidence to be admitted that did not meet the exception for treatment of diagnosis?

3. Did the court's decision to substitute the complainant's name for her initials in the jury instructions when her name was used in the charging instruments and throughout the trial constitute a comment on the evidence?

4. Did the prosecution commit flagrant and ill-intentioned misconduct when it highlighted the change from name to initials in the jury instructions as a way to protect child victims?

D. STATEMENT OF THE CASE

Zacra Burris, Dalelynn's mother, worked long hours, sometimes two shifts a day. 8/20 RP 443. [1] Due to a brain injury, Ms. Burris had memory problems, making work challenging. *Id*. at 446. She cycled through jobs. 8/21 RP 637. Multiple people watched the

[1] The transcripts are not sequential. To reduce confusion, the day and month of the hearing will be included.

complainant and her siblings when her mother was unavailable. *Id*. at 457.

Ms. Burris had dangerous boyfriends who were violent during and after their relationship with Ms. Burris. 8/21 RP 612-13. Dalelynn did not like having her mother's boyfriends in her house. *Id*. at 635.

Dalelynn was exposed to multiple sexual encounters. Child Protective Services records showed at least one sexual assault before the complainant met Mr. Keith. 8/21 RP 624, CP 88-89.

No one monitored what the complainant watched on television. She watched several shows with sexual content, including *Big Mouth*, a cartoon intended for older youth that explores sexual issues. 8/21 RP 702, 8/20 RP 591.

Mr. Keith got along with Ms. Burris' children but tried to exert some control over their behavior. 8/20 RP

473-74. He did not physically discipline them, but he did take away Dalelynn's Xbox as punishment. 8/21 RP 672.

Mr. Keith bonded with Ms. Burris' boys. 8/20 RP 508. Dalelynn did not get along with him and was angry with his discipline. *Id*. In a note to Santa Claus, the complainant wished Santa would kill Mr. Keith because he took her Xbox away. *Id*. at 540.

Dalelynn's grandmother, who saw the note, became concerned when Dalelynn wet her bed, calling CPS. 8/20 RP 541, 557. Protective Services took Dalelynn to meet with Christa Kleiner, a forensic nurse. 8/20 RP 573.

Ms. Kleiner interviewed and examined Dalelynn in her office at Dawson Place Child Advocacy Center. *Id*. The Advocacy Center is not a medical facility but a building where prosecutors, child interviewers, and

sheriffs work together on sexual assault cases. *Id*. After the interview, the government charged Mr. Keith with two counts of rape of a child in the first degree and two counts of child molestation in the first degree. CP 68-69.

Each time Dalelynn spoke of Mr. Keith, she told a different story. Dalelynn spoke with the forensic nurse. CP 80. The sheriff interviewed Dalelynn twice at the Advocacy Center, where Ms. Kleiner conducted her interview. CP 80. Defense counsel interviewed her after these police interviews. CP 81. She also spoke with other persons about this incident in unrecorded conversations. Each time she spoke, her story changed. CP 82.

Mr. Keith's defense at trial was that Dalelynn was not telling the truth. 8/24 RP 763. No physical evidence or witness supported her story. Mr. Keith

intended to demonstrate Dalelynn did not like him and no longer wanted him in her life. 8/19 RP 369. Having seen successful allegations of sexual assault resulting in the removal of persons from her life, Dalelynn knew that if she made a sexual assault allegation against Mr. Keith, he would no longer be allowed to be around her. *Id.*

Before trial, Mr. Keith notified the court of his intent to use the past allegations made by Dalelynn to show why the jury should not believe the current claims. CP 85. While the court agreed the evidence could be used for impeachment, it limited Mr. Keith's cross-examination to incidents Dalelynn agreed had happened in a hearing without the jury. 8/20 RP 554, 8/21 RP 624. This ruling precluded Mr. Keith from confronting other witnesses, including Dalelynn's grandmother and her father's girlfriend, about other

incidents and how these experiences shaped Dalelynn's view of using sexual assault allegations to get rid of someone from her life. *Id*.

At trial, the court permitted the prosecutor to have the forensic nurse read statements Dalelynn made during a forensic exam directly into the record. 8/20 RP 577. Dalelynn made these statements at the Dawson Place Advocacy Center. 8/20 RP 391.

