

70443-1

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NO. 70443-5-1

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

STATE OF WASHINGTON

Respondent

v.

JAMES M. FEY,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

1. When the defendant did not renew his objection evidence admitted under ER 803(a)(4) after the trial court made a tentative pretrial ruling on its admission, has the defendant waived review of that decision?

2. Were statements made by a victim to her therapist properly admitted under ER 803(a)(4)?

3. If evidence was erroneously admitted under ER 803(a)(4), was it harmless?

4. Was it proper to admit evidence that a child was living out of her home after a report of sexual assault by a family member?

5. Was it harmless error to admit the defendant's identity under the fact of complaint doctrine when there was no evidence anyone but the defendant had sexually assaulted the victim?

6. Was evidence that a victim suffered from a medical condition that affected her memory relevant?

7. Where questions and argument regarding the defendant and his wife's parenting decisions relevant and not unduly prejudicial?

8. Does the cumulative error doctrine apply?

9. Did defense counsel employ a reasonable defense strategy?

10. Should the court remand the case to allow the trial court to reconsider sentencing conditions that restrict his contact with minors without exception for his own minor children?

II. STATEMENT OF THE CASE

K.R., born September 21, 2001, lived with her mother C.R, stepfather, James Fey, the defendant, older sister A.R. and 6 year old twin sisters H. and E. in Lake Stevens. They moved into that house in July 2011. K.R.'s parents each had their own living room. The defendant's room was called the "man cave." 2 RP 132-136.¹

Beginning about the time the family moved into the Lake Stevens home the defendant began touching K.R. on her vagina. He did this more than one time. The touching occurred in his man cave. The defendant touched her both over and under her clothing. K.R. recalled one time specifically where they were watching an action movie in the man cave. The other members of the family were elsewhere in the home. On another occasion the defendant grabbed K.R.'s wrist and made her touch his penis. K.R. told the

¹ The report of proceedings includes five trial volumes (1-5 RP), a sentencing hearing (6 RP) and a transcript from Ex. 33, a video of the forensic interview of K.R. by Gina Coslett.

defendant to stop because it made her uncomfortable. 2 RP 151-164.

On May 29, 2012 an Open Door Theater (ODT) company performed for K.R.'s class at her school. The play called "Talk About Stuff" was designed to teach children about safety rules in situations of abuse and bullying. One part of the play depicted a 12 year old girl who reported that her mother's boyfriend had touched her private parts. After the play K.R. spoke with Arika Gloud, one of the actresses. K.R. asked Ms. Gloud "what if it's a parent touching you? What if it's your dad? That's happening to me. I should tell." 2 RP 222-233. Ms. Gloud reported K.R.'s disclosure to school officials, who in turn called the police. 3 RP 274, 296.

The defendant was charged by amended information with one count of first degree child molestation. 1 CP 63. A jury convicted him of that charge. 1 CP 40.

III. ARGUMENT

A. THE DEFENDANT WAIVED AN OBJECTION TO THE ADMISSION OF K.R.'S STATEMENTS TO HER THERAPIST ABOUT SPECIFIC INSTANCES OF SEXUAL ASSAULT. THOSE STATEMENTS WERE PROPERLY ADMITTED INTO EVIDENCE.

During pretrial motions the prosecutor informed the court that he intended to elicit statements K.R. made to her therapist Jo Jordan under the hearsay exception for statements made for the

purpose of medical diagnosis or treatment. ER 803(a)(4). 2 CP 88, 92. Defense counsel noted that K.R. went to counseling with Ms. Jordan as a result of a court order entered in a dependency proceeding. Counsel conceded that had her parents sent her to counseling the exception to the hearsay rule would apply, but questioned whether “court ordered counseling is going to be for the purposes of the child’s mental health or whether that has something to do with some pending civil proceeding...” 1 RP 18-19.

The trial judge drew on his experience both as a practicing attorney and court commissioner before he became a judge to comment that the purpose of court ordered counseling in dependency actions was to treat a child’s mental health concerns. He then queried whether he could assume that was the case in this instance. Defense counsel provided no other argument. The court then concluded that if the State could lay a foundation that from the therapist’s perspective the purpose behind treatment was to treat the mental state of the child, then it would be admissible as an exception to the hearsay rule. 1 RP 19-21.

Ms. Jordan testified that she is a psychotherapist, employed at the Child Advocacy Program through Compass Health. That program was designed to help children who had been sexually

abused. She described her goal as to help children heal by facing their experiences and learning to cope with them. To do so she first conducted an assessment. She employed age appropriate therapeutic games to help with treatment. When she began treating K.R. in June 2012 Ms. Jordan used these same procedures. She informed K.R. at the beginning of treatment that other children had similar experiences to K.R.'s. K.R. was assured that Ms. Jordan's office was a safe place, and that when she was ready to talk Ms. Jordan would be there for her. They also played a game called Survivor's Journey that asked K.R. to explain how she felt about the person who touched her and if she still cared about him. In the course of K.R.'s therapy Ms. Jordan also diagnosed K.R. with a medical condition that affected her memory, as well as her behavior and physical condition. 3 RP 324-344.

After laying this foundation the State asked Ms. Jordan about K.R.'s statements. Ms. Jordan testified to those statements without further objection. K.R. told Ms. Jordan about being in the man cave with the defendant watching movies when he pulled her down on the floor, started tickling her, and then touched her front privates. K.R. said that she thought she was the only one the defendant had touched. K.R. said the defendant started touching

her when she was 9 years old, beginning one week after they moved into their home. 3 RP 344-345, 348, 352.

1. The Admissibility Of K.R.'s Statements To Her Therapist Has Not Been Preserved For Review.

Whether K.R.s' statements to Ms. Jordan were admissible under ER 803(a)(4) has not been preserved for review for two reasons. First, the trial court's pretrial ruling was only preliminary. Second, the basis for the objection made at trial is different than the basis argued on appeal.

