Supreme Court No. 98215-5
COA No. 78613-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRETT ANTHONY COFER,

Petitioner.

PETITION FOR REVIEW

MAUREEN M. CYR
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Cases

Other Authorities

Rules

A. IDENTITY OF PETITIONER/DECISION BELOW

Brett Anthony Cofer requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Cofer, No. 78613-0-I, filed on January 27, 2020. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

Brett Cofer was charged with four separate counts of first degree child molestation. For each count, the State alleged the aggravating factor that the offense was part of an ongoing pattern of sexual abuse. Together, the charges required proof of at least *eight* separate acts of child molestation.

The complainant, K.M., testified that she was molested "[m]ore than once" but "[n]ot every night," over a period of a couple of months. RP 293. The only other evidence presented of the number of incidents was K.M.'s out-of-court statement to a police sergeant that the event occurred "around 10 times" and "roughly the same way 10 to 15 times." RP 374-75.

K.M.'s out-of-court statements to the police sergeant were inadmissible hearsay. Nonetheless, defense counsel agreed to the admission of the statements as substantive evidence under ER

801(d)(1)(ii), the hearsay exception for prior consistent statements. But the statements were not admissible under that exception because the State did not offer them to rebut a charge of recent fabrication.

The Court of Appeals affirmed the conviction, holding defense counsel's agreement to the admission of the hearsay statements was a reasonable tactical decision, given that the defense theory throughout trial focused on K.M.'s inconsistent account of events. Slip Op. at 5.

Agreeing to the admission, as substantive evidence, of an out-of-court statement that does not fall under an exception to the hearsay rule cannot be reasonable where the State bears the burden to prove at least eight separate incidents, and the hearsay statement is the only evidence offered to prove that so many incidents occurred. Did the Court of Appeals unreasonably apply the deficient performance prong of the Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) test for determining ineffective assistance of counsel, warranting review by this Court? RAP 13.4(b)(1), (2), (3), (4).

C. STATEMENT OF THE CASE

The complainant, K.M., was the daughter of Brett Cofer's girlfriend. RP 314-15, 323-24. In August 2013, when K.M. was nine years old, she, her younger brother, and Cofer moved in to Cofer's

mother's house while K.M.'s mother remained homeless, struggling with a drug addiction. RP 326-27. K.M. and her brother lived at the Cofer home for four months. RP 326. K.M. claimed that during that time, she and Cofer slept in the same bed. RP 274-75, 281.

One day in July 2017, K.M. told her stepmother that when she was living with Cofer, he "touched her with his penis." RP 283, 317. The stepmother took K.M. to the Grays Harbor County Sheriff's Office where K.M. spoke to Detective Sergeant Darrin Wallace. RP 289, 370-71. K.M. then spoke to a sexual assault nurse examiner and underwent a physical exam. RP 289, 342-47. No physical evidence of sexual abuse was ever presented.

Cofer was charged with four counts of first degree child molestation. CP 209-14. Each count carried the aggravating factor allegation that "the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time." CP 213.

At trial, K.M. testified that on a "regular night," she and Cofer would go to bed, "but some nights he would molest me and then we would go to bed." RP 276. She said "he would pull down my pants and he would touch me with his penis" "[o]n my vagina." RP 276. She did

not know how many times this occurred but "every time was the same." RP 278, 293-94. It happened "[m]ore than once" but "[n]ot every night," over a period of about two months. RP 293, 303.

On cross-examination of K.M., defense counsel elicited a few out-of-court statements she had made to the defense investigator, Neil Harrison. RP 300-03. For instance, K.M. had told Harrison the abuse "started a couple of months after" she moved in, and "happened at night." RP 301-02. K.M. had said Cofer "followed [her] into the bedroom" when she went to bed, and she was "on the left side of the bed." RP 301-02. And K.M. had said that Cofer was circumcised. RP 303. K.M. affirmed at trial she believed Cofer was circumcised. RP 303, 306-07, 311.

