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SUPREME COURT
STATE OF WASHINGTON
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SUPREME COURT NO. 99526-5
COURT OF APPEALS NO. 360016-III.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JUAN JOSE HUEZO LUNA,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR REVIEW

JUAN JOSE HUEZO LUNA #405454
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A. IDENTITY OF PETITIONER

Juan Jose Huevo Luna (hereinafter Mr. Huevo), petitioner herein, respectfully requests that this court review the entire decision of the Court of Appeals (Division III), a copy of which is attached as Appendix A. State v. Huevo, NO. 36001-6-III.(Unpublished Opinion).

B. ISSUES PRESENTED FOR REVIEW

Mr. Huevo was charged with Rape of a Child in the First Degree, and three counts of Child Molestation in the First Degree. The one count of Rape of a Child in the First Degree and the first count of Child Molestation in the First Degree alleged aggravating circumstances of an ongoing pattern of sexual abuse and breach of a position of trust. The second count of child molestation in the first degree alleged the aggravating circumstance of violation of a position of trust. Slip op. at 4. On January 30, 2018, the jury returned verdicts of guilty of rape of a child in the first degree and two counts of child molestation in the first degree, and found that the enhancements applied. Brief of Appellant at 5.

The trial court sentenced Mr. Huevo on Count One to 300 months; Count Two to 216 months; and Count Three to 180 months, each count running concurrently. Id.

Mr. Huevo timely appealed his convictions, arguing that the trial court erred when it (1) allowed the witnesses to provide written responses to the State's questions before the jury; and (2) excluded his request to present evidence of his sexual morality. Mr. Huevo also argued that there was insufficient evidence to convict him. BOA at 10-11. In his statement of Additional grounds

(SAG) brief, Mr. Huezo argued that the trial court abused its discretion when it allowed the prosecutor to -- over defense counsel's objections -- commit misconduct by violating the motion in limine and soliciting Mr. Huezo's opinion testimony on his accusers' credibility (SAG at 4-9); that the prosecutor committed misconduct by commenting on Mr. Huezo's right to remain silent and then used such silence to infer his guilt (SAG at 9-14); that that the prosecutor committed misconduct when it improperly shifted the burden of proof onto Mr. Huezo (SAG at 14-17); that he received ineffective assistance of counsel because his trial counsel failed to withdraw from the case, failed to cross-examine and impeach material witnesses, and also failed to move for dismissal of the charges (SAG at 17-30); and that cumulative error denied him a fair trial. SAG at 30-33.

Accordingly, the issues raised herein are as follows:

DOES THE LOWER COURT'S DECISION THAT MR. HUEZO PRESENTED THE COURT NO AUTHORITY THAT THE STATE MAY NOT QUESTION THE ACCUSED ABOUT THE VICTIM'S TRUTHFULNESS DISREGARD THE RECORD AND CONFLICT WITH BINDING PRECEDENT?

DOES THE LOWER COURT'S DECISION THAT MR. HUEZO'S TRAIT OF SEXUAL MORALITY MUST BE PROVED BY TESTIMONY ABOUT HIS REPUTATION FORMED WITHIN A GENERALIZED AND NEUTRAL COMMUNITY CONFLICT WITH BINDING PRECEDENT?

DOES THE LOWER COURT'S DECISION THAT, ALTHOUGH THE PROSECUTOR'S QUESTIONS AND CLOSING REMARKS INDIRECTLY CRITICIZED MR. HUEZO FOR REMAINING SILENT BEFORE TRIAL, THE QUESTIONS AND REMARKS DID NOT CONSTITUTE FLAGRANT OR PREJUDICIAL MISCONDUCT CONFLICT WITH BINDING PRECEDENT?

DOES THE LOWER COURT'S DECISION THAT THE STATE DID NOT SHIFT THE BURDEN OF PROOF ONTO MR. HUEZO CONFLICT WITH BINDING PRECEDENT?

DOES THE LOWER COURT'S DECISION THAT THE TRIAL COURT DID NOT BREACH MR.

HUEZO'S CONFRONTATION RIGHTS WHEN IT ALLOWED MR. HUEZO'S ACCUSERS TO TESTIFY VIA WRITTEN ANSWERS CONFLICT WITH BINDING PRECEDENT?