During the trial, the parties and the court referred to Dalelynn by her first or full name. *E.g.,* 8/20 RP 397, 449, 532, 573, 8/21 RP 628. The court stopped using her name in its closing instructions and substituted her name with her initials. CP 56-57, 62-63. In his closing argument, the prosecutor told the jury that the court did this to protect children and their identities. 8/24 RP 754.

A jury found Mr. Keith guilty of the charged offenses. 8/24 RP 594-95. The court imposed a sentence of 240 months to life. *Id*. at 821.

E. ARGUMENT

1. Mr. Keith was deprived of his right to present a defense.

Both the federal and state constitutions guarantee the right to present a defense. U.S. Const. amend. VI; Const. art. I, § 22; *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). This Court reviews individual evidentiary rulings for an abuse of discretion and considers de novo whether the rulings deprived Mr. Keith of his right to present a defense. *State v. Arndt*, 194 Wn.2d 784, 797–98, 453 P.3d 696 (2019).

If the evidence the defendant seeks to introduce is relevant, the reviewing court must weigh the right to

produce relevant evidence against the government's interest in limiting the prejudicial effects of that evidence to determine if excluding the evidence violates the defendant's constitutional rights. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983); *State v. Orn*, 197 Wn.2d 343, 353, 482 P.3d 913 (2021).

In *Jones*, the trial court barred the defendant from introducing evidence based on a rape shield statute. This Court acknowledged the *Hudlow* requirements that evidence be minimally relevant and the required balancing of the government's interest and the defendant's need to present information. *Jones*, 168 Wn.2d at 720. There, this Court held the exclusion of evidence effectively barred the defendant from presenting his defense and thus violated his Sixth Amendment rights. *Id.* at 721. This Court held that the Sixth Amendment protects only evidence that is of high

probative value, but rather that evidence of "extremely high probative value . . . cannot be barred without violating the Sixth Amendment." *Id.* at 724.

Even though the trial court believed prior allegations of sexual misconduct were likely to be admissible under Mr. Keith's theory of defense, it limited how he could explore those issues. 8/14 RP 31. It determined it would not allow evidence from earlier encounters, except through the complainant, as they were only relevant if the complaint remembered them happening. *Id.* Because Dalelynn had not made the prior allegations, the court determined it would preclude Mr. Keith from using them in his defense. *Id.* at 35.

Despite the Court of Appeals' analysis to the contrary, all of the allegations were relevant. App 7. Dalelynn's grandmother notified CPS about her

suspicions because of prior abuse by others. 8/20 RP 542. Knowing that accusing Mr. Keith would get him out of her life, Dalelynn used the opportunity to change her story about hating Mr. Keith because of his restrictions on video games to one that would ensure CPS would force him out of her life. 8/20 RP 521.

In a hearing outside the jury's presence, Dalelynn could only speak about learning about sexual behavior from her older cousin. 8/21 RP 616. She told the court she was afraid of her mother's boyfriends because they had hurt her mother. *Id*. at 613. She denied knowledge of other sexual incidents. *Id*.

The court determined Mr. Keith could ask Dalelynn about prior acts if he established through her that she knew of them. 8/21 RP 624. In deciding whether this restriction was reasonable, this Court should be mindful of Dalelynn's age and unreliable

memory. 8/21 RP 629, 663. Further, Dalelynn likely had developmental delays. 8/20 RP 580.

Given her age, developmental delays, and the discomfort anyone would feel talking about sexual encounters, it is not surprising the complainant provided little information to the court about past abuse. Limiting Mr. Keith's defense to only cross-examining the complainant about what she remembered was equivalent to precluding him from presenting his defense.

Like *Jones*, Mr. Keith's theory of defense hinged on the reliability of Dalelynn's testimony. No other evidence existed to support her claims. Were Mr. Keith able to show Dalelynn understood that when you make accusations against a person, that person no longer can discipline you, the jury would have had serious doubts about her veracity. Without this evidence, the only

thing Mr. Keith could do was establish that Dalelynn did not always tell the truth. Given her vulnerability and the nature of the charges, this was not sufficient.