When a trial court makes a final ruling on a pretrial evidentiary matter the party losing the motion regarding the evidence has a standing objection. State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984). When the trial court indicates that its ruling is preliminary or tentative, then the party opposing admission of the evidence must raise the issue again before it is introduced in order to preserve the objection. State v. Asaeli, 150 Wn. App. 543, 587, 208 P.3d 1136, review denied, 167 Wn.2d 1001 (2009). Here the trial judge indicated that his ruling to admit K.R.'s statements to Ms. Jordan under ER 803(a)(4) was tentative when he conditioned admission of that evidence on the State being able to lay a proper foundation. 1 RP 21. The defendant did not interpose a further

objection after the State had laid that foundation. 3 RP 344. Thus the issue has been waived.

The defendant also waived review on the specific grounds he now asserts for error in admission of Ms. Jordan's testimony because those grounds were not raised in the trial court. A party may only assign error on the specific ground of his evidentiary objection made a trial. State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

At trial the defendant objected to K.R.'s statements to Ms. Jordan on the basis that it was court ordered treatment, and therefore it was not necessarily for the purpose of diagnosis and treatment. 1 RP 18-19. Now he argues the evidence was impermissible because it lacked indicia of reliability. Specifically he argues that statements to therapists should not have the same presumption of reliability that statements to doctors have and K.R.'s statements to Ms. Jordan were not reliable because K.R. did not have a motive to be truthful. BOA at 9-14. Since he did not object on the basis that K.R.'s statements lacked sufficient indicia of reliability to be considered statements made for the purpose of medical diagnosis or treatment, he has not preserved that issue for review.

An issue may be raised for the first time if it involves a manifest error affecting a constitutional right. RAP 2.5(a)(3). The court will first look to the claimed error to assess whether, if the claim is correct, it implicates a constitutional interest as compared to some other kind of trial error. State v. Bonds, 174 Wn. App. 553, 568, 299 P.3d 663, review denied, 178 Wn.2d 1011 (2013). Here the defendant asserts that erroneous evidentiary rulings violated his due process right to a fair trial. BOA at 9. Where a violation of due process is alleged the court will look at the alleged violation, and the facts alleged by the defendant, to determine whether, if true, his constitutional right to a fair trial had been violated. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

The defendant cites two cases to support his contention that an erroneous evidentiary ruling violates due process by depriving the defendant a fundamentally fair trial. Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed. 835 (1991), Dowling v. United States, 493 U.S. 342, 107 L.Ed.2d 708, 110 S.Ct. 668 (1990). In each of these cases the court found no due process violation because the evidence in question was properly admitted. McGuire, 502 U.S. at 68-70, Dowling, 493 U.S. at 675. That does not

necessarily support the conclusion that evidence admitted in violation of evidence rules also violated due process.

Where hearsay is admitted erroneously no due process violation occurs when the declarant and the hearsay recipient both testify at trial. State v. Stevens, 58 Wn. App. 478, 486, 794 P.2d 38, review denied, 115 Wn.2d 1025 (1990). Here both K.R. and Ms. Jordan testified and were subject to cross examination. No due process violation occurred. The defendant has failed to raise an issue of constitutional magnitude. Whether K.R.'s statements were properly admitted under ER 803(a)(4) because they lacked sufficient indicia of reliability has therefore been waived for review.

2. The Statements Were Properly Admitted Into Evidence.

A trial court's decision to admit evidence is reviewed for a manifest abuse of discretion. State v. Ackerman, 90 Wn. App. 477, 481, 953 P.2d 816 (1998). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. In re Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997). If the court decides to review this issue then the record shows that the trial court did not abuse its discretion by permitting Ms. Jordan to testify to statements made by K.R. during therapy sessions.

Statements are admissible as an exception to the hearsay rule if they are made

for the purpose of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

ER 803(a)(4).

Statements are admissible under this exception if the declarant's motive in making the statement is consistent with the purposes of promoting treatment, and the content of the statements are the kind reasonably relied on by the person providing treatment. In re Dependency of M.P., 76 Wn. App. 87, 93, 882 P.2d 1180 (1994), review denied, 126 Wn.2d 1012 (1995). These factors may be satisfied from the circumstances surrounding the statements at issue as detailed in the record. State v. Florczak, 76 Wn. App. 55, 66, 882 P.2d 19 (1994), review denied, 126 Wn.2d 1010 (1995).

Washington courts have held that statements made to therapists and social workers who are treating the declarant fall under this exception. State v. Ackerman, 90 Wn. App. 477, 482, 953 P.2d 816 (1998), State v. Sims, 77 Wn. App. 236, 240, 890 P.2d 521 (1995), State v. Moses, 129 Wn. App. 718, 731, 119 P.3d

906 (2005), review denied, 157 Wn.2d 1006 (2006). Statements made during therapy fall within this exception even if treatment was court ordered as long as the child understands the purpose of therapy is to help her and the statements were made during counseling session. In re Custody of A.C., 137 Wn. App. 245, 258, 153 P.3d 203 (2007), reversed on other grounds, 165 Wn.2d 568 (2009). The child need not understand what a therapist is for her statements to be admissible under this rule. Id.

Here K.R. understood that she was in counseling with Ms. Jordan. K.R. and Ms. Jordan “talked a lot, and we – we play game there, a, like, she has feeling games.” K.R. did talk about what happened with the defendant, but only when she had to. 2 RP 178.

Ms. Jordan described her role as helping children who have experienced sexual abuse. The treatment goal is to help children heal by facing their experiences and learning to get beyond them. She begins treatment by conducting an assessment interview with the child. The interview is designed to find out whether the child is ready for treatment and if so what symptoms the child is having and what the child is most interested in having help with at that time. The assessment asks the child to describe what has happened to her, and how those things have affected her. During treatment she

uses various therapeutic games to assist in helping children heal. Ms. Jordan testified that in connection with treating K.R. she used these same practices. In addition Ms. Jordan had occasion to diagnose clients based on what the child said, as aid to treatment. 3 RP 326, 329-336, 340-343.

