SUPREME COURT NO. 98385-2
COURT OF APPEALS NO. 79087-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EVAN SMITH,

Petitioner.

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

The Honorable Robert Lewis, Judge

PETITION FOR REVIEW

JENNIFER WINKLER
Attorney for Petitioner

NIELSEN KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Evan Smith asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Smith seeks review of the Court of Appeals' unpublished decision in State v. Evan Smith, filed March 9, 2020 ("Opinion" or "Op."), which is appended to this petition.

C. ISSUES PRESENTED FOR REVIEW

1. Smith was charged with two felony sex crimes and misdemeanor assault[1] against his neighbor for conduct alleged to have occurred during a short period of time outside the neighbor's house. For much of the incident, the neighbor's 10-year-old child, L., was present or in the vicinity, yet she reportedly observed nothing untoward. The State failed to call L. to testify, even though it would have been natural for the State to call her, had her testimony been favorable to the State. Smith asked the trial court to instruct the jury on the missing witness doctrine, but the court refused. Did the trial court abuse its discretion in failing to instruct the jury on that doctrine?

[1] The charges were indecent liberties by forcible compulsion (count 1), attempted second degree rape (count 2), and fourth degree assault, a gross misdemeanor (count 3). CP 172-73.

2. In closing, the State asserted it need not call the child to testify because her testimony would be cumulative of the complainant mother's testimony. The record did not support this. Did prosecutorial misconduct deny Smith a fair trial?

3. Based on counsel's failure to object to the misconduct, did ineffective assistance of counsel also deny Smith a fair trial?

4. Did cumulative error deny Smith a fair trial?

D. STATEMENT OF THE CASE[2]

Late one winter night, complainant M.G. looked out her window and saw Smith, a neighbor she had met a few times, on her porch. He was reaching into a box of beer. 2RP 307, 310, 314, 319. It was late, but M.G. and her then-10-year-old daughter L. were still awake. 2RP 311, 328.

M.G. went outside and asked Smith if something was wrong. 2RP 320. Smith said he had just left another neighbor's house and had noticed M.G. outside. 2RP 322-24. About 15 minutes into their conversation, M.G.'s daughter L. came outside. 2RP 328; 3RP 350. L. and Smith commenced a snowball fight, which both appeared to enjoy. 2RP 329.

[2] This petition refers to the verbatim reports as follows: 1RP – 7/24/18; 2RP – 7/25/18; 3RP – 7/26/18; and 4RP – 7/27/18; 5RP – 7/30/18 (verdicts); and 6RP – 9/18/18 (sentencing). The first four volumes are consecutively paginated.

Later, while M.G. was putting her dog in the garage, she saw Smith talking to L. and gesturing with a pocket knife. 2RP 334. L. tensed up, which led M.G. to believe L. was upset. 2RP 335. M.G. heard only portions of their conversation. 2RP 335. However, she learned that L., a dog lover, had told Smith she wanted to own a Tibetan mastiff because such dogs were fierce. 3RP 422. In response, Smith attempted to demonstrate that even a vicious dog could be defeated by a pocketknife. 2RP 334-35.

After this discussion, M.G. decided L. should go inside. 2RP 336. M.G. told L. she would be inside soon, but that L. should open the kitchen door every two minutes. 2RP 336. She wanted L. to act as an annoyance so M.G. would have an excuse to get rid of Smith. 2RP 336. Smith had groped M.G.'s buttocks during the snowball fight. 2RP 342; 3RP 350. M.G. told Smith to stop, informing him that such behavior was inappropriate because L. was present. 2RP 342.

After L. went inside, Smith's comments became more overtly sexual. 2RP 342-43. He asked M.G. to give him a ride to Arlington so he could "hook up with a bartender." 3RP 352. His penis exposed, he told M.G. that if she would not give him a ride, she should perform oral sex on him. 3RP 353. M.G. laughed in disbelief. 3RP 353.

L. soon emerged from the house with a bowl, and she asked M.G. to fill the bowl with snow. 2RP 339, 342. After M.G. collected snow for her daughter, L. went back inside. 2RP 341.

M.G. offered Smith another beer and got one for herself. 2RP 339, 342; 3RP 353, 398. M.G. told Smith she was married and therefore nothing would happen between them. 2RP 341; 3RP 353. As M.G. began to light a cigarette, Smith grabbed M.G. by the collar and flung her onto the hood of her car. 3RP 354-55. Smith reached under M.G.'s shirt to tug at her leggings. 3RP 357-58. He said he could satisfy her sexually. 3RP 358.

As M.G. attempted to regain her footing on the icy ground, she heard the click of the door latch. 3RP 359. The distraction enabled M.G. to break free from Smith. 3RP 359. She told Smith to leave and repeated that nothing was going to happen between them. 3RP 359. She noticed that Smith's pants were unzipped, and his penis was exposed. 3RP 360.

M.G. lit another cigarette. 3RP 364. Smith grabbed M.G.'s hand and placed it on his penis. 3RP 364-65. Smith asked M.G. if she liked it. 3RP 365. M.G. said yes, hoping to calm the situation. 3RP 365, 398-99.

L. opened the door and stuck her head out. 3RP 365, 429. M.G. pulled her hand out of Smith's pants and Smith stepped away. 3RP 366. L. made eye contact with M.G., then went back inside. 3RP 366.