"Where a case stands or falls on the jury's belief or disbelief of essentially one witness, the witness' credibility or motive must be subject to close scrutiny." *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). Mr. Keith should have been able to argue Dalelynn's history of unfounded claims of sexual abuse and the removal of the purported culprits provided a motive for her false claims here. Given the lack of other evidence to support Dalelynn's story, this evidence was central to Mr. Keith's defense.

The error that the Court of Appeals affirmed conflicts with this Court's opinions. This Court cannot say this error did not contribute to the verdict obtained. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d

889 (2002). Further, the error deprived Mr. Keith of his right to present a defense, which is a fundamental right under the Fourteenth Amendment and Article I, Section 22. Review should be granted.

2. Allowing the jury to hear improperly admitted hearsay statements from a forensic nurse prejudiced Mr. Keith.

Hearsay is generally inadmissible. ER 802. Hearsay evidence is only allowed if the evidentiary rules, court rules, or statute permits its introduction. *State v. Huynh*, 107 Wn. App. 68, 74, 26 P.3d 290 (2001).

Further, the "rules do not give trial courts discretion to admit inadmissible evidence." *State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 690, 370 P.3d 989 (2016). As such, this Court reviews whether the trial court should have admitted a statement de novo as ER 802 explicitly states hearsay evidence is

inadmissible except as provided by the hearsay exception rules. *Id.* at 688- 89; *see also* ER 803, 804. Reversal is required where there is prejudice. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

A statement may be admissible if it is offered for treatment or diagnosis but only "insofar as reasonably pertinent to diagnosis or treatment." *In re Personal Restraint of Grasso*, 151 Wn.2d 1, 84 P.3d 859 (2004). To be admissible, the proponent must demonstrate the statement was reasonably pertinent to treatment by demonstrating (1) the declarant's motive in making the statement was to promote treatment, and (2) the medical professional reasonably relied on the statement for purposes of treatment. *Id.* at 20. The proponent of this evidence bears the burden of establishing it meets the carefully drawn criteria for

admissibility under ER 803(a)(4). *State v. Giles*, 196 Wn. App. 745, 757, 385 P.3d 204 (2016).

If nothing in the record indicates the declarant understood their statement would further their diagnosis or treatment, then the government has failed to establish the first prong of the "reasonably pertinent" test under ER 803(a)(4). *State v. Lopez*, 95 Wn. App. 842, 850, 980 P.2d 224 (1999); *accord State v. Christopher*, 114 Wn. App. 858, 862, 60 P.3d 677 (2003). Here, the government had to show that Ms. Kleiner reasonably relied on Dalelynn's statement for a medical purpose. *State v. Redmond*, 150 Wn.2d 489, 496-97, 78 P.3d 1001 (2003).

Although the Court of Appeals found otherwise, this Court should review whether the government met the threshold for admissibility. App 11. If this Court were to find the error unpreserved, it should accept

review because this was a manifest error. And because the government failed to establish the statements were admissible and because their admission prejudiced Mr. Keith, this Court should reverse Mr. Keith's conviction upon granting review.

First, Ms. Kleiner was not acting in a medical capacity. Ms. Kleiner is a forensic nurse. 8/20 RP 566. Her examination of Dalelynn took place at an advocacy center, where the prosecutor, sheriff, and victim services coordinate sexual assault cases. 8/20 RP 573. And while Ms. Kleiner conducted a physical exam, she provided no reason why one was necessary, except for billing purposes. 8/20 RP at 571. She admitted that any related injuries would be healed if an assault occurred outside of 72 hours like here. *Id*. She provided no other basis for conducting a physical exam.

Next, Ms. Kleiner did not tell the court that Dalelynn understood the exam's purpose to be for medical reasons. 8/20 RP 586. Ms. Kleiner told the court she explained to the complainant what her job was but did not explain it further than that. *Id*. at 573.

The failure to establish a medical reason for the interview is critical to the question of its admissibility. Ms. Kleiner did not interview the complainant for treatment purposes. She worked at the Dawson Place Advocacy Center and was closely linked to the police and the prosecution, who worked in the same building. Nothing about Ms. Kleiner's interview with the complainant suggested it was for medical purposes. ER 803(a)(4). The Court erred when it allowed the government to have Ms. Kleiner read from her report.

This error prejudiced Mr. Keith. The focus of the case was whether Dalelynn was telling the truth.