This record provides circumstantial evidence that K.R. knew that she was in counseling to deal with issues she had related to sexual abuse. She understood that talking to Ms. Jordan and playing the “feeling” games were part of her treatment. In turn, Ms. Jordan relied on what K.R. said to provide a diagnosis and treatment for K.R.’s problems. The court did not abuse its discretion in permitting testimony about what K.R. specifically said in treatment.

The defendant argues the evidence should not have been allowed because it was insufficiently reliable to qualify under ER 803(a)(4). First he argues that statements which are presumptively reliable when made to a medical professional should not share that same presumption when made to a mental health therapist. He relies on People v. LaLone, 437 N.W.2d 611 (Mich. 1989). There the court considered as an issue of first impression in that state whether statements to a psychologist would fall under Michigan’s

version of ER 803(a)(4). Id. at 612. The court speculated that statements to a psychologist may not be as reliable as those made to a medical doctor, because untrue physical complaints would be easier to discern than untrue mental complaints. Id. As noted Washington Courts have permitted statements made to mental health counselors when it was clear those statements were made for the purpose of diagnosis and treatment. State v. Ackerman, supra, State v. Sims, supra, State v. Moses, supra. The nature of the treatment provider alone does not render the statements unreliable.

Next the defendant again relies on LaLone to assert that the statements to Ms. Jordan were not reliable. In LaLone the court found that statements made after a police report were not as reliable as those made during a regularly scheduled therapy session. The court assumed that once the complainant had “offered the story to the police, she would offer consistent statements to a psychologist.” LaLone, 437 N.W.2d at 615.

This line of reasoning is inapplicable under the circumstances of this case. The record demonstrates that K.R. did not initially disclose to police. She was unaware that she was disclosing sexual abuse when she first approached the actress

after the play. As a result of her disclosure she experienced several negative consequences, including separation from her family and her mother's rebuke because there were "four innocent people who are suffering" as a result of K.R.'s disclosure. Each of these consequences came before K.R. talked about the defendant molesting her in therapy. 2 RP 163, 176; 3 RP 344-346, 367-368. The rationale for telling a consistent story in LaLone therefore did not exist in this case because K.R. had a motive to recant her report in order to eliminate those circumstances resulting from her disclosure. Despite that motive she consistently reported that the defendant had molested her. In light of that circumstance her report of abuse was reliable.

The defendant next argues that K.R.'s statements were not reliable because treatment was court ordered. He states K.R. believed the purpose of the meetings was to prepare her for court, not to receive treatment. BOA at 12. The defendant mischaracterizes the record. K.R. did not state that she was seeing Ms. Jordan for reasons other than for treatment to deal with what had happened to her. K.R.'s testimony regarding court related to the mechanics of the proceedings, and not specifically what she would testify to once in court. 2 RP 178-179. Those discussions

could have been for treatment purposes, because going to court was going to be one of the consequences of what the defendant did to K.R. Preparing K.R. for what to expect once she got there was part of helping her heal by facing her experiences and learning to get beyond them.²

Additionally, Ms. Jordan's testimony clearly showed that K.R. was told that she was in counseling to help her address psychological issues. K.R. was between 10 and 11 years old when she was in therapy with Ms. Jordan. 2 RP 132, 178; 3 RP 334. The court has accepted that a child of that age who is seeing a doctor would understand her statements to that person were for the purposes of treatment. State v. Kilgore, 107 Wn. App. 160, 183, 26 P.3d 308 (2001), affirmed, 147 Wn.2d 288 (2002). Given K.R.'s age, what she was told, and what she talked about with Ms. Jordan, she understood her statements were for the purpose of being treated, and not to prepare her to go to court.

In contrast to the facts here, the court has found statements erroneously admitted under ER 803(a)(4) where those statements were made in connection with an investigation. State v. Perez, 137

² In the presentence investigation report K.R.'s social worker reported that K.R.'s fears and anxiety intensified as result of testifying at trial. 3 CP ___ (page 3)

Wn. App. 97, 106-107, 151 P.3d 249 (2007), State v. Lopez, 95 Wn. App. 842, 850, 980 P.2d 224 (1999). Nothing about the timing or the circumstances of K.R.'s statements to Ms. Jordan demonstrate that they were made for the purpose of a court investigation rather than for diagnosis or treatment. Thus the trial court did not abuse its discretion when it permitted testimony regarding those statements to Ms. Jordan.

3. If K.R.'s Statements Were Erroneously Admitted It Was Harmless.

If the Court concludes that K.R.'s statements to Ms. Jordan about the abuse were admitted in error, it was harmless. Evidence erroneously admitted pursuant to ER 803(a)(4) requires reversal only if it is reasonably probable that the error materially affected the outcome of the trial. State v. Alvarez-Abrego, 154 Wn. App. 351, 371, 225 P.3d 396, review denied, 168 Wn.2d 1042 (2010). Ms. Jordan testified that K.R. told her about one incident where the defendant touched her front private in the course of a tickle game. 3 RP 344-345. K.R. similarly testified to the defendant touching her on her front private. 2 RP 152-162. In addition K.R. recounted several other instances of sexual touching during the interview with the child interview specialist. Ex. 33. Since there was other, more

detailed, evidence introduced recounting the sexual abuse, evidence of the one incident K.R. told Ms. Jordan about did not likely materially affect the outcome of the case.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED EVIDENCE K.R. WAS NOT LIVING AT HOME AFTER SHE DISCLOSED SHE HAD BEEN SEXUALLY ABUSED BY THE DEFENDANT.

Before trial the defendant sought an order precluding evidence that there was a dependency action pending involving the defendant and his family. 1 CP 60. The State opposed the motion on the basis that evidence K.R. was placed in foster care bore on her credibility. The State argued that it was relevant because K.R. would not have falsely accused the defendant or maintained a false allegation of abuse if she knew that it would result in being put in foster care and separated from her family. 1 CP 23-24, 66-67.