Smith agreed to leave. 3RP 366. As M.G. reached for another beer, however, Smith pushed M.G. against a pole and rubbed her vaginal area over her leggings. 3RP 368. M.G. shoved Smith, who stumbled. 3RP 368-69. Recovering from his stumble, Smith slapped M.G., reddening her cheek. 3RP 370, 430. Smith then squeezed M.G.'s cheeks, announced "we could fuck anytime," and walked away. 3RP 371.

Once M.G. confirmed that Smith was leaving, she went inside and woke her husband, who convinced M.G. to call the police. 3RP 375, 476-77. Police arrived at M.G.'s residence about an hour later. 3RP 376, 469-70, 484. M.G. verbally recounted the incident to deputies. She also spent about 90 minutes crafting a lengthy handwritten statement. 3RP 379-80, 402-03. However, as M.G. acknowledged at trial, she left out several details in her initial accounts. 3RP 382-83. For example, in her initial written statement, M.G. did not mention that Smith at one point tried to lead her to the garage, that he tried to pull her pants down, that he grabbed her hand and made her touch his penis, *or* that he rubbed her vagina over her clothes. 3RP 413-15, 441-42, 460; see also 3RP 511-12 (deputy's testimony). M.G. acknowledged these details emerged only later, in a protection order

petition, a subsequent statement to police, a defense interview, and at a "previous hearing"[3] on the matter. 3RP 405-15, 445, 457-58.

L. was still awake when police arrived, although they did not speak with her. 3RP 487, 535, 544. Instead, L. was interviewed by a child interview specialist about two weeks later. 3RP 434-35.

At trial, after the State rested, Smith asked the court to instruct the jury on the missing witness doctrine, addressing the State's failure to call L. to testify. 4RP 597-606. Counsel proposed the following instruction:

> If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person's testimony would have been unfavorable to a party in the case. You may draw this inference only if you find that:
>
> (1) The witness is within the control of, or peculiarly available to, that party;
>
> (2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or insignificant;
>
> (3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;
>
> (4) There is no satisfactory explanation of why the party did not call the person as a witness; and
>
> (5) The inference is reasonable in light of all the circumstances.

[3] Smith's first trial ended in a mistrial following jury deadlock. E.g. 3RP 408-09.

> The parties in this case are the State of Washington and Evan Smith.

CP 108; see 11 WASH. PRAC., PATTERN JURY INSTR. CRIM. (WPIC) 5.20 (4th Ed.) (pattern instruction).

Defense counsel explained why the instruction was necessary:

> [T]he missing witness instruction is appropriate for [L.]. The requirements are that the witness be peculiarly available to one party, that the testimony would not be cumulative or inconsequential, and that . . . the party would have called the witness.

4RP 597-98. Counsel pointed out that the issue of peculiar availability, under the case law, did not examine whether the opposing party could subpoena the witness. Rather, the question was as follows:

> [T]o be available to one party to an action there must have been such a community [of] interest between the party and the witness, or one party must have so superior an opportunity for knowledge of a witness and ordinary experience would have made it reasonably probable that the witness would have been called to testify for such a party except the fact that the testimony would have been damaging.

4RP 598. As M.G.'s daughter, L. was peculiarly available to the State under these criteria. 4RP 598-99. As for the relevance of L.'s testimony, defense counsel argued L. was present and outside for at least a portion of the interaction between Smith and her mother. Yet, as established by L.'s

forensic interview,[4] she saw nothing strange between Smith and her mother. But rather than diminishing the significance of L.'s testimony, this made the testimony relevant. One could infer this was precisely the reason the State was not calling L. as a witness. 4RP 601-03.

The State argued, in contrast, that L. was not peculiarly available to the State, and that the fact that L. did not see anything was insignificant considering she was inside the house part of the time. 4RP 599, 603-04.

The court ultimately ruled it would not give the instruction:

> In the [pattern instruction], one of the requirements is it says the circumstances must establish as a matter of reasonable probability that the party would not knowingly fail to call the witness in question unless the witness's testimony would be damaging. *I don't find under the facts and circumstances of this case what the child observed, as well as the age of the child, that that prong is satisfied, and therefore, on that basis, I'm not giving the instruction*.

4RP 606 (emphasis added).

In closing, the State used the court's ruling to its advantage. The prosecutor argued as follows:

> And [defense counsel] said, you know, we didn't hear from [M.G.]'s daughter.[5] And I'll leave you to consider why a

[4] The parties did not submit a recording of the interview for the trial court's review. However, the parties appeared to generally agree as to its contents, i.e., that L. did not see any improper contact between Smith and M.G and that Smith and L. had a conversation about how even a mean, large dog could be overcome with a knife. 4RP 599, 601-03.

[5] Defense counsel, arguing in favor of reasonable doubt, had argued simply, "Why didn't we hear from [M.G.'s] daughter?" 4RP 647-48.

> prosecutor wouldn't want to call a ten-year-old to testify in front of a bunch of strangers *about her mother being assaulted* when that's not necessary because we have a victim who went through it all.

4RP 668 (emphasis added). Defense counsel did not object.

A jury convicted Smith as charged. CP 78-80, 172-73.

Smith appealed, raising the issues identified above and other sentencing related-issues. The Court of Appeals rejected Smith's claims as to the underlying convictions, holding the trial court properly denied the missing witness instruction, the prosecutor likely committed misconduct but it was not incurably prejudicial, and that even if counsel's failure to object to the misconduct was deficient, Smith was not prejudiced. Op. at 6-14. Smith now asks that this Court grant review, reverse the Court of Appeals, and reverse his convictions.