Allowing out-of-court statements to be heard by the jury by a trusted adult, the nurse, corroborated Dalelynn's statements. This corroboration made it impossible for Mr. Keith to have a fair trial, especially given the number of times Dalelynn changed her story.

Evidentiary errors require reversal if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected" absent the evidence. *In re Det. of Post*, 170 Wn.2d 302, 314, 241 P.3d 1234 (2010). "Where there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010) (internal quotations omitted). This Court should grant review of the Court of Appeal's decision affirming the trial

court's decision not to intervene to prevent the use of improper hearsay that prejudiced Mr. Keith.

3. The use of initials in jury instructions was a comment on the evidence.

The Court of Appeals has held that it is not a comment on the evidence to substitute initials for a person's name in the closing instructions, including here. App 9; *State v. Mansour*, 14 Wn. App. 2d 323, 329-33, 470 P.3d 543 (2020), *review denied*, 196 Wn.2d 1040 (2021). Because the Court of Appeals holding conflicts with this Court's interpretation of what constitutes a comment on the evidence, this Court should grant review.

"Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. IV, § 16. The constitution 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.'" *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)).

During Mr. Keith's trial, everyone referred to the complainant by her first or full name. Only in the closing instructions did this change, and the court suddenly referred to her by her initials instead. CP 56-57, 62-63.

The decision of the court to substitute the complainant's name for her initials conveyed to the jury the court's opinion that the complainant was a child rape victim who needed the court's protection. The prosecution affirmed the court's comment when it told the jury that the reason for using initials was to protect the complainant. 8/24 RP 755. In closing arguments, the government stated, "We use initials in

court documents, when we're dealing with children, to protect their identity." *Id*.

Although this Court denied review in *Mansour*, it should grant review here. While the court may not have intended for its instructions to be a comment on the evidence, when the prosecutor used the initials to explain why they were necessary to protect the child victim, it is clear that the jury could have perceived this change in how she was described to be a comment on the evidence. 8/24 RP 755.

Unlike *Mansour*, this Court can now see the impact of changing the name to initials had on the jury. With no correction from the court, the prosecution told the jury changing the complainant's name to initials was for her protection. This exploitation led the jury to believe the court agreed the complainant was a victim and needed protection. When exploited, as here,

it was an improper comment on the evidence. This Court should grant review.

4. The prosecutor's explanation that initials were used in the instructions to protect the complainant was misconduct.

Even if this Court does not accept review of whether the substitution of names for initials in the jury instructions was not an error, it should review the prosecutor's improper use of the initials. The government argued that initials were used in the instructions to protect Dalelynn. 8/24 RP 755. The Court of Appeals did not find this to be misconduct because it was proper for the court to substitute initials for names in jury instructions. App 11.

The Court of Appeals analysis misses the fundamental problem with the prosecution's decision to take advantage of the name switch. By highlighting the initials for the jury, it telegraphed that the trial court

understood Dalelynn was a victim the jury needed to protect. This was misconduct.

In closing arguments, the government stated, "We use initials in court documents, when we're dealing with children, to protect their identity." 8/24 RP 755. When this prosecutor made this statement, it deprived Mr. Keith of his right to a fair trial. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Because this misconduct could not be cured and likely affected the outcome of Mr. Keith's trial, it requires a new trial.

Misconduct violates the "fundamental fairness essential to the very concept of justice." *Donnelly v. DeChristoforo*, 416 U.S. 637, 642, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); U.S. Const. amend. XIV; Const. art. I, § 3, § 22. The Court must reverse where it finds the government committed misconduct by making

inappropriate remarks, and those remarks had a prejudicial effect. *State v. Fuller*, 169 Wn. App. 797, 812, 282 P.3d 126 (2012).

This Court can find that this misconduct shifted the burden of proof. *Allen*, 182 Wn.2d at 373–74; *State v. Lindsay*, 180 Wn.2d 423, 434, 326 P.3d 125 (2014). When the government told the jury the court changed the complainant's name to initials in its instructions to protect her, the government subtly argued the jury also had a duty to protect the complainant. This subtle shift reduced the government's burden of proof by alerting the jury to the court's belief that the complainant was a victim, even if that was not what the court intended.