After K.M.'s testimony, the prosecutor moved to admit K.M.'s out-of-court statements to Sergeant Wallace as substantive evidence under ER 801(d)(1)(ii). RP 366-67. The prosecutor argued the statements were admissible to rebut the claim that K.M. had fabricated her report of abuse. RP 366.

Defense counsel agreed to the admission of K.M.'s out-of-court statements to Wallace as substantive evidence. RP 367-68. Based on

the parties' agreement, the court admitted the statements under ER 801(d)(1)(ii). RP 368.

Wallace testified at length about what K.M. had said to him. RP 373-78. Wallace said K.M. had told him the event occurred "around 10 times" and "roughly the same way 10 to 15 times." RP 374-75. Her statement also contained extensive and inflammatory details that no other witness had testified about. RP 373-78. The explicit nature of the statements is particularly apparent when contrasted with K.M.'s trial testimony, which was generally terse. See RP 264-311, 374-78. In addition, the statement undoubtedly elicited a strong emotional reaction in the jury. For example, Sergeant Wallace testified that K.M. had told him, "She felt in her soul that it was not right to be doing these things, but that her support network and her support group, she didn't trust anybody in that family household." RP 377-78.

The jury found Cofer guilty of all four counts as charged, and answered "yes" on the special verdict forms regarding the aggravating factors. CP 217-24.

Cofer appealed, arguing he had received ineffective assistance of counsel due to his attorney's unreasonable decision to agree to the admission of K.M.'s hearsay statements to Sergeant Wallace. The

Court of Appeals affirmed, holding counsel had a reasonable tactical basis not to object to the admission of the statements because "[t]he defense theory throughout trial focused on K.M.'s inconsistent account of events." Slip Op. at 5. The Court of Appeals did not acknowledge that the trial court had admitted K.M.'s hearsay statements as substantive evidence, and that the statements were the only evidence offered to prove at least eight separate incidents of molestation.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Court of Appeals unreasonably concluded that counsel had a legitimate tactical basis for agreeing to the admission of K.M.'s hearsay statements to Sergeant Wallace.

Counsel had no legitimate tactical basis not to object to the admission of K.M.'s out-of-court statements to Sergeant Wallace. The statements were not admissible as prior consistent statements under ER 801(d)(1)(ii) because the defense had not asserted nor implied that K.M. changed her story over time because she had a recent motive to lie. The introduction of this damaging evidence materially affected the outcome of the trial and requires reversal.

1. The accused in a criminal trial has a constitutional right to the effective assistance of counsel.

An accused in a criminal case has a state and federal constitutional right to the effective assistance of counsel. In re Pers.

Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 99, 351 P.3d 138 (2015); Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI; Const. art. I, § 22.

"Representation of a criminal defendant entails certain basic duties." Strickland, 466 U.S. at 687-88. Among those duties, defense counsel must employ "such skill and knowledge as will render the trial a reliable adversarial testing process." Id.

A defendant establishes an ineffective assistance of counsel claim by showing his attorney's performance was deficient and he was prejudiced as result. Id. An attorney's performance is deficient if it falls below an objective standard of reasonableness. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel's conduct is not objectively reasonable if no legitimate strategic or tactical reasons support it. Id. at 336.

"'Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.'" Yung-Cheng Tsai, 183 Wn.2d at 102 (quoting State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d (2009) (citing Strickland, 466 U.S. at 690-91)).

Prejudice results where "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. *A reasonable probability is a probability sufficient to undermine confidence in the outcome.*'" State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 694) (alteration in Thomas). Defendant "'need not show that counsel's deficient conduct more likely than not altered the outcome in the case.'" Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 693).

2. Defense counsel's failure to object to hearsay evidence amounts to ineffective assistance of counsel if counsel had no legitimate tactical basis not to object and the evidence prejudiced the defense.