E. REASONS REVIEW SHOULD BE ACCEPTED

1. The trial court should have instructed the jury on, and permitted the defense to argue, the missing witness doctrine.

Review is appropriate under RAP 13.4(b)(1). A party's failure to produce a witness who would ordinarily and naturally testify on behalf of that party may raise the inference that the witness's testimony would have been unfavorable to that party. The trial court erred in failing to give a missing witness instruction in reference to L. Because the failure to properly instruct the jury on was not harmless, reversal is required on all counts.

A determination whether any proposed instruction is warranted requires the trial court to "[look] at the evidence in the light most favorable to the proponent of the instruction." State v. Hanson, 59 Wn. App. 651, 656, 800 P.2d 1124 (1990). With this standard in mind, this Court reviews a trial court's refusal to give a requested jury instruction for abuse of discretion. State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336 (1998). A trial court abuses its discretion when its decision is based upon untenable reasons. State v. Reed, 168 Wn. App. 553, 571, 278 P.3d 203 (2012).

The missing witness doctrine applies when, as a matter of logical probability, a party would naturally call a witness but fails to do so. If so, the jury may draw an inference that the evidence would be unfavorable to the party. State v. Blair, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991) (quoting State v. Davis, 73 Wn.2d 271, 276, 438 P.2d 185 (1968), overruled on other grounds by State v. Abdulle, 174 Wn.2d 411, 275 P.3d 1113 (2012)); see WPIC 5.20 (allowing jury to draw such an inference).

To invoke the missing witness rule, and to obtain a corresponding instruction, an accused person is not required to prove that the State deliberately suppressed unfavorable evidence. Blair, 117 Wn.2d at 488; State v. McGhee, 57 Wn. App. 457, 462-63, 788 P.2d 603 (1990). Rather, an accused need only establish circumstances suggesting that the State would not knowingly fail to call the witness unless the witness's testimony

would be damaging. Davis, 73 Wn.2d at 280. "'[T]he inference is based, not on the bare fact that a particular witness is not produced as a witness, but on [her] non-production when it would be natural for [the party] to produce the witness if the facts known by [her] had been favorable.'" Id. (quoting 2 J. Wigmore, EVIDENCE §286 (3d ed. 1940)).

A missing witness instruction should be given when, in addition, the uncalled witness is "peculiarly available" to one of the parties. Davis, 73 Wn.2d at 276. "Peculiarly available" to one party does not mean it would have been impossible for the opposing party to obtain the witness's presence at trial. Blair, 117 Wn.2d at 490; Davis, 73 Wn.2d at 276-77. Rather, it means that there is a community of interest between the first party and the witness, or that the party has such a superior opportunity for knowledge of a witness that there was a reasonable probability that the witness would have been called except that the testimony would have been damaging. Id. at 277; see also State v. Cheatam, 150 Wn.2d 626, 653-54, 81 P.3d 830 (2003) (availability determined based upon the circumstances of that witness's relationship to the parties, not merely physical presence or accessibility).

In Davis, for example, this Court held that an uncalled undersheriff, who was an eyewitness to a controversial interrogation and who worked closely with the county prosecutor's office, was peculiarly available to the prosecution based on "community of interest." Davis, 73 Wn.2d at 277.

Considering this and other requirements for the instruction, this Court held the trial court erred in failing to instruct on the missing witness doctrine. Id. at 276-81 (portion of opinion surviving Abdulle, 174 Wn.2d 411).

Smith should have been permitted to argue the inference that L.'s testimony, had she been called, would have been unfavorable to the State. CP 108 (defense proposed instruction); WPIC 5.20. To summarize a seminal case, the missing witness doctrine applies, and a party is entitled to a related instruction, if (1) the absent witness is peculiarly available to the opposing party, (2) the missing testimony is not merely cumulative, (3) the witness's absence is not satisfactorily explained, and (4) the witness is not incompetent, or her testimony privileged. See Blair, 117 Wn.2d at 488-90.

Properly considered in the light most favorable to the instruction's proponent, Smith satisfied each of these requirements. Specifically, appearing to address the third requirement, explanation for the witness's absence, the court indicated that L.'s testimony would have been too insignificant—insufficiently damaging to the State's case—for the "missing witness" inference to arise. Relatedly, her age, 12 at the time of trial, adequately explained why the State did not want to call her. 4RP 606.

But the trial court's reasoning is untenable—it is not supported by the facts and it fails to recognize the significance of what L. *did not* see. As defense counsel correctly asserted, L.'s forensic interview indicated that

any testimony by L. was likely to undermine the State's case. L. was present for substantial portions of her mother's interaction with Smith yet saw nothing of note. 4RP 599, 601-03. As defense counsel argued below, this was itself significant and an important component of the defense theory that M.G. fabricated the sexual contact. 4RP 601-03.

"'Relevant evidence' means evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401; State v. Weaville, 162 Wn. App. 801, 818, 256 P.3d 426 (2011). In ER 401 terms, L.'s failure under the circumstances to observe anything made the acts less likely to have occurred.

M.G.'s credibility was the central issue at trial. Smith's defense was that M.G. fabricated the acts constituting the charged crimes. According to the defense offer of proof, as well as M.G.'s own testimony, L. was present for, and in a position to observe, several acts by Smith that comprised the charged crimes. Yet, according to L.'s interview, L. saw nothing.