Before ruling on the motion the Court conducted a hearing outside the presence of the jury in which K.R. testified that after she first disclosed the sexual abuse she began living with her foster mother Kim Miller. At first K.R. felt shy meeting a new person and was a little scared, but by the time of trial she felt more comfortable with Ms. Miller. K.R. missed her family from the time she was placed in foster care to the time of trial. She did not know that

before she disclosed that it would result in her placement in foster care. K.R. stated that her feelings about foster care did not affect the truth of what she said. However, had she known she was going to be placed in foster care she would not have disclosed what had happened with the defendant because she did not want to leave her family. 2 RP 106-112.

The court excluded evidence that there was a dependency action pending. However the court recognized evidence K.R. had been placed out of the home was relevant to her credibility. It concluded that characterizing that placement as foster care would be too prejudicial to the defendant. Instead it permitted the parties to refer to K.R.'s living situation as an "out of home placement." The court reasoned that term did not imply a judicial decision regarding her placement, but still allowed the State to argue its theory of the case. 2 RP 115, 117-125. The court then included an instruction limiting consideration of evidence that K.R. was in an out of home placement only for the purpose of assessing K.R.'s credibility or lack thereof. 1 CP 49.

The defendant argues the trial court erred in permitting evidence concerning K.R.'s living situation after she disclosed the defendant had sexually abused her. He argues the evidence was

not relevant. He also argues the evidence was unduly prejudicial. Finally, he argues the limiting instruction was improper because it allowed the jury to use evidence to improperly bolster K.R.'s credibility. BOA at 20-21.

Evidence is relevant if it has a tendency to make the existence of any fact that is of consequence to the determination of an action more probable or less probable than it would be without the evidence. ER 401. "The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible." State v. Gregory, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). A trial court's decision that evidence is relevant is reviewed for an abuse of discretion. Id.

The defense theory was that K.R. was lying when she reported the defendant had sexually abused her. 2 RP 115. Thus K.R.'s credibility was a central issue in the case at each stage in which she asserted, and re-asserted, that the defendant had sexually abused her. Evidence that K.R. not only did not have a motive to lie when she first reported the abuse, but in fact had a motive to recant her statements, shed light on whether her statements were true or not. If she did not know that she would be taken out of the home before she first reported, then the possibility

that she would be removed from the home could not be the reason she reported sexual abuse. If she missed her family, and was not able to have contact with them after she reported, then if her original report was not true she would have motive to recant that statement. Because she consistently reported the defendant had sexually abused her even in light of the negative consequences she suffered as a result of that report, her testimony could be considered credible.

A trial court may exclude relevant evidence if it determines that the probative value is substantially outweighed by the danger of unfair prejudice. ER 403. Evidence that is likely to evoke an emotional response rather than a rational decision creates a danger of unfair prejudice. State v. Beadle, 173 Wn.2d 97, 120, 265 P.3d 863 (2011). The trial court has broad discretion in balancing the probative value of the evidence against its possible prejudicial impact. State v. Rice, 48 Wn. App. 7, 737 P.2d 726 (1987).

The trial court understood that while evidence K.R. had been separated from her family was probative of her credibility, there was a danger that jurors would not understand the different burdens of proof in a criminal and a dependency matter and conclude that K.R. had already been found credible by a court. Thus it excluded

evidence that she was in foster care, while still permitting evidence that K.R. had been separated from her family, and the impact that had on her. The evidence was neutral. It did not explain why K.R. came to live with Ms. Miller. Nor did it explain who Ms. Miller was in relation to K.R.'s family except that K.R. was unfamiliar with her before K.R. disclosed the abuse. 2 RP 143-144, 163, 176-166, 2 RP 211-213.

The defendant argues that even this neutralized evidence should not have been admitted. His argument is based on speculation that jurors would infer K.R. was placed out of her home due to State action, and the State took that action because K.R.'s allegations were credible. BOA at 20. The defendant's argument fails because the jury was instructed to decide the case based solely on the evidence that was admitted. If evidence was not admitted jurors were not to consider it in reaching their verdict. 1 CP 42. Jurors are presumed to follow the court's instructions. State v. Southerland, 109 Wn.2d 389, 391, 745 P.2d 33 (1987).

There was no evidence that even inferred K.R. was removed from her home due to State action. There was some evidence that K.R.'s mother blamed K.R. for the family's circumstances, and that her mother thought the defendant was innocent. 3 RP 367; 4 RP

512-513. The jury could have concluded that was circumstantial evidence that K.R.'s mother had something to do with K.R. living outside the home because K.R.'s report was not credible. 1 CP 47.

Likewise the trial court did not err in finding the probative value of K.R.'s reaction to her out of home placement was not outweighed by the danger of undue prejudice. The evidence was highly probative because it was unlikely that K.R. would continue to falsely allege the defendant molested her in the face of the negative consequences she experienced. The danger that evidence would cause jurors to decide the case based on an emotional response rather than a rational evaluation of the evidence was minimal. It would be reasonable to expect some change in the family situation as a result of K.R.'s disclosure. Because the evidence showed K.R.'s family was close-knit her reaction would be considered normal. It is not so dramatic as to likely overshadow a rational evaluation of the evidence.

Finally the defendant argues the court's limiting instruction permitted jurors to use the evidence to improperly bolster K.R.'s credibility. The defendant did not object to that instruction. 1 CP 49; 5 RP 615. A party who does not object to a jury instruction waives that claim of error on appeal unless the instruction

constitutes a manifest constitutional error. State v. Smith, 174 Wn. App. 359, 365, 298 P.3d 785, review denied, 178 Wn.2d 1008 (2013). The defendant does not argue error in the limiting instruction meets the RAP 2.5(a)(3) standard for review. Any claim of error in the instruction is therefore waived.

Further, the instruction was also neutral. It did not suggest K.R. was credible. Rather it told jurors that the evidence could be considered only to assess “K.R.’s credibility or lack thereof.” (emphasis added). Thus jurors were permitted to consider evidence K.R. was not living with her family anymore to conclude whether or not her report of sexual abuse was credible.