DOES THE LOWER COURT'S DECISION THAT MR. HUEZO DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL CONFLICT WITH BINDING PRECEDENT?

DOES THE LOWER COURT'S DECISION THAT THE COMBINED EFFECT OF THE ERRORS DID NOT VIOLATE THE CUMULATIVE ERROR DOCTRINE CONFLICT WITH BINDING PRECEDENT?

C. STATEMENT OF THE CASE

The facts of Mr. Huevo's alleged crimes and convictions are quoted from the lower court's decision below, and Mr. Huevo's SAG brief.

-FROM THE DECISION BELOW:

Juan Luna Huevo is the stepfather of Tammy, born April 5, 2005, and Bonnie, born July 31, 2006, both pseudonyms. The girl's [sic] mother began dating Luna Huevo in November 2009 and married him in January 2010. Luna Huevo is more than two decades older than the girls.

At age nine, Tammy became the subject of sexual abuse by Juan Luna Huevo. Luna Huevo began sexually abusing Bonnie when she was eight years old.

Slip op. at 1-2.

FROM MR. HUEZO'S SAG BRIEF:

TAMMY'S STATEMENTS TO LAW ENFORCEMENT BEFORE TRIAL:

that Mr. Huevo had been sexually abusing her since she was nine years old; that at first he would put his finger in her hole to try and make it bigger; that he would put some sort of lubricant on his finger before he would touch her vagina; that he would tell her that she was too small; that as the sexual abuse progressed, he would put his penis in her vagina; that he would take her into his bedroom, lock the door, and place a blanket at the bottom of the door; that he would pull a little square package (either blue or red) from a Mario backpack, and then take something from the package and put it on his private and then use oil to make it go into her easier; that one time she was screaming so Mr. Huevo put a zebra blanket into her mouth to silence her; that she was tied up with tape at her aunt's house; that Mr. Huevo tied her to a bar and vaginally penetrated her while her legs and arms were tied up; that she saw white stuff coming out of Mr. Huevo's penis; that Mr. Huevo would google people

having sex on his phone and show it to her; that Mr. Huevo would tell her to smile like the girls in the video, and that this was because she was usually crying; that there were times when she was gone with her mom and they would come back home and she would realize that Mr. Huevo was sexually abusing her little sister; and that the last time Mr. Huevo abused her was about three days ago.

SAG Brief at 22.

FROM THE DECISION BELOW:

At trial, Tammy testified that Juan Luna Huevo sexually touched her on several occasions and in multiple locations in Kennewick, including at an apartment her family rented at the Hawaii Village Apartments, at her family's home on Steptoe Street, at her aunt Niashia Morales Enriquez's residence, and in a vehicle. The sexual touching included Luna Huevo placing his hand on Tammy's private parts, placing his private parts against her body, and placing his penis inside her mouth.

Tammy further testified that Juan Luna Huevo tied her hands behind her back with duct tape. Luna Huevo obtained a condom from a blue and gray backpack in the bathroom and placed it on his penis. Luna Huevo also rubbed oil on his penis. During trial, Luna Huevo confirmed that he used condoms and oil when engaging in sexual activity.

According to Tammy, Juan Luna Huevo also sexually abused her sister. Once Tammy asked Luna Huevo whether he was "doing the same thing [to Bonnie]," and he responded that he was. Report of Proceedings (RP) at 271.

FROM MR. HUEZO'S SAG BRIEF:

BONNIE'S STATEMENTS TO LAW ENFORCEMENT BEFORE TRIAL:

That Mr. Huevo touched her on several occasions between the time she was 8 and 9 years old; that he would come into her room and touch her vagina over her clothes; that she remembered one time when he carried her to her room and took all of his clothes off (save for his boxers) and touched her vagina over her underwear; and that he told her that she was too small for him to put his penis in her, but he would once she was older.

SAG Brief at 25.

FROM THE DECISION BELOW:

Bonnie testified that Juan Luna Huevo touched her private area once. Bonnie further testified that she witnessed Juan Luna Huevo touch Tammy's private parts while Tammy slept at the Steptoe house. Bonnie

witnessed Luna Huevo take Tammy into his bedroom, at which time she heard Tammy crying.