L., who had reportedly been instructed to *open* the door every few minutes, audibly worked the latch when, according to the State, the attempted rape occurred. 3RP 359; see 4RP 632 (closing argument). Yet L. saw nothing. In addition, L. reportedly stuck her head out the door during one of the two instances of indecent liberties alleged by the State. 3RP 365-

66, 429; see 4RP 629-30 (closing argument). Again, L. saw nothing. 4RP 366. Finally, L. was present to view her mother's demeanor during the entire incident and apparently noticed nothing amiss. For example, M.G. got snow for L. when L. asked, and M.G. smiled at L. 4RP 603. By that time, according to M.G.'s account, Smith had already engaged in inappropriate conduct. While the Court of Appeals dismissed the importance of such interactions, Op. at 10, such testimony would have been relevant precisely because it was detrimental to the State's case.

In its ruling, the trial court also mentioned L.'s age, suggesting the State was not calling L. because she was young and had been traumatized. 4RP 606. But the court's reasoning in this respect is likewise untenable. L. was almost 12 at the time of trial. 3RP 462. Considering M.G.'s description of L., she was undeniably competent to testify. E.g. 2RP 335 ("[s]he's very composed, she has two Marines as parents"). And while the court suggested that L. had been traumatized by the incident, 4RP 600, the testimony reveals nothing of the sort. M.G. merely testified that a single comment by Smith made L. appear tense, which M.G. interpreted as being upset. 2RP 335.

L. was within an age group and level of composure such that the prosecution would not have hesitated to call her as a witness if she had something favorable to say. The converse is true: The State's failure to call L., under the circumstances, leads to a reasonable inference that her

testimony would have undermined the State's case. Thus, the trial court abused its discretion in failing to give the missing witness instruction.

The error was prejudicial as to all charges: Smith's defense was that M.G. fabricated both the sexual and physical assaults. 4RP 637 (defense closing argument). And each assaultive act was alleged to have occurred within a period of minutes. See 4RP 638, 660. Smith was able to undermine M.G.'s credibility in several important respects: M.G. did not seek help from family members when the incident allegedly occurred, she did not simply go inside her house, and she did not mention significant details until days, weeks, or months later. E.g. 4RP 639-41 (defense closing argument).

Smith wished to argue, consistent with the pattern instruction, that the jury was entitled to infer that L.'s testimony would have been unfavorable to M.G., further undermining M.G.'s credibility. But, defense counsel was only permitted to point out L.'s absence, asking, rhetorically, "Why didn't we hear from [L.?]" 4RP 648. Meanwhile the State responded in rebuttal by asserting facts not in evidence, improperly bolstering M.G.'s credibility, and exploiting Smith's inability to respond.

The trial court erred, and the error was not harmless. Because the Court of Appeals' opinion conflicts with the missing witness doctrine as delineated by this Court, review is warranted.

2. **Prosecutorial misconduct denied Smith a fair trial; Smith also received ineffective assistance of counsel**.

Review is also warranted under RAP 13.4(b)(3) as a significant constitutional question. The prosecutor's argument misstated the evidence, denying Smith his due process right to a fair trial on all counts. And counsel performed ineffectively by failing to object to the misconduct.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments and article I, section 22 of the state constitution. In re Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). When a prosecutor commits misconduct, he or she may deny the accused a fair trial. Id.; Boehning, 127 Wn. App. at 518.

Prosecutorial misconduct is grounds for reversal if the prosecutor's conduct was both improper and prejudicial. State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). Prejudice is established where there is a substantial likelihood the misconduct affected the jury's verdict. State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

A prosecutor commits misconduct by encouraging the jury to decide a case based on evidence outside of the record. State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012); State v. Claflin, 38 Wn. App. 847, 850-51, 690 P.2d 1186 (1984). "'[E]vidence is [s]omething (including testimony, documents, and tangible objects) that tends to prove or disprove

the existence of an alleged fact.'" State v. Boehning, 127 Wn. App. 511, 522, 111 P.3d 899 (2005) (quoting BLACK'S LAW DICTIONARY 595 (8th ed. 2004)).

Here, the State got to be the "good guy," refraining from calling a child to the stand, while claiming that, had L. testified, she would have simply corroborated her mother's version of events. On its face, the State's argument allowed the State to "have its cake and eat it too." State v. Laws, 51 Wn.2d 346, 351, 322 P.2d 134 (1958). But worse than that, there was never any cake. The State's claim was false. L. did not witness any assault.

Defense counsel did not object. Where counsel fails to object, prosecutorial misconduct is, nonetheless, reversible when the misconduct is incurable by corrective instruction. State v. Walker, 164 Wn. App. 724, 730, 736, 265 P.3d 191 (2011); see also State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012) (focus is on curability rather than subjective intentions of prosecutor).

Had defense counsel objected, the court—prohibited from commenting on the evidence—would likely have instructed the jury that the State's arguments were not evidence. But "[b]ecause the jury will normally place great confidence in the faithful execution of the obligations of a prosecuting attorney, [a prosecutor's] improper insinuations or suggestions are apt to carry more weight against a defendant." State v. Thierry, 190 Wn.

App. 680, 694, 360 P.3d 940 (2015). Thus the jury was likely to accept the State's version of facts even in the presence of a generic curative instruction And, contrary to the Court of Appeals characterization, Op. at 12, the State's case had significant weaknesses, which are discussed at page 15 above. As a result, it is likely that the misconduct—the assertion of corroborative facts not in evidence—affected the verdicts on each closely related charge.