C. ANY ERROR IN ADMITTING DETAILS OF K.R.’S INITIAL DISCLOSURE WAS HARMLESS.

Prior to trial the court addressed the permissible scope of testimony from the ODT actress and school officials regarding K.R.’s initial disclosure. The court permitted testimony from the ODT actress that K.R. asked her “what if it’s your dad” that had inappropriately touched her. 1 RP 30. With respect to statements from school officials the defense stipulated that the State could elicit testimony that “K.R. made a complaint of sexual abuse.” 2 CP 93; 1 RP 34. At trial the court overruled an objection to testimony

by Laurie Schreiber that K.R. identified the defendant as the person who had touched her inappropriately. 3 RP 275. Similar testimony was introduced through Ms. Connell. 3 RP 280.

The defendant argues this evidence was erroneously admitted because it goes beyond the fact of complaint doctrine. That rule permits the State to introduce evidence that the victim of a sexual assault complained to someone after the assault. State v. Ferguson, 100 Wn.2d 131, 135, 667 P.2d 68 (1983). The fact of complaint is admissible to rebut an inference that the complaining witness was silent following the attack. State v. Fleming, 27 Wn. App. 952, 957, 621 P.2d 779, review denied, 95 Wn.2d 1013 (1980). The testimony may identify the nature of the offense complained of. State v. Goebel, 40 Wn.2d 18, 25, 240 P.2d 251 (1952), overruled on other grounds, State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995). However details of the offense, including the perpetrator's identity are not admissible under this rule. Fleming, 27 Wn. App. at 957. Error in admitting the name of the assailant under this rule is harmless where there is no issue regarding the identity of the perpetrator. Ferguson, 100 Wn.2d at 136, Fleming, 27 Wn. App. at 958.

Here there was no issue as to the identity of the person who molested K.R. Evidence introduced through her counselor Ms. Jordan, the forensic interview, and K.R.'s in court testimony all identified the defendant as the one who sexually assaulted her. Any error in admitting evidence K.R. identified the defendant as the one who inappropriately touched her when she reported to the school officials was harmless.

The defendant argues that the State used this evidence to impermissibly bolster K.R.'s credibility in closing argument. BOA at 22. The State did point out that K.R. had been consistent in recounting certain details in part to argue that she was credible. However the portion of the transcript identified by the defendant relates to K.R.'s statements during the forensic interview and to Ms. Jordan. 5 RP 629, 657. The defendant has stipulated to the admission of the forensic interview. As discussed above statements to Ms. Jordan were properly admissible under the hearsay exception for statements made for the purpose of medical diagnosis and treatment. "Statements attributing fault to a member of the victim's immediate household may be reasonably pertinent to treatment and are thus admissible because it is 'relevant to the prevention of recurrence of injury.'" State v. Ackerman, 90 Wn.

App. at 482 quoting, State v. Butler, 53 Wn. App. 214, 221, 766 P.2d 505, review denied, 112 Wn.2d 1014 (1989). It was not improper for the State to refer to evidence that was properly introduced to argue that K.R. was credible.

D. EVIDENCE K.R. SUFFERED FROM A MEDICAL CONDITION THAT AFFECTED HER MEMORY WAS NOT AN OPINION ABOUT HER CREDIBILITY.

The State sought to elicit testimony from Ms. Jordan that K.R. suffered from Post-Traumatic Stress Disorder (PTSD) and as a result K.R. had memory loss. The State argued that evidence was relevant to rebut an argument that K.R.'s memory loss was the result of her inability to keep the details of a false allegation straight. 2 CP 93-94; 1 RP 34-35. The defense objected on the basis that reference to a diagnosis of PTSD was a comment on the veracity of K.R.'s allegations. The defense stipulated however that the State could elicit testimony that K.R.'s memory had been compromised. 1 RP 36-37. The court ruled that evidence that K.R. had a mental health condition that impacted her memory was admissible. It disallowed testimony that the condition was PTSD. 1 RP 38. Thereafter the State elicited testimony from Ms. Jordan that K.R. had been diagnosed with a medical condition that affected her ability to recall events, as well as her behavior, sleep habits, and

other things. On cross examination Ms. Jordan testified that she did not know if K.R.'s memory was better or worse now than it was before, or if it was the same. 3 RP 343-344, 356.

The defendant argues that this evidence was an improper comment on K.R.'s credibility. The defendant waived any argument that evidence K.R. had difficulty with her memory because he stipulated that evidence was admissible. State v. Thomas, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). The only issue therefore is whether it was improper to admit evidence that her memory problems were the result of a diagnosed condition.

An expert witness may testify to an opinion under ER 702, if the expert testimony is helpful to the trier of fact. State v. Black, 109 Wn.2d 336, 341, 745 P.2d 12 (1987). If the testimony is helpful to the trier of fact it may nevertheless be excluded if it is too prejudicial. Id., 109 Wn.2d at 348. An expert may testify to her opinion even if it embraces an ultimate issue to be decided by the trier of fact. ER 704. However, an expert may not express an opinion of personal belief regarding the veracity of witnesses. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008).

In Black a counselor who treated sexual assault victims testified that based on a constellation of symptoms that an alleged

rape victim suffered she fit the profile for rape trauma syndrome. Black, 109 Wn.2d at 339. The only issue at trial was whether sexual intercourse between the defendant and the victim was consensual. Id. at 338. The court held the expert's testimony constituted an improper opinion that the defendant was guilty because the term "rape trauma syndrome" implied the opinion that the victim was telling the truth and was in fact raped. Id. at 348. The court went on to state that characterizing the victim's symptoms as PTSD with rape as the likely stressor would be equally impermissible. Id. at 349.