Generally, error may not be predicated upon a trial court's ruling admitting evidence unless an objection was made at trial. ER 103. But in a criminal case, the defendant may challenge the admission of hearsay evidence for the first time on appeal in the context of an ineffective assistance of counsel claim. State v. Hendrickson, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007). The failure to object to hearsay is ineffective assistance of counsel if counsel had no tactical reason not to object and a reasonable probability exists that without the evidence the defendant would not have been convicted of the charge. Id.; Strickland, 466 U.S. at 687-88.

3. A witness's prior consistent statements are admissible only to rebut a claim that the witness recently developed a motive to fabricate.

"Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c).

The hearsay rule excludes hearsay statements even if the witness is present and testifies at trial and is thus presently under oath, observable by the trier of fact, and subject to cross-examination. ER 802; State v. Sua, 115 Wn. App. 29, 41, 60 P.3d 1234 (2003). That is because offering out-of-court statements that are similar to and in harmony with the witness's present testimony on the stand is merely an attempt to bolster the testimony of the witness. Thomas v. French, 99 Wn.2d 95, 103, 659 P.2d 1097 (1983). Such bolstering is improper because repetition is not generally a valid test for veracity. Id.

An exception exists for certain prior consistent statements of a witness. A statement is not considered hearsay and may be admissible if the declarant testifies at the trial and is subject to cross examination, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." ER 801(d)(1)(ii).

The rule permits admission of a witness's prior consistent statements only if the opposing party discredits the witness's testimony by suggesting it is a recent fabrication. State v. Harper, 35 Wn. App. 855, 857, 670 P.2d 296 (1983); ER 801(d)(1)(ii). "Evidence which counteracts a suggestion that the witness changed his story in response to some threat or scheme or bribe by showing that his story was the same prior to the external pressure is highly relevant in shedding light on the witness' credibility." Harper, 35 Wn. App. at 858. (internal quotation marks and citation omitted). But "[e]vidence which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force for the simple reason that mere repetition does not imply veracity." Id. (internal quotation marks and citation omitted).

Merely assailing the witness's testimony in cross-examination or opening statement does not alone justify admission of prior consistent statements. State v. Braniff, 105 Wash. 327, 331-33, 177 P. 801 (1919). Admissibility is "'confined to those statements offered to rebut a charge of "recent fabrication or improper influence or motive."'" United States v. Collicott, 92 F.3d 973, 979 (9th Cir. 1996) (quoting Tome v. United States, 513 U.S. 150, 157, 130 L. Ed. 2d 574,

130 L. Ed. 2d 574 (1995) (quoting FRE 801(d)(1)(B)).[1] The questioning must raise an inference sufficient to allow counsel to argue the witness had a reason to fabricate her story later. State v. Dictado, 102 Wn.2d 277, 290, 687 P.2d 172 (1984). A statement that merely corroborates the witness's earlier testimony is generally not relevant. State v. Bargas, 52 Wn. App. 700, 702, 763 P.2d 470 (1988).

Logically, to be admissible for this proper purpose, the prior statement must have been made at a time before the date of the facts from which the motive to falsify is inferred. Harper, 35 Wn. App. at 857; State v. Purdom, 106 Wn.2d 745, 750, 725 P.2d 622 (1986) (prior consistent statements may be used to rebut claim of fabrication only when were made prior to time that motive to fabricate arose).

Moreover, the rule does not permit "the introduction of an entire conversation by a witness after the opposing party has 'opened the door' by impeaching the witness using portions of that conversation." Collicott, 92 F.3d at 979. The plain language of the rule allows only statements "offered to rebut an express or implied charge against the

---

[1] Washington's ER 801(d)(1)(ii) is the same as FRE 801(d)(1)(B). Karl B. Tegland, Washington Practice: Evidence Law and Practice, § 801.1, n.1. Thus, federal case law interpreting FRE 801(d)(1)(B) is persuasive authority in interpreting Washington's rule. In re Det. of Pouncy, 168 Wn.2d 382, 392 n.9, 229 P.3d 678 (2010).

declarant of recent fabrication or improper influence or motive." ER 801(d)(1)(ii). "The rule of permissible rehabilitation is not so broad as to permit the use of hearsay on one subject to support the impeached testimony on another subject." Com. v. Fisher, 447 Pa. 405, 415, 290 A.2d 262 (1972).