The comment also exceeded the government's authority to argue the law as stated in the trial court's instructions. *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). If the use of initials is not used to

protect sex crime victims, then it is improper for the government to argue otherwise. The government cannot argue the initials are not a comment on the evidence and then use them to suggest the court has already decided Dalelynn deserves its protection.

Often, subtle misconduct can have the greatest impact. *Allen*, 182 Wn.2d at 373. Here, the government's misconduct was subtle but powerful. Telegraphing to the jury the court felt protecting the complainant was important enough to change her name in the instructions was misconduct. This argument misled the jury and unfairly prejudiced Mr. Keith. *Id*. at 373-74.

The government committed incurable misconduct when it argued the court saw Dalelynn as a victim who needed protection. In granting review, this Court should find there was a substantial likelihood the

prosecutor's misconduct in making this argument affected the jury's verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

F. CONCLUSION

Based on the preceding, Mr. Keith respectfully requests that review be granted pursuant to RAP 13.4(b).

This petition is 3,616 words long and complies with RAP 18.17.

DATED this 15th day of February 2022.

Respectfully submitted,

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APPENDIX

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FILED
1/18/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. RANDY L. KEITH, Appellant.	)	No. 81949-6-I UNPUBLISHED OPINION

VERELLEN, J. — Randy Keith was convicted on two counts of first degree rape of a child and two counts of first degree child molestation.

He argues retrial is required because two of the court's evidentiary rulings prejudiced his right to present a defense and allowed inadmissible hearsay. But a defendant has no right to present irrelevant evidence, and Keith fails to show the evidence he sought to admit was relevant. And he failed to preserve the hearsay issue for review because he did not object to the decision to admit it.

Keith contends the to-convict jury instructions using only the initials of the alleged victim commented on the evidence, bolstered the victim's credibility, and reduced the State's burden of proof. But he fails to explain why we should disregard this court's recent decision in State v. Mansour,[1] which considered these arguments under similar circumstances and rejected them.

[1] 14 Wn. App. 2d 323, 470 P.3d 543, review denied, 196 Wn.2d 1040, 479 P.3d 708 (2021).

He also contends the prosecutor committed prejudicial misconduct by discussing the to-convict instruction with the jury and explaining the use of initials was intended to protect the victim's identity. Because the instruction itself was proper, Keith fails to show how an accurate explanation for the instruction was itself improper.

Therefore, we affirm.

FACTS

Randy L. Keith and Zacra Burris dated for most of 2018 and broke up on Christmas Day. Burris lived in an apartment with her nine-year-old daughter, D.G., and her two younger sons. Beginning that summer, Keith began sleeping at Burris's apartment regularly, even when she was working nights.

Keith was involved in the household's daily activities, such as shopping for groceries, cooking meals, putting the kids to bed, and bathing them. He also helped D.G. with her homework and would play Barbie dolls with her. Keith even gave D.G. an Xbox game console as a reward for doing her homework, and they bonded while playing video games together. Unlike Burris, Keith used discipline to make the children complete their chores and homework. One punishment was taking away her Xbox.

Beginning around late November or early December of 2018, the kids "started not liking being home or wanting to be around him," and D.G. "just didn't want to be around him."[2] Burris and D.G.'s grandmother assumed D.G. disliked Keith's use of discipline to enforce rules. But D.G.'s grandmother decided to call

[2] Report of Proceedings (RP) (Aug. 20, 2020) at 474-75.

Child Protective Services (CPS) after D.G. became "really clingy,"[3] wrote a letter to Santa Claus asking him to kill Keith, and wet the bed when sleeping at her home.

CPS referred D.G. for an evaluation by the Providence Intervention Center for Assault and Abuse at the Child Advocacy Center of Snohomish County at Dawson Place. She was evaluated by Christa Kleiner, a pediatric nurse practitioner working as a sexual assault nurse examiner. During the evaluation, D.G. told Kleiner that Keith had touched her "private area . . . a lot" with his fingers and also used his tongue and "his private area" even when she told him to stop.[4]

Keith was charged with two counts of first degree rape of a child and two counts of first degree child molestation. Pretrial, Keith sought to introduce evidence that members of D.G.'s family had made a number of unfounded sexual abuse allegations about others to CPS, and the court denied the request. During trial, Keith argued D.G. made up the allegations because she "hate[d] her mom's boyfriend"[5] due to his effort to impose more discipline, and her "plan [was] to make more of an accusation" to get "him permanently out of their lives."[6]

D.G. and Kleiner both testified. D.G. gave detailed testimony about Keith's conduct, and defense counsel cross-examined her about numerous inconsistencies between her testimony and various pretrial interviews. The State asked Kleiner to read portions of her evaluation notes that quoted D.G.'s statements from her evaluation, and defense counsel did not object. The jury

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[3] Id. at 541.