In contrast testimony by a physician who examined a child who had reported sexual abuse did not amount to an improper opinion in State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007). There a child reported the defendant has engaged in numerous sexual assaults that included vaginal penetration, sodomy, and fellatio. Id. at 924. The doctor testified that he observed no physical evidence of sexual contact, but that was normal to have no findings after receiving a history like the one reported by the child. Id. He also testified that the child had good language skills, and spoke clearly. Id. The court held the doctor's testimony was not an improper opinion. It noted that in cases of alleged child abuse the

child's credibility is always an issue; the trial court has broad discretion to admit evidence corroborating the child's statements. Id. at 933. Because the doctor's testimony was not an opinion that the defendant was guilty or the child was truthful, there was no error in admitting it. Id. "His testimony was content neutral, focusing on the clear communication, rather than the substance of matters discussed." Id.

The testimony at issue in this case is more like that in Kirkman than in Black. K.R.'s lack of memory regarding details of the sexual assaults that she originally reported was a significant part of the defense that K.R. was lying about those assaults. Thus whether K.R. had a diagnosed condition that affected her memory was highly probative of an alternative explanation.

Ms. Jordan's testimony that K.R.'s memory problems had been diagnosed as a medical condition was content neutral. She did not state that she believed K.R. was telling the truth because of, or in spite of, her memory lapses. Nor did her testimony suggest that she had an opinion as to the cause of K.R.'s memory lapses. On the contrary, it suggested that she had no knowledge what caused the memory lapses because she did not know if K.R.'s memory was better at the time of trial or before.

Calling it a medical condition rather than a mental health condition further distanced K.R.'s memory problems from any suggestion that an emotional trauma resulting from the defendant sexually assaulting her was the cause of that problem. K.R. had broken her arm by falling off playground equipment just prior to trial and appeared in court with a splint and a sling. 2 RP 102-103, 150. That, and evidence K.R. had been out of the home for approximately 10 months before trial, suggested that K.R.'s memory loss could have been the result of a physical trauma such as a concussion, rather than emotional trauma brought on by sexual abuse on the defendant's part.

E. QUESTIONS AND ARGUMENT REGARDING PARENTING DECISIONS WERE RELEVANT AND NOT UNDULY PREJUDICIAL.

The defendant argues that the State was allowed to elicit evidence about two instances that reflected on his and C.R.'s parenting skills which were not relevant and were unduly prejudicial. The first instance occurred when the defendant allowed K.R. and her younger sisters to watch a movie called "Sucker Punch." The second instance occurred during a joint counseling session where C.R. told K.R. "there are four innocent people suffering here." 3 RP 367.

1. Sucker Punch.

Each reference to the movie Sucker Punch was either stipulated to or introduced by the defendant. The first reference came in the forensic interview where K.R. reported that she was uncomfortable when the defendant showed her the movie "Sucker Punch." She described it as showing girls who were not wearing much clothing being required to dance for boys. Ex. 33 RP 42. The defendant stipulated to admission of this evidence.

During the defense case A.R. testified on direct that on Memorial Day weekend the defendant, K.R. and the twins were watching that movie while their mother was in another room of the house. 4 RP 430-433, 442. On cross examination A.R. testified that the movie contained scantily clad women, sexual innuendo, and violence. A.R. was permitted to testify over objection that the movie was not entirely appropriate for K.R. to watch. The court sustained an objection to whether A.R. would have allowed K.R. to watch the movie. 4 RP 448-449.

The defendant confirmed that he had allowed the girls to watch that movie because they liked action movies. He testified that he had the girls cover their eyes during the sexual portions of the movie. 4 RP 580-581. On cross examination the prosecutor

questioned the defendant about inconsistencies between his testimony and what he told the detective investigating the case. While the defendant told the detective the girls had watched The Muppet Movie, he left out that he had also let them watch Sucker Punch. 4 RP 607. The defendant confirmed the movie contained violent and sexually explicit scenes, but he thought it was alright for the girls to watch the movie because it also contained fight scenes which the girls liked. 4 RP 610.

Because the defendant agreed to allow evidence that he let the girls watch the movie Sucker Punch he has waived any objection to evidence about that movie or what role he played in allowing his children to watch it. Kammerer v. Western Gear Corp., 96 Wn.2d 416, 420-421, 635 P.2d 708 (1981). The evidence relating to the movie that the defendant argues was irrelevant came during the course of cross examination. The scope of cross examination is within the discretion of the trial court. State v. Lord, 117 Wn.2d 829, 870, 822 P.2d 177 (1991) cert denied, 506 U.S. 856 (1992). Generally cross examination should be limited to the subject matters on direct examination, and matters affecting the witnesses' credibility, although the court may permit cross examination into other matters. Id.

What the defendant told the detective about what movies he watched with K.R. did bear on his credibility. While he was willing to reveal that he let her watch a movie that no one would likely question for a child her age, he left out that he let her watch a more questionable movie. That suggests that he was hiding something, which bore on his credibility.

Whether it was appropriate to allow K.R. to watch that movie was also relevant to whether he had sexually molested her. Allowing a child to watch movies with sexual themes could desensitize the child to sexual situations. In doing so it could make the child less likely to resist the defendant's sexual advances.

2. C.R.'s Four Innocent People Comment.

Ms. Jordan was cross examined about the delay from the time K.R. started counseling to the time that she talked about being abused. 3 RP 362-363. On redirect the prosecutor asked about whether lack of family support could have contributed to the reason for the delay. In the context of that line of questioning the prosecutor elicited testimony that during a joint counseling session with K.R. and her mother C.R., C.R. directed a comment toward K.R. that "there are four innocent people suffering here." K.R. reacted to the comment by tearing up. 3 RP 365-368.

A party who opens up a subject on cross examination contemplates that the rules will allow redirect examination within the scope of the examination in which the subject matter was first introduced. State v. Gefeller, 76 Wn.2d 449, 455, 548 P.2d 17 (1969). "It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it." Id.