Counsel was, moreover, ineffective for failing to object to the misconduct. Every accused person is guaranteed the right to effective assistance of counsel. U.S. CONST. amend. VI; CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) counsel's performance was deficient and (2) the deficiency prejudiced the defense. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. A claim of ineffective assistance of counsel presents a mixed question of fact and law that is reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

As for the first prong, counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Maurice, 79 Wn. App. 544, 551-52, 903 P.2d 514 (1995). Conduct for which there is no legitimate tactical reason is constitutionally inadequate. State v. McFarland, 127 Wn.2d 322, 335, 336, 899 P.2d 1251 (1998); accord Roe

v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). As for the second prong, the test for prejudice is whether it is reasonably probable that, without the error, at least one juror would have reached a different result. Wiggins v. Smith, 539 U.S. 510, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

When a prosecutor resorts to improper argument, counsel has a duty to interpose a contemporaneous objection to give the court an opportunity to correct counsel, and to warn the jurors against being influenced by such remarks. Emery, 174 Wn.2d at 761-62. Counsel's failure to preserve error constitutes ineffective assistance and justifies examining the error on appeal. State v. Ermert, 94 Wn.2d 839, 848, 621 P.2d 121 (1980). If objections are necessary to preserve error, no reasonable strategy or tactic explains failure to object on the record.[6]

Here, counsel rendered ineffective assistance by failing to object to the prosecutor's arguments advancing nonexistent evidence. No tactic explains counsel's failure to preserve the error. Counsel's failure to object to the misconduct was, moreover, prejudicial. The prosecutor claimed, without evidentiary support, that L. would have corroborated that her

[6] Even if declining to object is a reasonable tactic to avoid drawing attention, counsel may still object to misconduct outside the presence of the jury. See State v. Lindsay, 180 Wn.2d 423, 441, 326 P.3d 125 (2014) (adopting exception to contemporaneous objection rule in prosecutorial misconduct cases to avoid repeated interruptions to closing arguments).

mother was assaulted, sexually and otherwise. For the reasons stated, the remarks likely influenced the verdicts on all counts. For this reason, as well, this Court should grant review and reverse Smith's convictions.

3. Cumulative error deprived Smith of his right to a fair trial on all counts.

Where several errors standing alone do not warrant reversal, the cumulative error doctrine requires reversal when the combined effect of the errors denied the accused a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The State's improper closing argument exacerbated the prejudice from the court's erroneous refusal to give a missing witness instruction. Because the cumulative effect of the errors deprived Smith of a fair trial, this Court should grant review and reverse his convictions.

F. CONCLUSION

This Court should accept review under RAP 13.4(b)(1) and (3) and reverse the Court of Appeals.

DATED this 7th day of April, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC

JENNIFER WINKLER, WSBA No. 35220
Office ID No. 91051
Attorneys for Petitioner

APPENDIX

FILED
3/9/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. EVAN NEIL SMITH, Appellant.	No. 79087-1-I DIVISION ONE UNPUBLISHED OPINION FILED: March 9, 2020

APPELWICK, C.J. — Smith appeals his convictions for indecent liberties by forcible compulsion, attempted second degree rape, and fourth degree assault. He argues that the trial court abused its discretion in failing to instruct the jury on the missing witness doctrine. He contends that the prosecutor committed incurably prejudicial misconduct during closing arguments. Further, he asserts that he received ineffective assistance of counsel due to his trial counsel's failure to object to the prosecutor's misconduct. He also asserts that cumulative error deprived him of his right to a fair trial. Last, he argues that the provision in his judgment and sentence imposing interest on nonrestitution LFOs must be stricken. We affirm Smith's convictions, but remand to the trial court to strike the provision requiring interest accrual on nonrestitution LFOs.

FACTS

Late at night on December 12, 2016, and into the early morning hours of December 13, Evan Smith went out walking in his neighborhood in rural Arlington.

He was carrying and drinking beer. One of Smith's neighbors, Crystal Chiechi, was up late on December 12 watching television. At around 11:30 p.m., she was startled to see Smith standing outside her back room window, motioning towards her back door. Chiechi's boyfriend was friends with Smith's dad, but she did not know Smith very well.

Assuming her boyfriend would be home soon, Chiechi went out on her back porch and engaged in small talk with Smith. However, he quickly started making comments that Chiechi found bizarre. For example, when she asked Smith what he did for fun, he responded that he liked to go to the brewery in town, but that "all the women around here are either taken or they're only 13 right now."

Later in the conversation, Smith told Chiechi that she and her boyfriend should start having kids. He then grabbed her right hip and told her that her "hips need a baby between them." Chiechi started to panic. Smith then tried to get her to go into her detached garage with him to look for something an old owner might have left behind. Chiechi responded that they needed to wait until her boyfriend got home. Smith kept insisting that they go into the garage, at which point Chiechi saw her boyfriend's car coming down the road. Smith left soon after her boyfriend arrived.

Shortly after midnight, another neighbor of Smith's, M.G., heard her dogs barking in an unusual manner. M.G. stuck her head out her door and saw Smith standing about six feet away. He was reaching into a box of beer that she kept outside. Smith had stopped at her home on two previous occasions to talk to her husband, but M.G. had not spent time with him before. Because the roads were

icy and Smith was on foot, M.G. thought that he might have wrecked his car. Her husband was asleep, so she went outside to see if she could help. Once she got outside, Smith told her that he had just left Chiechi's house and had noticed her outside. M.G. had taken her dogs outside about 15 minutes prior.