On February 8, 2017, friends of eleven-year-old Tammy saw her crying during fifth grade music class. After speaking with Tammy, her friends informed their teacher about their concerns. Tammy's teacher then contacted Sarah McMullin, the school counselor, who spoke with Tammy.

Tammy and her ten-year-old sister, Bonnie, disclosed to Sarah McMullin that Juan Luna Huevo sexually abused them. McMullin contacted the Kennewick Police Department. On February 8, 2017, ~~Maura Wukstaja~~ forensic child interviewer at the Sexual advocacy Response Center, interviewed both children.

On the night of February 8, 2017, Kennewick Police Department Detective Jose Santoy obtained warrants to search Tammy and Bonnie's home and the residence of their aunt, Niashia Morales Enriquez. Police found condoms, duct tape, zip ties, and a zebra blanket. Law enforcement neither preserved nor tested the blanket for DNA.

At some unidentified time, Dr. Shannon Phipps, later a trial witness, examined Tammy. Tammy was fearful and withdrawn while relating her history to Dr. Phipps. Tammy informed the physician that "she [Tammy] was too small," such that Juan Luna Huevo's penis did not fit inside her. RP at 161. Dr. Phipps' found no physical abnormalities in Tammy.

PROCEDURE

The State of Washington charged Juan Luna Huevo with one count of rape of a child in the first degree for conduct involving Tammy and three counts of child molestation in the first degree, with one count involving Tammy and two counts involving Bonnie. The one count of rape of a child in the first degree alleged aggravating circumstances of an ongoing pattern of sexual abuse and breach of a position of trust. The second count of child molestation in the first degree alleged the aggravating circumstance of a violation of a position of trust.

During a pretrial interview with defense counsel, Tammy disclosed that sexual contact imposed by Juan Luna Huevo occurred fifty-eight times at the Hawaii Village apartment and that her mother was home on about thirty of the occasions. Tammy also disclosed that sexual contact occurred twenty times at Niashia Morales Enriquez's residence and thirty times at the Steptoe house.

Before trial, the trial court granted the State's motion in limine precluding a witness from assessing the credibility of another witness. Also at the beginning of trial, the court entertained the State's motion to exclude character and reputation evidence. Juan Luna Huevo

intended to have four witnesses testify to his sexual morality and decency; his ex-spouse, Laura Martinez; his daughter, Alexis Huevo; and his two sisters-in-law, Nancy Morales Enriquez and Niashia Morales Enriquez. The trial court allowed Luna Huevo to present offers of proof before ruling on the State's motion to exclude the family member's testimony. During the offer of proof, Luna Huevo did not ask Alexis Huevo questions regarding his reputation for sexual morality. He conceded that he failed to establish a sufficient foundation for Nancy Morales Enriquez and Niashia Morales Enriquez to testify to his reputation in the community. The trial court denied any testimony from the four witnesses as to Luna Huevo's morality.

During her testimony, the State asked Tammy to describe Juan Luna Huevo's penis. Tammy did not respond. The State then asked Tammy whether she would prefer to write her answer, to which Tammy nodded affirmatively. Defense counsel objected to a written answer, but the trial court overruled the objection. Tammy's written answer read, "It was long and tiny hair." RP at 264. Defense counsel cross-examined Tammy, but did not question her about the one written answer.

During trial, Tammy did not testify to the number of times of sexual contact she earlier reported to defense counsel. Rather, she testified that Juan Luna Huevo touched her privates one time at the Hawaiian Village apartment, put his penis against her vagina more than once at the Hawaiian Village apartment, and touched her vagina one time at Niashia Morales Enriquez's residence.

Bonnie testified with difficulty during trial. Bonnie did not answer some questions and responded to other questions with "I don't know" or "I don't remember." RP at 216-44. Bonnie testified that Juan Luna Huevo touched her private part on one occasion.

Bonnie did not respond to a State's question of why she did not tell her mother about her stepfather's conduct. When she hesitated to answer, the State asked Bonnie to write her answer. The trial court overruled defense counsel's objection to a written answer. The court commented:

This child is 11 and has been on the stand since a little after 11 o'clock. It's now 11:28. This witness is clearly having a difficult time responding and answering to questions. . .

RP at 228. Bonnie wrote that she did not tell her mother because she thought her mother would not believe her.