[4] Id. at 577.

[5] RP (Aug. 19, 2020) at 369-71.

[6] RP (Aug. 24, 2020) at 767.

found Keith guilty of all charges. He was sentenced to a minimum term of 240 months' incarceration with a maximum term of life on each of the first degree child rape convictions, both running concurrently with his 198-month sentences for the molestation convictions.

Keith appeals.

ANALYSIS

I. Right to Present a Defense

Keith argues the court prejudiced his Sixth Amendment right to present a defense when it excluded evidence of D.G.'s family members' unfounded allegations to CPS. The State contends the evidence was not relevant.

When a defendant alleges his right to present a defense was infringed, we review evidentiary rulings for an abuse of discretion and then consider de novo whether the rulings prejudiced his constitutional rights.[7] A trial court abuses its discretion when its decision rests on untenable grounds or was made for untenable reasons.[8]

Keith argues the evidence was necessary to impeach D.G. by demonstrating an alternate motive for her accusations. Keith asserted to the trial court that D.G.'s

> use of allegations as a tool to make sure that [Keith] cannot and does not return to the family is something she has learned, because over the years, she has watched her mom, her father, her father's girlfriend, [and] her grandmother make allegations, probably

[7] State v. Arndt, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019) (citing State v. Clark, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017)).

[8] Id. at 799 (quoting State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007)).

> unfounded . . . as ways to prevent [D.G.] from being able to see people, prevent her from being able to contact people.[9]

The court concluded the evidence might be admissible:

> I agree, if the child has that information, based on the defense theory, it's likely admissible.
>
> I think the best way to handle it would probably be, before the child testified, we have a short hearing—hopefully, short—outside the presence of the jurors, where [defense counsel] ask[s] the questions, and if you can tie in that the child was aware of it and can establish that, you know, in essence, that she understood that, you know, making these statements led to this result, then I would consider allowing you to use the testimony.[10]

Criminal defendants have the right to present evidence in their own defense.[11] But this right is "'subject to established rules of procedure and evidence.'"[12] Irrelevant evidence is inadmissible.[13] "Defendants have a right to present only relevant evidence, with no constitutional right to present irrelevant evidence."[14] "'Evidence is relevant if a logical nexus exists between the evidence and the fact to be established.'"[15]

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[9] RP (Aug. 14, 2020) at 31.

[10] Id. at 37-38.

[11] Clark, 187 Wn.2d at 653.

[12] State v. Ward, 8 Wn. App. 2d 365, 371, 438 P.3d 588 (2019) (internal quotation marks omitted) (quoting State v. Lizarraga, 191 Wn. App. 530, 553, 364 P.3d 810 (2015)).

[13] ER 402.

[14] State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (citing State v. Gregory, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006)).

[15] State v. Pratt, 11 Wn. App. 2d 450, 462, 454 P.3d 875 (2019) (quoting State v. Burkins, 94 Wn. App. 677, 692, 973 P.2d 15 (1999)), aff'd, 196 Wn.2d 849, 479 P.3d 680 (2021).

ER 104 governs conditional relevance and "defines a procedure for handling the situation in which a party wishes to prove fact A, but fact A is relevant only if fact B is established."[16] The court has discretion to determine the order of proof.[17]

Here, the court concluded the history of unfounded allegations to CPS was relevant if D.G. knew of them and of their possible effects. Keith argues the court abused its discretion because it "restricted testimony about prior acts to only those [D.G.] could remember."[18] But, under the defense's theory, the unfounded allegations were relevant because they taught D.G. how to get rid of people she did not like. If D.G. was unaware of the family's allegations, then there was no link between the past CPS allegations and D.G.'s allegations against Keith. Without a logical nexus between the two, the evidence was not relevant.[19] The court did not abuse its discretion by conditioning relevance on D.G.'s knowledge of the allegations.[20]

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[16] State v. Dixon, 159 Wn.2d 65, 78, 147 P.3d 991 (2006) (emphasis omitted) (quoting ER 104(b) cmt. 104). Even though the trial court did not expressly base its ruling on ER 104 or conditional relevance, we can affirm on any legal basis supported by the record. State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004) (citing In re Marriage of Rideout, 150 Wn.2d 337, 358, 77 P.3d 1174 (2003)).