4. Defense counsel had no legitimate tactical basis not to object to K.M.'s statements to Sergeant Wallace because they were not admissible under ER 801(d)(1)(ii) and were highly damaging to the defense.

The prosecutor argued K.M.'s statements to Sergeant Wallace were admissible as substantive evidence because defense counsel on cross-examination had "brought out inconsistencies" between K.M.'s trial testimony and her statements to the defense investigator Harrison. RP 366. Admission was also justified, the prosecutor argued, because defense counsel had implied during cross-examination and in opening statement that K.M. had fabricated her report of abuse. RP 366.

This reasoning by the prosecutor did not satisfy the requirements for admissibility under ER 801(d)(1)(ii). Defense counsel never stated explicitly nor implied that K.M. had developed a motive to fabricate her story sometime between when she spoke to Wallace and when she testified at trial. To the contrary, counsel's theory was that K.M.'s story of abuse was *always* untrue. Counsel said in opening, "No

one understands why [K.M.] is making this accusation against Mr. Cofer." RP 260-61. Counsel did not say or imply that K.M.'s central accusation of abuse against Cofer had changed over time.

Counsel's attempt to impeach K.M. by eliciting inconsistencies between her prior statements and her trial testimony was mere cross-examination and not a charge of recent fabrication. See Braniff, 105 Wash. at 331-33. Counsel asked K.M. about prior statements she had made not only to Harrison but also to Wallace and the sexual assault nurse. RP 297-300, 368. Counsel's questioning did not raise "an inference sufficient to allow counsel to argue the witness had a reason to fabricate her story later." Dictado, 102 Wn.2d at 290. Instead, counsel's theory was that K.M. did not remember the events correctly and in her testimony, "[d]etails are lost, muddled and wholly inconsistent." RP 430-33.

Because counsel did not expressly claim nor imply that K.M. had recently fabricated her story, her prior consistent statements to Wallace were not admissible as substantive evidence. ER 801(d)(1)(ii); Dictado, 102 Wn.2d at 290; Harper, 35 Wn. App. at 857-58. The statements merely corroborated her earlier testimony and were not relevant. Bargas, 52 Wn. App. at 702.

Counsel had a duty to know the relevant law. Yung-Cheng Tsai, 183 Wn.2d at 102; Strickland, 466 U.S. at 690-91)). Counsel's failure to understand that ER 801(d)(1)(ii) did not apply was not reasonable and amounts to deficient performance. Id.

Moreover, contrary to the Court of Appeals' opinion, counsel's agreement to the admission of the evidence was not consistent with the defense theory of the case. Instead, the evidence was highly damaging to the defense.

First, the statements were extensive, detailed and inflammatory, with details that no other witness had testified about, including K.M. RP 264-311, 373-78. Also, the statements must have elicited a strong emotional response in the jury. Sergeant Wallace testified that K.M. told him "[s]he felt in her soul that it was not right to be doing these things." RP 377-78.

Most importantly, the erroneous admission of the hearsay was particularly prejudicial because it contained material information regarding the number of incidents which was otherwise missing from K.M.'s testimony. Wallace testified K.M. told him the event occurred "around 10 times" and "roughly the same way 10 to 15 times." RP 374-75. By contrast, at trial, K.M. did not specify how many times the event

occurred. She said it was "[m]ore than once" but "[n]ot every night," over a period of a couple of months. RP 293.

In closing argument, the prosecutor recognized that K.M.'s hearsay statement was necessary to fill this significant gap in her testimony. The prosecutor acknowledged that K.M. did not testify about how many times the events occurred, other than saying it happened "multiple times." RP 425. The prosecutor seized on K.M.'s statements to Wallace, saying, "She told Sgt. Wallace that it might have happened ten times. Maybe more." RP 425.