When the State asked Bonnie why she did not inform her mother about Tammy's crying while being molested by Juan Luna Huevo, Bonnie replied that she was scared. When asked by the State why she was scared, Bonnie did not respond. Bonnie wrote her response over the defense's objection. The State showed Bonnie's response to the jury.

Our record does not include the response. Defense counsel chose not to cross-examine Bonnie.

During trial, the forensic child interviewer, Mauri Murstig, explained the concept of episodic memory versus script memory:

[A]sking a child who has experienced that [sexual abuse] for a long period of time, you know, they're not going to be able to give you an exact number that happened over months or years. And so, you know, what we try to do is just one time, more than one time and then try and get them to provide as many, you know, if there were specific times they could remember, specific episodes, we try to focus on that. But, you know, it's going to be impossible to have them describe every time something happened, if it happened, you know, over a long period of time.

RP at 132.

Dr. Shannon Phipps, D.O. testified about the physical examination she conducted on Tammy. The State's attorney questioned Phipps: "because you don't find any kind of physical manifestations in her body, does that mean no sexual abuse occurred?" RP at 154. Dr. Phipps answered:

No, it doesn't. The body is incredible for healing. And I would relate this back to the example that I gave between an acute and a non-acute visit.

If you're walking down the street and you twist your knee. You might have some swelling initially. If you go immediately for something, that might be perceived. Whereas if you wait three or four days, the swelling may have resolved, there may not be a physical finding yet the injury still occurred, so the body can heal.

RP at 154. Phipps averred that she would not expect to see tears or lesions in the vaginal area if a penis rubbed against the area, rather than entered the vagina. Finally, Dr. Phipps declared that "[i]t's more typical not to find findings than to find findings" in sexual assault exams. RP at 161.

Kennewick Police Department Jose Santoy testified during trial. He explained the reason for not testing or preserving for evidence the zebra blanket.

[T]he blanket, like I said, it was in a general area of the bedroom and any of the children could have touched it, to include the defendant and the victims.

RP at 205. After resting its case at trial, the State dismissed

count 4, a child molestation charge involving Bonnie.

Juan Luna Huevo testified on his behalf. He denied any inappropriate sexual contact with either Tammy or Bonnie. During cross-examination, the State asked:

Isn't it true during that interview you told Detective Santoy that [Tammy] would never lie about anything this serious; isn't that true?

RP at 401. On defense counsel's objection and the trial court's overruling the objection, the State proceeded to ask the question two more times, once about Tammy and once about Bonnie. The State also asked Luna Huevo about his comment about Tammy's hygiene issues the morning of his arrest:

This is the first we're hearing about all this; Isn't that true?

RP at 399.

Trial defense counsel suffered the death of his niece during the trial. In response to the niece's death, counsel stated that "a brief continuance would be sufficient" in order to ensure his effectiveness at trial. RP at 105. The trial court granted a one-day recess for counsel to rest before continuing with trial. On return from the one-day recess, trial counsel made no further mention of his need for additional continuances. Trial counsel had tragically lost three siblings to cancer in the thirteen months preceding his niece's death.

During summation, the State's attorney commented:

[Juan Luna Huevo] took the stand and he told you, ...[t]hat there is also this thing that happened the morning of 2-8 where Tammy witnessed him pulling Bonnie's hair....And something about Tammy not wiping herself.

You know what's interest? Think about this.

No question was ever asked of Kelly about any of that. Huh. Don't you think that's weird? No question was asked of Bonnie about any of that. None of that was mentioned in opening statement. Why is that? Because it only came in through him. Nobody else was asked about any of that. Think about that. Why? Because it's not true.

RP at 463-64. The prosecuting attorney added:

He [Juan Luna Huevo] waited an entire year to now tell his side. Didn't tell it that day. Maybe he's had some time to think about it.

RP at 464.

The jury found Juan Luna Huevo guilty on all three counts and further found the presence of the aggravating circumstances.

Slip op. at 2-9.

D. REASONS REVIEW SHOULD BE ACCEPTED AND ARGUMENT

RAP 13.4(b) permits review by this court where a decision of the Court of Appeals is in conflict with a decision of the Court of Appeals or the Supreme Court, raises a significant question of law under the Washington State or United States Constitution, or deals with an issue of substantial public interest. This petition meets the first criteria.