Smith initially told M.G. that he was going to get on her roof and fix her chimney, which had a tarp on it. He wanted to get a ladder, and tried pulling her towards her shop to find one. M.G. told Smith that she did not want him to fix her chimney, and refused to go with him to her shop. At that point, M.G.'s daughter, L.G., came outside. Smith let go of M.G.'s arm, and Smith and L.G. engaged in a snowball fight. At one point during the snowball fight, Smith walked behind M.G. and cupped her buttocks. M.G. reacted by shoving his hand away. Smith did not touch M.G. again while her daughter was outside.

Once the snowball fight started to wind down, Smith went to the side of M.G.'s garage and urinated in full view of both M.G. and L.G. Around this time, M.G. let one of her dogs outside, and it lunged at Smith. She had never seen her dog react that way, so she put it in the garage. As M.G. retrieved her dog, Smith and L.G. had a conversation about dogs, during which Smith demonstrated how he would gut a dog with a pocket knife. He pulled out a pocket knife and pretended to gut a dog in the air.

At that point, M.G. put L.G. inside. She did not wake up her husband because she felt like she could handle the situation. However, she told L.G. to open the door every two minutes. She hoped that if L.G. kept opening the door,

she would have an excuse to go back inside. She had already told Smith that she needed to go to bed, but was unsure if he would try to follow her if she went inside.

About two minutes later, L.G. came back outside and asked for a bowl of snow. M.G. grabbed the bowl and got some snow for L.G. During this time, Smith yelled at L.G. to get back in the house. L.G. went back inside. M.G. became angry that Smith had yelled at her daughter, and told him again that he needed to leave.

Smith then urinated a second time on M.G.'s porch. As he was urinating, he asked M.G. for a ride to Arlington so that he could meet a bartender. M.G. told him that she was not going anywhere. Smith then told her that if she was not going to take him to Arlington, she needed to perform oral sex on him. M.G. was taken aback and laughed in disbelief. At that point, she handed Smith a beer and grabbed one for herself. Smith had already had several beers. She told Smith that nothing was going to happen between them.

M.G. then went to light a cigarette. As she bent down to use her lighter, Smith grabbed her by the collar and flung her 8 to 10 feet onto the hood of her car. She became very scared and remembered saying, "[N]o, no, no, no." With her body on the car and Smith behind her, Smith tried reaching under her pullover shirt and removing her leggings. He called her a "dirty bitch" and said that she "would like it rough." M.G. eventually heard her daughter crack the doorknob and was able to spin around. L.G. did not actually come outside. Smith then backed away from M.G., at which point she saw that his penis was fully exposed. M.G. did not scream for help in part because she did not want her to daughter to come outside.

M.G. again told Smith that he needed to go home, and that nothing was going to happen between them. She tried to calm down and grabbed another cigarette. However, Smith took the cigarette from her, grabbed her hand, and shoved her hand down his pants. He wrapped her hand around his penis and began stroking it as he was talking to her. L.G. then opened the door. M.G. was able to remove her hand from Smith's pants as L.G. popped her head outside. She did not actually step outside, and shut the door after making eye contact with M.G. Smith also zipped up his pants and backed away. He told M.G. that she was right and that he should go.

M.G. grabbed another beer for Smith, and told him to take it and leave. Smith then pushed her up against a pole about two feet from where she was standing. He grabbed her right leg, pried her thigh open, shoved his hand into her vaginal area, and forcibly rubbed the area through her leggings. M.G. was able to shove Smith, who stumbled backwards. Smith then slapped M.G. in the face and pinched both of her cheeks. Afterwards, he finally left. M.G. then went inside, woke up her husband, and called 911.

The State later charged Smith with indecent liberties by forcible compulsion, attempted second degree rape, and fourth degree assault. The jury in Smith's first trial was unable to reach a verdict. As a result, the court declared a mistrial. At his second trial, Smith requested that the court give a "missing witness instruction" regarding M.G.'s daughter, L.G., who the State did not call as a witness. The court denied Smith's request.

A jury found Smith guilty as charged. The court imposed a total minimum term of 89.25 months of confinement to a maximum term of life. It also imposed a $500 victim assessment and a $100 biological sample fee. The judgment and sentence provided that the legal financial obligations (LFOs) imposed "shall bear interest from the date of the judgment until payment in full."

Smith appeals.

DISCUSSION

Smith makes four arguments. First, he argues that the trial court abused its discretion in failing to give a missing witness instruction regarding L.G. Second, he argues that the prosecutor committed incurably prejudicial misconduct during closing arguments. Third, he argues that he received ineffective assistance of counsel due to his trial counsel's failure to object to the prosecutor's misconduct. Fourth, he argues that the provision in his judgment and sentence imposing interest on nonrestitution LFOs must be stricken.

I. Failure to Give Missing Witness Instruction

Smith argues first that the trial court abused its discretion in denying his request for a missing witness instruction. He asserts that, because the State did not call L.G. as a witness, he was permitted to an instruction that the jury could infer that L.G.'s testimony would have been unfavorable to the State.