[17] Dixon, 159 Wn.2d at 78; ER 104(a).

[18] Appellant's Br. at 17.

[19] Pratt, 11 Wn. App. 2d at 462 (quoting Burkins, 94 Wn. App. at 692).

[20] See Dixon, 159 Wn.2d at 78 (a trial court does not abuse its discretion by conditioning relevance when "the defense's desire to prove fact A . . . was dependent on proof of fact B").

"[T]he trial court's proper inquiry under ER 104(b) is 'whether the evidence is sufficient to support a finding of the needed fact.'"[21] During the in limine hearing, D.G. did not testify that she knew about unfounded allegations to CPS by her family, and Keith did not provide evidence she did. Because Keith failed to proffer any evidence showing D.G. was aware of past allegations to CPS or their use to exclude people, the court did not err by concluding her family members' past, unfounded CPS allegations were irrelevant. And because a defendant has no right to present irrelevant evidence,[22] Keith fails to show the court prejudiced his right to present a defense.[23]

II. Hearsay

Keith argues hearsay testimony by Kleiner violated the rules of evidence and was prejudicial, requiring retrial. The State argues he did not preserve this issue for review.

The State moved in limine to "allow testimony from [registered nurse] Christa Kleiner about the victim's description of the crime" under hearsay exception ER 803(a)(4).[24] ER 803(a)(4) allows admission of hearsay statements made for purposes of medical diagnosis or treatment.

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[21] Id. (quoting State v. Karpenski, 94 Wn. App. 80, 102, 971 P.2d 553 (1999)).

[22] Jones, 168 Wn.2d at 720 (citing Gregory, 158 Wn.2d at 786 n.6).

[23] To the extent Keith argues his right to present a defense was harmed by also excluding this evidence from witnesses other than D.G., he still fails to explain how it was relevant to D.G.'s allegations.

[24] Clerk's Papers (CP) at 143.

When the court considered the State's motion, defense counsel said, "There [are] statements that the alleged victim made to [Kleiner] that we concede we expect to come in under" ER 803(a)(4).[25] Defense counsel objected only to Kleiner testifying to statements from Burris and not to statements from D.G. The State proposed "not talk[ing] about the things that the mother told Ms. Kleiner" and "focus[ing] only on the statements by the child, which . . . fall squarely in the medical hearsay exception."[26] Defense counsel agreed and also agreed to the court's ruling admitting Kleiner's hearsay testimony "[s]o long as [the State] can lay the foundation."[27] During trial, Keith did not object when Kleiner testified to hearsay from D.G. about being raped and molested by him.

The general rule is that an appellate court will not review an error raised for the first time on appeal unless it is a manifest error affecting a constitutional right.[28] Absent manifest error, an appellant cannot assign error to a ruling admitting evidence when he fails to make a timely and specific objection.[29] Because Keith never objected to Kleiner's testimony and does not argue his constitutional rights were affected, he failed to preserve this issue for review.[30]

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[25] RP (Aug. 14, 2020) at 20.

[26] Id. at 25.

[27] Id. at 26.

[28] State v. Gentry, 183 Wn.2d 749, 760, 356 P.3d 714 (2015) (citing State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a)(3)).

[29] State v. Heutink, 12 Wn. App. 2d 336, 355, 458 P.3d 796 (citing ER 103(a)(1); State v. Avendano-Lopez, 79 Wn. App. 706, 710, 904 P.2d 324 (1995)), review denied, 195 Wn.2d 1027, 466 P.3d 775 (2020).

[30] Id. (citing ER 103(a)(1); Avendano-Lopez, 79 Wn. App. at 710); see Gentry, 183 Wn.2d at 760-61 (declining to address a purely statutory error alleged for the first time on appeal).

III. Use of Victim's Initials

Keith contends the use of D.G.'s initials in the to-convict jury instructions was a comment on the evidence by the court that bolstered D.G.'s credibility and reduced the State's burden of proof.

