No. 101737-5
COA No. 84590-0-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.
JEFFREY LEE ANTEE,

Petitioner.

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

Cause No. 18-1-00331-34

ANSWER TO PETITION FOR REVIEW

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2. Whether review is appropriate under RAP 13.4(b)(3), where the issue of ineffective assistance of counsel was not raised until the petition for review and there is no showing of either deficient performance or prejudice necessary for a showing of ineffective assistance of counsel.

B. STATEMENT OF THE CASE

The petitioner, Jeffrey Antee, was charged with three counts of rape of a child in the first degree, one count of child molestation in the first degree, one count of assault of a child in the first degree, and two counts of assault of a child in the third degree. CP 359-362. The charges were based on multiple assaults of Antee's then four-year-old stepchild, D.D. CP 1-3.

The State relies upon and incorporates by reference the detailed statement of the case included in the Brief of Respondent

in the Court of Appeals for purposes of this answer.[1] The jury found Antee not guilty of rape of a child in the first degree as charged in count one, guilty of rape of a child in the first degree as charged in count two, guilty of rape of a child in the first degree as charged in count three, guilty of child molestation in the first degree as charged in count four, guilty of assault of a child in the second degree as charged in count five, not guilty of the crime of assault of a child in the third degree as charged in count six, and guilty of the crime of assault of a child in the third degree as charged in count seven. 1RP 1012-1013; CP 367-375. The jury found D.D. and Antee were family or household members at the time of commission of count five. CP 372. In a bifurcated proceeding, the jury returned special verdicts indicating that Antee used a position of trust, confidence, or

[1] The Brief of Respondent was filed in Division II cause number 56122-1-II on July 26, 2022. The brief and record were transferred to Division I of the Court of Appeals and considered under cause number 84590-0-I.

fiduciary responsibility to facilitate the crime in counts two, three, four, five, and seven. 1RP 1047-1050; CP 431-440.

On appeal, Antee argued that the testimony of D.D. was insufficient to satisfy the confrontation clause when considered in relation to the child hearsay statute, RCW 9A.44.120, and that statements made to a nurse and a therapist were improperly admitted under ER 803(a)(4).[2] The Court of Appeals distinguished the facts of this case from the facts in State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997) and found that the facts were more similar to those in State v. Clark, 139 Wn.2d 152, 985 P.2d 377 (1999) and State v. Price, 158 Wn.2d 630, 642, 146 P.3d 1183 (2006), to find that the right to confrontation was not violated. State v. Antee, No. 84590-0-I (Unpublished Opinion) at 5-7.[3]

[2] The Brief of Appellant was filed in the Court of Appeals on May 4, 2022.
[3] The Unpublished Opinion of Division I of the Court of Appeals is attached to the Petition for Review.

The Court of Appeals noted that "Antee did not object to admission of D.D.'s hearsay statements to her therapist and the SANE nurse under ER 803(a)(4)," therefore "RAP 2.5(a) precludes review of Antee's evidentiary challenge to statements admitted under this exception". *Id.* at 8. The Court of Appeals affirmed Antee's convictions. Antee now seeks review in this Court.

C. ARGUMENT

A petition for review will be accepted by this Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Antee argues that review should be granted because the decision of the Court of Appeals conflicts with the holding of State v. Rohrich and because this Court may accept

review where there is a significant question of law under the Washington State Constitution or the United States Constitution. Neither provision provides a basis upon which this Court should accept review.

1. The Court of Appeals correctly found that the admission of child hearsay under RCW 9A.44.120 did not violate the right of confrontation and that decision does not conflict with decision of this Court.

Antee did not argue that the trial court abused its discretion by finding that the statements made by D.D. were admissible at the initial child hearsay hearing, but rather argued that because D.D. was found competent to testify, the statements should not have been admitted because D.D.'s testimony at trial was insufficient to satisfy the confrontation clause. Antee's reliance on State v. Rohrich, for this proposition is misplaced.

In State v. Clark, at 159-160, the defendant made a similar argument to that which Antee made in the Court of Appeals citing to Rohrich. The Clark court noted that in Rohrich, the State called an alleged victim and asked her only innocuous

background questions and failed to ask her about the alleged sexual abuse and the victim was not cross examined. Clark, at 160. The Court noted that the facts in Clark were distinguishable from Rohrich, noting that the State asked the victim about the alleged acts, and she denied they occurred, and the State asked about the prior hearsay statements and the victim indicated that they were lies in the Clark case. Clark, at 161. The Court noted that on that record, Clark had a full opportunity to cross examine the victim about the alleged acts and about her hearsay statements, therefore the admission of the statements did not violate the confrontation clause. *Id.* at 161.

In State v. Price, at 630, this Court again considered whether a child's testimony was sufficient to support admission of hearsay statements under the confrontation clause. The Court noted that the prosecution asked the victim about the underlying events and the contents of the victim's statements to her mother and a detective, and while the victim did not adopt her prior statements on the stand or recant, the Court found that there was

no effort to shield the child from responding to questions as had occurred in Rohrich. Price, at 648.

The Court noted that "the Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id*. at 648, *citing,* United States v. Owens, 484 U.S. 554, 559, 108 S.Ct. 838, 98 L.Ed. 2d 951 (1988). The Price Court held, "all of the purposes of the confrontation clause are satisfied even when a witness answers that he or she is unable to recall." Price, at 650.