Evidence that K.R. took a long time to start talking about being sexually molested bore on the defendant's theory that she was lying when she reported the abuse. By raising the subject the defense opened up the opportunity for the prosecutor to explore alternative reasons why K.R. did not immediately start talking about the defendant abusing her. 3 RP 372. K.R. had been very close to her family, even by her mother's account. 4 RP 483-484, 518. Whether her mother did or did not support K.R. was relevant to whether K.R.'s delay was evidence that she was lying or not. Because the evidence was relevant to a topic raised by the defendant the trial court did not abuse its discretion when it permitted the State to elicit testimony about C.R.'s conduct and K.R.'s reaction in counseling.

F. THE CUMULATIVE ERROR DOCTRINE DOES NOT REQUIRE REVERSAL.

The defendant argues that as a result of the alleged evidentiary errors he is entitled to a new trial under the cumulative error doctrine. That doctrine applies when there have been several trial errors that stand alone may not justify reversal, but when combined may deny a defendant a new trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). It does not apply when there are few errors that had little or no effect on the outcome of the trial. Id.

The defendant argued that the trial court erred in admission of five types of evidence. Only the defendant's identity when K.R. reported the abuse to school officials was admitted in violation of the fact of complaint doctrine. The rest of the evidence the defendant complains about was properly admitted for a variety of reasons outlined above. The one error in admitting evidence was minor, and harmless. The defendant is not entitled to a new trial on the basis of cumulative evidentiary error.

G. DEFENSE COUNSEL MADE A REASONABLE STRATEGIC DECISION WHEN HE STIPULATED TO ADMISSION OF K.R.'S FORENSIC INTERVIEW.

K.R. was interviewed by Gina Coslett, a child interview specialist on May 29, 2012. 2 RP 238, 250. The interview was

video recorded. Ex. 33. At trial the defense attorney stipulated that interview could be admitted into evidence. 1 RP 47. The defendant argues that because the interview would not have been admitted absent his attorney's stipulation that his attorney performed deficiently. He argues that he was prejudiced because it is reasonably probable that the jury's verdict rested on evidence from that interview rather than from K.R.'s in court testimony.

When a defendant alleges that he received ineffective assistance of counsel he bears a heavy burden to show (1) that defense counsel's performance was deficient, "i.e. that it fell below an objective standard of reasonableness based on consideration of all the circumstances;" and (2) that the defendant was prejudiced, i.e. "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." In re Davis, 152 Wn.2d 647, 672-73, 101 P.3d 1 (2004), quoting State v. McFarland, 127 Wn.2d 322, 334, 335, 899 P.2d 1251 (1995). A reasonable probability is a probability sufficient to undermine the confidence in the outcome. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 564 (1984). The petitioner must satisfy both prongs in order to justify

overturning his conviction on the basis of ineffective assistance of counsel. Id. at 700.

“There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” Strickland 466 U.S. at 689. For that reason a reviewing court employs a strong presumption that counsel’s performance was reasonable. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). “Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is ‘all too tempting’ to ‘second-guess counsel’s assistance after conviction or adverse sentence.’” Harrington v. Richter, ___ U.S. ___, 131 S.Ct. 770, 788, 178 L.Ed.2d 624 (2011) quoting Strickland at 689.

When assessing a claim of ineffectiveness the court will consider counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct. Id. at 690. If the attorney’s performance can be characterized as legitimate trial strategy or tactics, it will not support a claim that the defendant received ineffective assistance of counsel. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). A strategic choice made after

a thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable. Strickland, 466 U.S. at 690. To rebut the presumption that counsel performed reasonably he must show that “there was no conceivable legitimate tactic explaining counsel’s performance.” State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) quoting, State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

A reasonable trial strategy may include forgoing things a defendant is otherwise entitled to. Defense counsel made a strategic choice to inform jurors in an aggravated first degree murder case that it was not a death penalty case despite authority that held it was error to do so in State v. Rafay, 168 Wn. App. 734, 285 P.3d 83 (2012), review denied, 176 Wn.2d 1023, cert denied, 134 S.Ct. 170 (2013). The information was limited, and provided counsel with the advantage of gaining valuable insight into jurors’ qualifications to serve on that type of case. Id. at 778-781. Similarly, counsel made a strategic decision to forgo a Petrich³ instruction in State v. Carson, ___ Wn. App. ___, 320 P.3d 185 (2014). There counsel had researched the law and concluded that

³ State v. Petrich, 101 Wn.2d 566, 686 P.2d 173 (1984), overruled on other grounds, State v. Kitchen, 110 Wn.2d 403 (1988).

under the circumstances of the case that instruction would have been too confusing for jurors. Id. at 192.

Here trial counsel did investigate the law and the facts before settling on a trial strategy that included stipulating to admission of the recorded forensic interview. Counsel had looked into the admissibility of child hearsay, and concluded that absent his stipulation it would not be admitted. 1 RP 5-6. He had also interviewed K.R. and was familiar with the various statements that she had made pretrial. 2 RP 199-218; 6 RP 9, 11. He was also aware that K.R. had said she did not remember some details of incidents which she had previously reported, and that the State was prepared to present evidence to explain those memory lapses. 1 RP 34-38.

From his investigation defense counsel settled on a theory that K.R. was lying when she reported the defendant had sexually assaulted her. Counsel theorized that K.R.'s initial report simply mimicked the facts she learned in the ODT play. 2 RP 115; 3 RP 282; 5 RP 643-644. To support his theory he sought to introduce evidence that demonstrated that K.R. was not consistent when talking about the abuse. She initially gave full details of the abuse two or three weeks before meeting with Ms. Jordan, then gave no

details at all for months. K.R. was able to fully talk about the abuse in a defense interview several months after she began counseling, but at the time of trial did not do so. 3 RP 373-374.

The interview with Ms. Coslett was necessary to demonstrate that K.R.'s reports tracked with what she had learned in the ODT play, and to demonstrate that K.R.'s memory as to details was inconsistent depending on who she was talking to at any given time. K.R.'s interview with Ms. Coslett was conducted on the same date that she saw the ODT play. In one scene of the play a child's mother's boyfriend touches the child's in a manner that makes her uncomfortable. The child also reveals that the boyfriend has touched her private parts and made the child touch his private parts over her objection. 2 RP 226-230, 234, 250.