Whether the evidence showed "ten or more" or merely "multiple" incidents was significant because the State bore the burden to prove *four separate* incidents of "sexual contact" in order to prove the four charges of child molestation. CP 240-43. In addition, the State bore the burden to prove *at least eight* incidents of sexual abuse in order to prove the "pattern of abuse" aggravator.

The State alleged a separate "pattern of abuse" aggravator for each charge. CP 260-65. Proof of this aggravator requires proof beyond a reasonable doubt that "the crime was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested

by multiple incidents over a prolonged period of time." CP 221-24, 250; RCW 9.94A.535(3)(g).

The "ongoing pattern of abuse" aggravator applies only in cases where the State presents evidence of multiple incidents of abuse for each criminal charge. State v. Quigg, 72 Wn. App. 828, 840, 866 P.2d 655 (1994); State v. Daniels, 56 Wn. App. 646, 653-54, 784 P.2d 579 (1990); State v. Brown, 55 Wn. App. 738, 754-56, 780 P.2d 880 (1989).

Therefore, the State bore the burden to prove multiple incidents of abuse for each of the four charges, or at least *eight* incidents. Quigg, 72 Wn. App. at 840; Daniels, 56 Wn. App. at 653-54; Brown, 55 Wn. App. at 754-56.

Counsel should have recognized that, without the hearsay statements, the evidence was not sufficient to prove at least eight separate incidents of abuse. The only other evidence of the number of incidents was K.M.'s testimony that it happened "[m]ore than once" but "[n]ot every night," over a period of a couple of months. RP 293.

In sum, counsel had no reasonable tactical basis to agree to the admission of K.M.'s statements to Sergeant Wallace as substantive evidence.

5. Reversal is required because the admission of the evidence materially affected the outcome of the trial.

Counsel's unreasonable failure to object to hearsay evidence requires reversal if a reasonable probability exists that without the evidence the defendant would not have been convicted. Hendrickson, 138 Wn. App. at 833. A reasonable probability is one sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

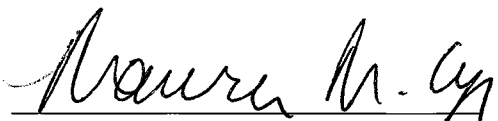
When hearsay evidence is erroneously admitted, the question on review is whether the outcome of the trial was materially affected by the improperly admitted evidence. State v. McDaniel, 37 Wn. App. 768, 771-72, 683 P.2d 231 (1984).

Because a reasonable probability exists that the outcome of the trial would have been different had counsel not unreasonably agreed to the admission of the hearsay, the convictions must be reversed.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 26th day of February, 2020.



MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX

FILED
1/27/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BRETT ANTHONY COFER, Appellant.	No. 78613-0-I DIVISION ONE UNPUBLISHED OPINION FILED: January 27, 2020

CHUN, J. — A jury convicted Brett Anthony Cofer on four counts of child molestation. Cofer seeks reversal, arguing ineffective assistance of counsel. He also challenges the trial court's authority to impose several conditions of community custody and a $200 criminal filing fee. We accept the State's concessions that two of the conditions of community custody are unconstitutionally vague and the $200 fee should be stricken. We affirm the convictions but remand for correction of Cofer's judgment and sentence.

I. BACKGROUND

Based on allegations that Cofer inappropriately touched nine-year-old K.M. multiple times, the State charged Cofer with four counts of first degree child molestation. Each count further alleged the aggravating factor of an ongoing pattern of sexual abuse of the same victim. Cofer pleaded not guilty and proceeded to trial.

During opening statements at trial, Cofer's counsel told the jury that "[n]o one understands why [K.M.] is making this accusation against Mr. Cofer" and that it would see "varying degrees of inconsistency in the story that [K.M.] tells you."