Here, the prosecutor asked D.D. specific questions about the underlying allegations and the statements that she had previously made. 1RP 573-584. Similar to Clark and Price, the prosecution did not shield D.D. from cross examination. The fact she did not adopt her previous statements did not deprive the defense of the opportunity to cross examine her or otherwise render the pretrial statements inadmissible. It was for the jurors to "have the opportunity to evaluate whether they believe the

child forgot or whether she was evading for some other reason," the right to confrontation was satisfied. State v. Kinzle, 181 Wn. App. 774, 784, 326 P.3d 870 (2014).

The trial court did not abuse its discretion by admitting statements under RCW 9A.44.120 and the admission of those statements did not violate the right to confrontation under the circumstances of this case. Even if D.D.'s testimony at trial could somehow be construed as making her unavailable at trial to testify, the trial court properly found that the facts presented corroborated the statements. That finding was supported by the testimony including, the photographs admitted during both the child hearsay hearing and the trial, Antee's own statements regarding a pen causing injuries, and testimony about D.D.'s sexualized behavior.

The decision of the Court of Appeals correctly followed Clark and Price. Moreover, the Court of Appeals also correctly noted that A Sixth Amendment confrontation clause objection must be raised at or before trial is waived. Unpublished Opinion,

at 8, *citing,* State v. Burns, 193 Wn.2d 190, 210-11, 438 P.3d 1183 (2019). There is no basis upon which this Court should accept review under RAP 13.4(b)(1).

2. Antee's ineffective assistance of counsel argument was not considered in the Court of Appeals and should not be considered in this Court.

This Court generally does not consider issues, even constitutional ones, raised for the first time in a petition for review. Crystal Ridge Homeowner's Ass'n v. City of Bothell, 182 Wn.2d 665, 678, 343 P.3d 746 (2015); *citing*, State v. Benn, 161 Wn.2d 256, 262 n.1, 165 P.3d 1232 (2007). There is no reason this Court should accept review of Antee's claim of ineffective assistance of counsel raised for the first time in this petition for review.

The Court of Appeals correctly noted that "Antee did not object to admission of D.D.'s hearsay statements to her therapist and the SANE nurse under ER 803(a)(4)," therefore "RAP 2.5(a) precludes review of Antee's evidentiary challenge to statements

admitted under this exception. Unpublished Opinion at 8. This Court may limit the scope of review based on the circumstances set forth in RAP 2.5. RAP 13.7(c). This Court should not consider the issue of ineffective assistance of counsel. Moreover, Antee has made no showing that his counsel provided ineffective assistance.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, State v. Stenson, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers.

Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, at 696-697. Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, State v. Briggins, 84 Wn. 2d 1012 (1974).

A defendant must overcome the presumption of effective representation. Strickland v. Washington, at 687; State v. Hendrickson, at 77-78; State v. McFarland, at 334-35. Here, the decision not to object to statements made to Nurse Wahl and

Therapist Yearian was strategic and an objection, if made, would likely not have been granted.

Had Antee properly objected to admission of the statements made to Wahl and Yearian, they still would have been properly admitted under ER 803(a)(4). "Statements made for purposes of medical diagnosis or treatment and describing medical history or past or present symptoms, pain, or sensations, of the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are excluded from the hearsay rule whether the declarant is available or not. ER 803(a)(4). Statements made by a sexual assault victim during a medical evaluation qualify for admission under this exception. State v. Williams, 137 Wn. App. 736, 154 P.3d 322 (2007). Statements made by a child victim indicating that the abuser is a member of the victim's immediate household are reasonably pertinent to treatment. State v. Fisher, 130 Wn. App. 1, 15, 108 P.3d 1262 (2005), *review denied*, State v. Fisher, 156 Wn.2d 1013 (2006).

A child's statements to a therapist are also independently admissible under ER 803(a)(4) where the therapist would have relied on the child's descriptions in determining the best course of treatment, which includes both the physical and emotional injuries that result from child abuse. In re Pers. Restraint of Grasso, 151 Wn.2d 1, 84 P.3d 859 (2004). It was proper for Antee to waive objection to admission of the statements that D.D. made to Yearian and Wahl for the purposes of medical and emotional treatment. Even if Antee had not waived any argument regarding the admission of the statements, there was no error in their admission.

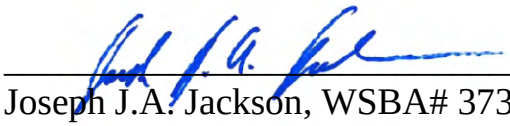
Antee can demonstrate neither deficient performance nor prejudice sufficient to establish a claim of ineffective assistance of counsel. There is no significant question of constitutional law such that this Court should accept review of the issue which Antee raises for the first time in the petition for review. No basis under RAP 13.4(b) supports Antee's Petition for Review.

D. CONCLUSION

For the reasons stated herein, the State respectfully requests that this Court deny review.

I certify that this document contains 2289 words, not including those portions exempted from the word count, as counted by word processing software, in compliance with RAP 18.17.

Respectfully submitted this 14th day of March 2023.



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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, in The Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Dated this 14th day of March 2023.

Signature: Stephanie Johnson

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

March 14, 2023 - 10:50 AM

Transmittal Information

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