During her interview with Ms. Coslett K.R. recounted similar conduct between herself and the defendant. K.R. recounted three incidents where the defendant touched her vagina and breasts, both over and under her clothes. She gave details about when it happened and where, what she was wearing, where other people in the family were at the time it was happening and what she and the defendant were watching on television when the defendant began to molest her. K.R. also gave similar details about a time when the

defendant cause K.R. to touch his penis. K.R. specifically stated that she reported that the defendant had touched her as a result of the information she learned in the ODT play. Ex. 33 RP 10-13, 16-40, 44.

K.R. began counseling with Ms. Jordan in mid-June 2012. K.R. did not initially talk to Ms. Jordan at all about the abuse. When she did finally talk about what the defendant had done at a session in January 2013 she gave few details; K.R. only recounted she was alone with the defendant in his man cave when he touched her front privates in the course of a "tickle game." 3 RP 334-335, 344-348.

From this evidence defense counsel argued that K.R.'s memory lapses were the result of her inability to keep the details of a fabrication straight. In making that argument he referred jurors to the forensic interview which was the one occasion in which K.R. had given a detailed account of what she claimed had happened. Counsel urged jurors to compare her statements in that interview with her statements in other interviews to make two points. First, K.R.'s memory was fine because she did remember details of those interviews, despite claiming a memory loss as to the details of the alleged assaults. Second, the forensic interview itself was

suggestive. Ms. Coslett asked K.R. to tell her “about another time” when there may not have been another time. He suggested to jurors that K.R. was answering “off the top of her head.” He then catalogued the inconsistencies in the various statements K.R. had made. 5 RP 637-650. Defense counsel could not have made these arguments without evidence of the forensic interview before the jurors.

The defendant argues that counsel performed deficiently because there was no conceivable tactical reason to stipulate to admission of otherwise inadmissible evidence for substantive purposes. Given the defense strategy however, it did not matter whether the evidence was admitted for substantive purposes or not. If the jury accepted the defense theory then every statement K.R. would have been discredited.

Since defense counsel did not perform deficiently, the defendant’s ineffective assistance of counsel claim should fail. It should also fail because the defendant was not prejudiced as a result of counsel’s decision to stipulate to admission of the forensic interview. K.R testified that the defendant touched her vagina numerous times, both over and under her clothing. The one time that she remembered the most occurred in the man cave when she

was watching an action movie with the defendant. Everyone else in the house was asleep, or at least not in the man cave with them. She was on the sofa when he began touching her. She felt very uncomfortable when the defendant was touching her vagina. She also remembered an incident when the defendant grabbed her by the wrist and forced her to touch his penis, which she described as not feeling good. 2 RP 151-165. Because K.R. testified to sufficient facts to support one count of first degree child molestation, admitting her statements from the forensic interview for substantive purposes did not form the sole basis for the defendant's conviction.

H. THE SENTENCE CONDITIONS PROHIBITING CONTACT WITH MINORS WERE APPROPRIATELY ORDERED.

At sentencing the court ordered several conditions of community custody that related to contact with minors. 6 RP 23; 1 CP 33. The defendant argues that it was error to impose these conditions without considering the impact they will have on his fundamental right to parent his minor daughters. He asks the court to remand to the trial court for resentencing.

The court may restrict the defendant's contact with the victim of an offense or a specified class of persons. RCW 9.94A.703(3)(b). It may also impose crime related prohibitions as a

condition of community custody. RCW 9.94A.703(3)(f). A crime related prohibition is one that directly relates to the circumstances of the crime. RCW 9.94A.030(10). An order restricting or prohibiting contact with minors is related to the circumstances of a sexual offense against a minor. State v. Riles, 135 Wn.2d 326, 347, 957 P.2d 655 (1998), abrogated on other grounds, State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). A trial court's decision to impose a condition of community custody is reviewed for an abuse of discretion. In re Rainey, 168 Wn.2d 367, 374-375, 229 P.3d 686 (2010).

Conditions which interfere with fundamental constitutional rights must be reasonably necessary to accomplish the essential needs of the State and public order. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). Parents have a fundamental liberty interest in the care, custody, and management of their children. Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct 1388, 71 L.Ed.2d 599 (1982). "The State also has a compelling interest in protecting the physical, mental, and emotional health of the children." In re V.R.R., 134 Wn. App. 573, 581, 141 P.3d 85 (2006). In a criminal case the fundamental right to parent may be restricted by a condition of the defendant's sentence if the condition is reasonably

necessary to prevent harm to the children. State v. Sanford, 128 Wn. App. 280, 288, 115 P.3d 368 (2005).

The defendant relies on Rainey in support of the claim that he is entitled to be resentenced. Rainey involved a lifetime no contact order in favor of the defendant's ex-wife and minor daughter after the defendant was convicted of telephone harassment and kidnaping the daughter. The court found no abuse of discretion in ordering no contact with either victim. Rainey, 168 Wn.2d at 380. But because the trial court did not explain how the length of the order was reasonably necessary to protect them it remanded for resentencing to allow the court to address the parameters of the order in light of the appropriate standard. Id. at 381-82.

The facts of this case are different from those in Rainey. Here the conditions restricting the defendant's access to minors without exception for his own two minor children was reasonably necessary to prevent harm to those children. The defendant had offended against his step-daughter, a child who called him "dad." The evidence showed that the children's mother did not believe that the defendant had molested K.R. She could reasonably be expected to not be protective should the defendant move on to

molesting one of his younger children. Despite the limitations placed on the defendant regarding contact with minors they do not completely prevent him from contacting his children. Condition 4 does contemplate that the defendant may have supervised contact with an adult who is knows about the offense and is approved by the community corrections officer. None of the conditions prohibit indirect contact. Because the court's order does not prevent all contact with his minor children, and they are reasonably related to those children's safety, remand for resentencing is not necessary.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to affirm the conviction and sentence.

Respectfully submitted on April 10, 2014.

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