(a) THE DECISION BELOW CONFLICTS WITH BINDING PRECEDENT PRECLUDING A WITNESS FROM TESTIFYING ABOUT THE CREDIBILITY OF ANOTHER WITNESS.

In State v. Suarez-Bravo, 72 Wn.App. 359, 864 P.2d 426 (1994), the court established the precept that a witness may not testify about the credibility of another witness. Id. at 366. In State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001), the court solidified the rule that no witness may offer testimony in the form of an opinion regarding the guilt of a defendant, for such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury. Id. at 759.

Mr. Huevo was tried for allegedly sexually assaulting his two stepdaughters (Tammy & Bonnie), who were the only witnesses to his alleged misconduct. There was no physical evidence of his guilt. Mr. Huevo denied the accusations and steadfastly maintained his innocence. SAG Brief at 4-5.

Before the trial, the State filed a motion in limine and argued therein to exclude the testimony of Tammy and Bonnie's mother, insofar as she intended to testify that she did not believe the allegations her daughters were making against Mr. Huevo. The State argued that credibility determinations were for the

jury. On the day of trial, the State renewed its motion in limine argument and stated that "the only people that can judge the credibility of any witnesses in this case are the ladies and gentleman of the jury," and then proceeded to inform the court:

"So any type of testimony that the defense intends to elicit from witnesses regarding their belief of one witness or another, the State, of course, would adamantly object to.

"Whereas the same goes for the State. And the State of Washington can't ask the police officers whether they believe the children. The State can't ask the child forensic interviewer if they believe the children. Finally, the State can't ask the mother do you believe the children. And it goes to both sides. And I would ask that any type of testimony that would be elicited from...Kelly Huevo... would be excluded as well."

SAG Brief at 4-5. The trial court agreed with the State and granted the motion in limine, stating that it was absolutely improper for one witness to get on the stand and say I believe this other witness, noting that credibility determinations are to be decided by the jury. SAG at 6. But during the cross-examination of Mr. Huevo, the State posed questions to him that were designed to elicit opinion testimony about Tammy & Bonnie's credibility:

PROSECUTOR:

"Isn't it true during the interview you told Detective Santoy that [Tammy] would never lie about anything this serious; isn't that true?"

Over defense counsel's objections, the trial court permitted the State to pose the question to Mr. Huevo two more times in front of the jury. SAG at 6-7.

In State v. Stith, 71 Wn.App. 14, 856 P.2d 415 (1993), the Court held that cross-examination designed to compel a witness to express an opinion as to whether other witnesses were lying constitutes misconduct. Id. at 18. Here, the trial court allowed the prosecutor, on cross-examination, to question Mr. Huevo

in such a manner so as to make it appear that he was vouching for Tammy and Bonnie's credibility; this despite the fact that he was maintaining his innocence.

In fine, the impermissible opinion testimony elicited by the State bore directly on Mr. Huevo's defense and therefore his guilt, and thereby violated Mr. Huevo's constitutional right to a jury trial under the U.S. Constitution, amendment VI, including the independent determination of the facts by the jury. Demery, 144 Wn.2d at 759 ("impermissible opinion testimony regarding the defendant's guilt may be reversible error because admitting such evidence violates [the defendant's] constitutional right to a jury trial, including the independent determination of the facts by the jury.").

The decision below states that Mr. Huevo "presents the court no authority that the State may not question the accused about statements he uttered to another regarding the truthfulness of the victim." Slip op. at 21.

This finding not only overlooks the authorities Mr. Huevo cited above for the proposition that it was prejudicially improper for the State to elicit his opinion testimony about Tammy and Bonnie's credibility, but such finding also conflicts with these same authorities. Perhaps recognizing this, the lower court proceeded to state:

"Regardless, we find no prejudice in the questions and answer because of the overwhelming evidence, including circumstantial evidence, of the crimes and Luna Huevo's concession to Tammy of the abuse of Bonnie."

Slip op. at 21. But our Supreme Court has said that the very act of a witness offering testimony in the form of an opinion regarding the guilt of a defendant is unfairly prejudicial to the defendant, for it invades the province of the jury. Demery, 144 Wn.2d at 759. In granting the State's motion in limine,

the trial court essentially agreed with this precept, as did the State when it argued the motion in limine.