"A missing witness instruction informs the jury that it may infer from a witness's absence at trial that his or her testimony would have been unfavorable to the party who would logically have called that witness." State v. Reed, 168 Wn. App. 553, 571, 278 P.3d 203 (2012). Such an instruction is proper when (1) the

missing witness's testimony is material and not cumulative, (2) the witness is particularly available to only one of the parties and not equally available to both parties, and (3) the witness's absence is not satisfactorily explained. State v. Montgomery, 163 Wn.2d 577, 598-99, 183 P.3d 267 (2008). We review a trial court's refusal to give a requested instruction based on the evidence in the case for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

Smith contends L.G. was a material witness. The record does not support this argument. After Smith requested a missing witness instruction regarding L.G., the trial court stated that it did not view her potential testimony as "very significant" in relation to the charges. The court asked counsel for Smith what "significant information" in L.G.'s forensic interview she thought should have been testified to that was not cumulative. The following exchange then took place:

> [COUNSEL]: Well, the --
>
> THE COURT: Because the only thing that I understood really was perhaps the daughter saw him urinating outside and the issue related to the knife, which to me, frankly, are not significant.
>
> I guess the other thing is, and I don't know and maybe this is not relevant, really, this inquiry, but what if the child just didn't observe anything, the child was just there?
>
> [COUNSEL]: Well, I think that is the issue, that is why the State didn't call the child. She came out several times when Mr. Smith was present and didn't ever see Mr. Smith close to her mother. The mother testified that in the incident up against the pole that the door opened, the child stepped out when Mr. Smith was making [M.G.] touch his penis. The child never saw anything. She was a very accurate historian of what she saw. She never saw --
>
> THE COURT: So you're telling me, then, that the child -- when the child came out, the specific testimony is that when she observed

> your client and [M.G.] that they were not in close proximity to each other?
>
> [COUNSEL]: She never saw them do anything --
>
> THE COURT: That's not my question. She may not have been in the position where she could have observed it, but you seem to indicate that the child said they were not in close proximity, and if that's the case, that may be a material issue in relation to the allegations in this case. But I don't know what the interview says, so I'm asking you, you made a representation that to me sounded like the child indicated they weren't even in close proximity.

In response, counsel for Smith did not state that L.G. actually said Smith and M.G. were not in close proximity. Rather, she stated that L.G. was the "only other eyewitness to these events aside from Mr. Smith and [M.G]."

As the discussion continued, counsel for Smith argued that L.G.'s testimony bore on M.G.'s credibility as a witness. She stated,

> [M.G.] said that there were times where the child was out and that Mr. Smith was grabbing her and that she was shushing him away. [L.G.] did not see anything like that. She did not see anything of Mr. Smith attempting to kiss [M.G]. She in her interview recounted the evening, said she came out multiple times, she had the snowball fight, she came out to get snow, that her mom smiled at her and told her to come back inside. She said if I had known what was going on, I have a rifle, I would have brought out my rifle. Her recount of what happened is not consistent with [M.G.]'s recount of what happened.

The State disagreed with this characterization, pointing out that L.G. "was inside the residence for most of the time," and that there was "a lot that she couldn't actually see."

The trial court declined to give the missing witness instruction. It explained,

> In the WPIC,[1] one of the requirements is it says the circumstances must establish as a matter of reasonable probability that the party

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[1] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 5.20, at 188-89 (4th ed. 2016) (WPIC).

> would not knowingly fail to call the witness in question unless the witness's testimony would be damaging. I don't find under the facts and circumstances of this case what the child observed, as well as the age of the child, that that prong is satisfied, and therefore, on that basis, I'm not giving the instruction.

The trial court's statements indicate that it did not consider L.G. to be an important witness, and that it did not view her potential testimony as material. As established above, the trial court asked counsel for Smith whether L.G. stated that she did not see Smith and M.G. in close proximity when she opened the door around the time that Smith made M.G. touch his penis. The court thought that this statement could be a material issue in relation to the allegations. However, counsel for Smith did not confirm that L.G. actually said that she did not see Smith and M.G. in close proximity. Instead, she responded that L.G. was the "only other eyewitness to these events."

Smith nonetheless argues that L.G. was in a position to observe several acts that comprised the charged crimes. He states that L.G. was close enough to the door to work the latch when "the attempted rape occurred," but that she "saw nothing." He further asserts that L.G. stuck her head out the door during one of the two instances of indecent liberties, but that, again, she "saw nothing." And, he states that L.G. "noticed nothing amiss" when M.G. got a bowl of snow for her, and that M.G. even smiled at her.

After Smith threw M.G. onto her car and tried reaching under her shirt and removing her leggings, M.G. heard the doorknob click. She clarified that the door never opened, and that L.G. never came outside. Smith does not cite evidence that L.G. could have seen what was happening through the door. Thus, based on

the record before this court, testimony by L.G. that she saw nothing during this event would be of little material value. It would not contradict M.G.'s explanation of what happened or undermine M.G.'s credibility.

Next, after Smith shoved M.G.'s hand down his pants and forced her to touch his penis, M.G. saw the door open. She clarified that L.G. then stuck her head outside. As this happened, Smith immediately stepped back from M.G., and M.G. was able to remove her hand from Smith's pants. M.G. was not sure how close she and Smith were at the time L.G. stuck her head outside. She thought that Smith might have been "stepping back." Therefore, testimony by L.G. that she saw nothing during this event would again be of little material value. It would not contradict M.G.'s explanation of what happened or undermine M.G.'s credibility.

And, M.G. did not testify that any of the acts comprising the charged crimes occurred while she got her daughter a bowl of snow. Thus, testimony by L.G. that she noticed nothing amiss at the time, and that M.G. smiled at her, would not be material. It would not contradict M.G.'s description of the events. The circumstances here do not establish that L.G.'s testimony would have been material and unfavorable to the State.