Article IV, section 16 of the Washington Constitution prohibits judges 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.'"[31] In Mansour, we considered and rejected similar arguments under similar circumstances.[32] A father was convicted of first degree child molestation against his daughter and argued the use of her initials in the to-convict instruction was a comment on the evidence by the court and reduced the State's burden of proof.[33] We concluded the use of initials did not comment on the evidence because the daughter's name was not a fact issue for the jury.[34] Nor did it telegraph "the judge's 'personal attitudes toward the merits of the case,' much less that the judge considered [the daughter] a victim."[35] We also concluded the jury instruction did not reduce the State's burden of proof because a jury would not presume a complainant was a victim "simply because of the use of her initials" when the jury

[31] State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)).

[32] 14 Wn. App. 2d at 325-26.

[33] Id. at 328, 329.

[34] Id. at 330 (citing Levy, 156 Wn.2d at 722).

[35] Id. (internal quotation marks omitted) (quoting Levy, 156 Wn.2d at 721).

was also property instructed about the presumption of innocence and the State's burden of proof.[36]

Keith argues we should decline to follow Mansour because here, unlike that case, the prosecutor referred to D.G.'s initials during closing argument. But he fails to explain why this fact makes Mansour inapplicable to his comment on the evidence, bolstering, and burden of proof arguments. Nor does he explain why this minor factual distinction means Mansour was wrongly decided.

Here, like Mansour, jury instruction 3 correctly stated the presumption of innocence and the State's burden of proof, and Keith cites no authority for the proposition that a closing argument can make an accurate jury instruction improper. Because Mansour is highly analogous to the circumstances here, it applies. Keith's arguments about the use of D.G.'s initials are unpersuasive.

Keith argues the prosecutor committed prejudicial misconduct during closing argument when he explained the use of initials in the to-convict jury instructions on the rape charges. Referring to D.G. by her first name, the prosecutor explained,

> [D.G.] has been very clear about who did this, and we are very clear about who was in the home at that time—had sexual intercourse . . . with D.G., [XX-XX]-2008. We use initials in court documents when we're dealing with children to protect their identity. The "D.G." stands for [full name], and that's her birthday.[37]

Keith did not object.

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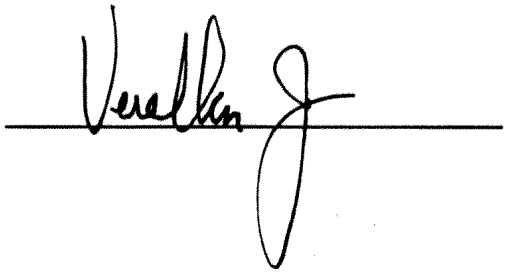
[36] Id. at 331.

[37] RP (Aug. 24, 2020) at 755.

Under these circumstances, Keith bears the burden of proving the prosecutor's conduct was improper, prejudicial,[38] and "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice."[39]

Keith contends the prosecutor's explanation for D.G.'s initials "reduced the government's burden of proof by alerting the jury to the court's belief that [D.G.] was a victim."[40] Because the use of D.G.'s initials neither instructs the jury on a factual issue requiring resolution nor telegraphs the court's beliefs,[41] he fails to show the prosecutor's argument was improper or that the resultant prejudice could not have been cured by a jury instruction.

Therefore, we affirm.



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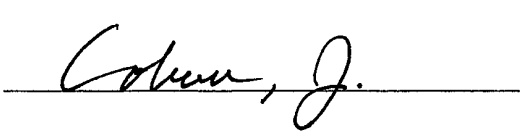

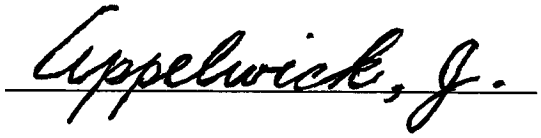

[38] State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012) (citing State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011)).

[39] Id. at 760-61 (citing State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997)).

[40] Appellant's Br. at 45.

[41] Mansour, 14 Wn. App. 2d at 329-30 (citing Levy, 156 Wn.2d at 721-22; State v. Alger, 31 Wn. App. at 244, 249, 640 P.2d 44 (1982)).

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81949-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: February 15, 2022

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