Assuming arguendo that the improper questioning of Mr. Huevo about the credibility of both Tammy and Bonnie (his accusers) was not per se prejudicial, the totality of the circumstances of the case demonstrate prejudice to Mr. Huevo.

Mr. Huevo was being tried for sexually assaulting Tammy and Bonnie, the only witnesses to the alleged abuse. The State's doctor uncovered no physical evidence of sexual assault. The State failed to preserve and conduct DNA testing of a blanket that Mr. Huevo was accused of using to silence Tammy during an alleged incident of sexual assault, and that would have been potentially useful to undermine Tammy's overall credibility.

Moreover, the State extensively commented on Mr. Huevo's right to remain silent and used his silence as substantive evidence of guilt, while Mr. Huevo's attorney also failed to cross-examine Bonnie despite having a prior inconsistent statement that was materially different than her new-and-improved trial testimony. SAG at 21. Mr. Huevo's attorney also failed to impeach Tammy with her prior inconsistent statement that was materially different than her trial testimony. Finally, the State improperly shifted the burden of proof onto Mr. Huevo (SAG at 14-17), while the trial court prevented Mr. Huevo from presenting evidence of his sexual morality.

It is against this backdrop of prejudicial errors and ineffective assistance of counsel that the lower court ought to have weighed the overall prejudicial impact on Mr. Huevo's right to a fair trial, but instead the lower court overlooked all of the same and simply found that there was overwhelming evidence of Mr. Huevo's criminal acts and, accordingly, found that the State's impermissi-

ble acts of eliciting Mr. Huevo's opinion testimony on his own accusers' credibility was not prejudicial.

The trial court abused its discretion when it permitted prosecutorial misconduct by allowing the State to repeatedly elicit opinion testimony from Mr. Huevo that put Mr. Huevo in the incredible position of vouching for the credibility of his accusers while, at the same time, maintaining that he was innocent of his accusers' allegations.

Mr. Huevo ought to be granted a new trial for the decision below conflicts with binding precedent supporting Mr. Huevo's argument that the trial court's decision allowing the prosecutorial misconduct significantly prejudiced Mr. Huevo's right to a fair trial under both the Washington State and U.S. Constitutions (Amendment VI).

(b) THE DECISION BELOW CONFLICTS WITH BINDING PRECEDENT ESTABLISHING THAT THE STATE'S DECISION TO USE MR. HUEZO'S SILENCE AS SUBSTANTIVE EVIDENCE OF HIS GUILT WAS PREJUDICIAL, FLAGRANT & ILL-INTENTIONED.

Here, the prosecutor -- during cross-examination, recross examination, and during closing arguments, extensively commented on Mr. Huevo's right to remain silent and used his silence against him as substantive evidence of his guilt. SAG 9-14. The decision below conceded that the prosecutor indirectly criticized Mr. Huevo for remaining silent before his trial, but found that the prosecutor's misconduct was not prejudicial or flagrant given the overwhelming evidence of guilt. Slip op. at 21-22.

There must be a substantial likelihood that the misconduct affected the jury verdict in order to establish prejudice. In re Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). In State v. Pinson, the court found that the State committed prejudicial misconduct where "The State essentially asked the jury to find that Pinson's silence was an admission of guilt, and argued that such an admiss-

ion was sufficient to convict him." Pinson, 183 Wn.App. at 420.

As the decision below reflects, the State's misconduct here is not substantively different than the State's conduct in Pinson: the State essentially asked the jury to find that Mr. Huezos's silence was substantive evidence of his guilt since he elected not to tell his side of the story to Detective Santoy, but instead waited until trial to tell it.

Hence Mr. Huezos has met his burden of demonstrating prejudice, and the decision below conflicts with both Pinson and Glasmann, supra, a conflict the lower court justifies by claiming that the record contains overwhelming evidence of Mr. Huezos's guilt. Slip op. at 21-22.

But as Mr. Huezos has pointed out above (See page 12, supra), and incorporates by reference, his trial was plagued with prejudicial errors and ineffective assistance of counsel that, under the cumulative error doctrine, denied him his right to a fair trial. Mr. Huezos's trial was essentially a credibility contest: who would the jury believe, Mr. Huezos or Tammy & Bonnie?