Moreover, the State had a reasonable explanation for its decision not to call L.G. to testify at trial. In L.G.'s forensic interview, she did not say anything that the State deemed to have evidentiary value. Specifically, the State explained that her forensic interview did not contain any evidence "really relevant to this case other than some information about her seeing Mr. Smith use a pocket knife to indicate that he was gutting a dog." And, given L.G.'s age, the State did not want to call a

child witness unless it was absolutely necessary to do so. Therefore, Smith failed to establish that the State would have called L.G. as a witness but for her damaging testimony. Accordingly, the trial court did not abuse its discretion in declining to give a missing witness instruction regarding L.G.

II. Prosecutorial Misconduct

Smith argues next that the prosecutor committed incurably prejudicial misconduct at trial. He contends that this misconduct denied him his right to a fair trial on all counts.

During the rebuttal closing argument, the prosecutor made the following statement regarding L.G.'s absence as a witness:

> [Defense counsel] said, you know, we didn't hear from [M.G.'s] daughter. And I'll leave you to consider why a prosecutor wouldn't want to call a ten-year-old to testify in front of a bunch of strangers about her mother being assaulted when that's not necessary because we have a victim who went through it all.

Smith asserts that, "[i]n making this argument, the prosecutor improperly argued facts not in evidence, suggesting that L.[G.] had seen her mother being assaulted." He further asserts that this argument "improperly claimed L.[G.] would have corroborated M.G.'s testimony that Smith assaulted M.G."

Smith failed to object to this statement at trial. As a result, our review is limited to determining whether the prosecutor's alleged misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. State v. Sakellis, 164 Wn. App. 170, 184, 269 P.3d 1029 (2011). "This standard requires the defendant to establish that (1) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict,' and (2) no curative

instruction would have obviated the prejudicial effect on the jury." Id. (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

Smith contends that, even with a curative instruction, "[t]he jury was likely to accept the State's version of the facts." He cites State v. Thierry, 190 Wn. App. 680, 694, 360 P.3d 940 (2015), for the general proposition that, because the jury normally places great confidence in the faithful execution of a prosecuting attorney's obligations, a prosecutor's improper insinuations or suggestions are apt to carry more weight against a defendant.

We agree that the State's comment could have been interpreted to suggest that L.G. witnessed the assault on her mother and the State simply did not want to put a young child through the ordeal of a sexual assault trial. But, Smith fails to explain why an admonishment to counsel and a curative instruction could not have alleviated any prejudice. In Thorgerson, the State Supreme Court determined that even ill intentioned remarks by a prosecutor in closing argument did not warrant reversal of a conviction, because the victim's testimony was consistent throughout the trial and consistent with what she had told other witnesses before the trial. 172 Wn.2d at 452.

Here, M.G.'s testimony was similarly consistent throughout the trial and consistent with what she reported to police before the trial. There was evidence to corroborate M.G.'s testimony, including the neighbor who had similar contact with Smith before he made his way to M.G.'s home, witnesses who saw her injuries that night, and physical evidence consistent with M.G.'s version of events. Given this evidence, the single, inappropriate comment in the State's rebuttal closing

argument did not have a substantial likelihood of having altered the outcome of this case.

Also, the court gave the jury the following instruction:

> The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

We presume that the jury follows the court's instructions. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

Smith has failed to establish that the alleged misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. Accordingly, his prosecutorial misconduct claim fails.

III. Ineffective Assistance of Counsel

In the alternative, Smith argues that his attorney provided ineffective assistance of counsel by not objecting to the prosecutor's remark during closing arguments.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If one of the two prongs of the test is absent, we need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266,

273, 166 P.3d 726 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Prejudice is present if there is a reasonable probability that, but for counsel's error, the result would have been different. Id. at 334-35. We review ineffective assistance of counsel claims de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

The comment was brief and there was significant evidence corroborating M.G.'s version of events. Even if we were to conclude that defense counsel's failure to object was deficient performance, Smith fails to establish that, but for counsel's failure to object, there is a reasonable probability that the result of this trial would have been any different.

Smith did not receive ineffective assistance of counsel.[2]

IV. Legal Financial Obligations

Smith argues last that the provision in his judgment and sentence imposing interest on nonrestitution LFOs must be stricken. He relies on House Bill 1783[3] and State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018).

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[2] Smith also argues that cumulative error deprived him of his right to a fair trial. The cumulative error doctrine applies "when a combination of trial errors denies the accused a fair trial, even when any one of the errors taken individually would be harmless." State v. Salas, 1 Wn. App. 2d 931, 952, 408 P.3d 383, review denied, 190 Wn.2d 1016, 415 P.3d 1200 (2018). Because Smith has not shown any error, the cumulative error doctrine does not apply.

[3] ENGROSSED SECOND SUBSTITUTE H.B. 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783).

In Ramirez, the State Supreme Court held that House Bill 1783 applies prospectively to cases on appeal. 191 Wn.2d at 747. House Bill 1783 amends RCW 10.82.090, providing that "no interest shall accrue on nonrestitution legal financial obligations." LAWS OF 2018, ch. 269, § 1(1). The State concedes that remand is appropriate to strike the provision requiring interest accrual on nonrestitution LFOs. We accept the State's concession and remand to the trial court to strike the provision.

We affirm Smith's convictions, but remand to the trial court to strike the provision requiring interest accrual on nonrestitution LFOs.

Leach, C.J.

WE CONCUR:

Andrus, J.

Dwyer, J.

NIELSEN KOCH P.L.L.C.

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