K.M.'s mother testified about becoming homeless in August 2013 and leaving K.M. in the care of her former boyfriend, Cofer.[1]

On direct examination, K.M. testified about the molestation.[2] On cross-examination, Cofer's counsel elicited testimony highlighting inconsistencies between K.M.'s trial testimony and statements she gave to several others, including Detective Sergeant Darrin Wallace of the Grays Harbor County Sheriff's Office, prior to trial.

K.M.'s stepmother testified about K.M.'s disclosure of the molestation in 2017 and taking K.M. to the authorities to report the abuse. Heather McLeod, a sexual assault nurse examiner (SANE), testified about the results of K.M.'s examination, and about circumstances in which patients may delay reporting of abuse events.

Following the testimony of these witnesses, the State informed that it would be calling Sergeant Wallace to testify about prior consistent statements K.M. made to him regarding details of the molestation. The State argued that this testimony was admissible under ER 801(d)(1). Cofer's counsel did not object to Sergeant Wallace's testimony, explaining:

---

[1] Cofer and K.M.'s mother conceived a child who was age two in August 2013. K.M.'s mother also left this child in Cofer's custody during her period of homelessness.

[2] K.M. was age 13 at the time of trial.

> And, Your Honor, since basically what [the prosecutor] would be asking is essentially a repetition of my cross-examination of [K.M.], I don't have an objection at this point. It's basically going to be statements that I—Sorry. Basically, it would be statements that I've already gotten from [K.M.]
>
> . . .
>
> And so we're clear. There was three different specific areas I—I was talking about inconsistent statements. So one was with Sergeant Wallace. The other was with the SANE nurse. And the other was with Mr. Harrison.
>
> So it may have just gotten a little muddled up in there.
>
> But, again, no objection.

Sergeant Wallace then testified about K.M.'s description of how Cofer molested her years earlier. In his own defense, Cofer testified that he was K.M.'s "dad from the time she was 4" years old and never touched her inappropriately.

The jury convicted Cofer as charged. The trial court sentenced Cofer to a term of total confinement of 225 months to life, lifetime community custody, numerous conditions of community custody, and imposed a $200 criminal filing fee.

Cofer appeals.[3]

II. DISCUSSION

A. Ineffective Assistance of Counsel

Cofer argues that his convictions should be reversed because he received ineffective assistance of counsel when his attorney agreed to the admission of

[3] Before sentencing, Cofer moved for a new trial on grounds that his defense counsel was ineffective for failing to adequately challenge K.M.'s credibility and failing to further question K.M. about whether Cofer was circumcised. The trial court denied the motion, finding "defendant's trial counsel's decision to not present additional evidence regarding circumcision, but instead to focus on deficiencies in the State's investigation, was a legitimate strategic choice." Cofer does not appeal the denial of the motion for a new trial.

K.M.'s statements to Sergeant Wallace as substantive evidence. We disagree.

The Sixth Amendment of the U.S. CONSTITUTION and article I, section 22 of the WASH. CONSTITUTION guarantees effective assistance of counsel. State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To prevail on a claim of ineffective assistance of trial counsel, a defendant must prove both deficient performance and prejudice.[4] State v. Jones, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). We need not address both prongs of the analysis if the defendant's showing on one prong is insufficient. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). We review claims of ineffective assistance of counsel, which is a mixed question of law and fact, de novo. Jones, 183 Wn.2d at 338-39.

We begin with a strong presumption that counsel's performance was effective. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this presumption, Cofer must establish the absence of any "'conceivable legitimate tactic explaining counsel's performance.'" Grier, 171 Wn.2d at 33 (quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). We will not find counsel ineffective based upon decisions concerning the defense theory of the case or trial tactics.[5] See State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737

---

[4] Establishing deficient performance requires a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Prejudice suffices to support a claim of ineffective assistance of counsel when counsel's errors are so serious as to deprive the defendant of a fair trial. Hendrickson, 129 Wn.2d at 78.

[5] "What may seem important and favorable to the defendant after the trial may during trial have appeared inconsequential or damaging to his attorney. . . [T]herefore, the choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment." State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967).

(1982). Upon review, if defense counsel's conduct can be considered a legitimate trial strategy or tactic, counsel's performance is not deficient. Grier, 171 Wn.2d at 33. Cofer bears the burden of establishing deficient performance. Grier, 171 Wn.2d at 42.

Cofer now argues that his trial counsel "had no legitimate tactical basis not to object to K.M.'s statements to Sergeant Wallace because they were not admissible under ER 801(d)(1)(ii) and were highly damaging to the defense." We disagree.

The record makes clear the tactical approach and trial strategy adopted by Cofer's trial counsel. The defense theory throughout trial focused on K.M.'s inconsistent account of events. On cross-examination, Cofer's counsel highlighted inconsistencies between K.M.'s trial testimony and her statements to Sergeant Wallace. Defense counsel did not object to such statements, regardless of their admissibility, because counsel saw no harm in the State eliciting testimony from Sergeant Wallace that was identical to testimony K.M. gave on cross-examination (regarding what she had told Sergeant Wallace). In closing arguments, Cofer's counsel explained the defense theory by pointing to various inconsistencies in K.M.'s testimony and concluded by saying: "We don't convict people on the basis of one person's words only. Especially when they're so inconsistent as to not to be believed."

Because not objecting to K.M.'s statements to Sergeant Wallace was a legitimate trial tactic, we conclude Cofer's counsel's performance was not deficient. And because failure to prove either prong defeats an ineffective

assistance of counsel claim, we hold that Cofer's claim for ineffective assistance of counsel fails. We affirm Cofer's convictions.

B. Conditions of Community Custody

Cofer next contends that the trial court erred by imposing conditions of community custody that are unconstitutionally vague. [App.'s Br. at 20-25] Specifically, he challenges the following two conditions:

> 6. Do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer.
>
> . . .
>
> 24. Based on eligibility, enter and successfully complete identified interventions to assist you to improve your skills, relationships, and ability to stay crime free.

A condition is unconstitutionally vague if it fails to (1) provide ordinary people fair warning of proscribed conduct, and (2) have standards that are definite enough to protect against arbitrary enforcement. State v. Irwin, 191 Wn. App. 644, 652-55, 364 P.3d 830 (2015) (holding as unconstitutionally vague a condition that read: "Do not frequent areas where minor children are known to congregate, as defined by the supervising [community custody officer].").

Cofer asserts that condition 6 is unconstitutionally vague because it does not provide adequate notice of what locations are prohibited, and that condition 24 is similarly vague because it does not provide adequate notice of what conduct is required. The State concedes each error. We accept each concession and remand for the trial court to strike these conditions.

C. Criminal Filing Fee

Cofer argues, and the State concedes, that the $200 criminal filing fee should be stricken from his judgment and sentence due to his indigence, statutory amendments, and State v. Ramirez, 191 Wn.2d 732, 746-50, 426 P.3d 714 (2018). We accept the State's concessions and remand for the trial court to strike the filing fee from Cofer's judgment and sentence.

Affirmed and remanded.

Chun, J.

WE CONCUR:

Mann, ACJ

Dwyer, J.

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. 78613-0-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:

☒ Michael Safstrom
Island County Prosecutor's Office
[ICPAO_webmaster@co.island.wa.us][m.safstrom@co.island.wa.us]

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: February 26, 2020

WASHINGTON APPELLATE PROJECT

February 26, 2020 - 4:18 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	78613-0
Appellate Court Case Title:	State of Washington, Respondent v. Brett Anthony Cofer, Appellant
Superior Court Case Number:	17-1-00222-5

The following documents have been uploaded:

- 786130_Petition_for_Review_20200226161439D1473546_5742.pdf
  This File Contains:
  Petition for Review
  The Original File Name was washapp.022620-09.pdf

A copy of the uploaded files will be sent to:

- ICPAO_Webmaster@islandcountywa.gov
- m.safstrom@co.island.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org
Filing on Behalf of: Maureen Marie Cyr - Email: maureen@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20200226161439D1473546