This being the essential nature of Mr. Huezos's trial, it is untenable for the lower court to find that Mr. Huezos did not show that the State's use of his silence was prejudicial, especially in light of the fact that (1) the State solicited Mr. Huezos's opinion testimony on his accusers' credibility (SAG 4-9); (2) the State improperly shifted the burden of proof onto Mr. Huezos (SAG at 14-17); and (3) Mr. Huezos's attorney failed to respectively cross-examine and impeach Bonnie and Tammy with their prior inconsistent statements that were materially different than their respective trial testimony, and thereby let their credibility go uncontested. SAG at 20-27.

Finally, although the lower court's decision recognized that the State indirectly criticized Mr. Huezos for remaining silent before trial, it did not

find the State's conduct flagrant. Slip op. at 21-22. But the record shows that the prosecutor executed a deliberate and methodical plan to have the jury use Mr. Huezos's right to remain silent against him as substantive evidence of guilt: the State questioned him during cross-examination, then during recross, and then told the jury during closing:

"The purpose of an interview, for them to give you, your side of the story?"

"That wasn't true. He waited an entire year to now tell his side. Didn't tell it that day. Maybe he's had some time to think about it."

SAG at 14. The prosecutor knew that the Fifth Amendment of the U.S. Constitution and the Washington State Constitution forbade it from compelling Mr. Huezos from being a witness against himself. State v. Pinson, 183 Wn.App. at 416; Id. at 416-17. The prosecutor also knew that it could not use Mr. Huezos's silence as evidence of substantive guilt. Burke, 163 Wn.2d at 217; State v. Knapp, 148 Wn.App. 414, 420, 199 P.3d 505 (2009). The prosecutor also knew that it would be improper to make a closing argument that encouraged the jury to infer guilt from Mr. Huezos's silence. Pinson, 183 Wn.App. at 417; Burke, 163 Wn.2d at 216-17. Nevertheless, the prosecutor used Mr. Huezos's silence against him; this constitutes ill-intention.

Moreover, the prosecutor took Mr. Huezos's trial testimony, wherein he intended to show the jury that his eldest stepdaughter had a motive to get him into trouble, and flagrantly misused it to excite and implicitly invite the jury to find him guilty because he didn't tell his story to the police. The prosecutor knew that Mr. Huezos's jury, like all juries, was biased in the sense that it believed that the police are the good guys that no innocent person should be hesitant to talk to.

Nevertheless, the prosecutor encouraged the jury to feed its inherent prejudices and infer Mr. Huezos's guilt because he exercised his constitutional right

to refuse to tell his story to the police. This was not done in a vacuum, but was committed in the context of a trial wherein (1) the prosecutor also committed misconduct by violating the motion in limine and solicited Mr. Huezos' opinion testimony on his accusers' credibility (SAG 4-9); (2) the prosecutor committed misconduct when it improperly shifted the burden of proof onto Mr. Huezos (SAG at 14-17); (3) the State unilaterally decided not to preserve a blanket that was potentially useful to Mr. Huezos' defense (SAG at 27-30); (4) Mr. Huezos' attorney deficiently performed by refusing to cross-examine and impeach Bonnie, and by refusing to adequately cross-examine and impeach Tammy with her prior inconsistencies and medical findings (SAG at 20-27); and (5) two young girls' testimony, regardless of their veracity, undoubtedly invoked the jury's sympathy.

In light of this record and the circumstances at trial, the prosecutor's use of Mr. Huezos' silence against him was both ill-intentioned and flagrant, and therefore was not amenable to curative instructions. State v. Emery, 174 Wn.2d 741, 762-63, 278 P.3d 653 (2012)(holding that certain comments calculated to inflame the passions of the jury are not amenable to curative instructions). And this is because:

Where evidence is admitted which is inherently prejudicial and of such a nature as to be most likely to impress itself upon the minds of the jurors, a subsequent withdrawal of the evidence, even when accompanied by an instruction to disregard, cannot logically be said to remove the prejudicial impression.

State v. Suleski, 67 Wn.2d 45, 51, 406 P.2d 613 (1965). The decision below conflicts with the binding precedent that prohibits the prosecutor from using Mr. Huezos' silence as substantive evidence of his guilt, and with case law showing that the prosecutor's misconduct was prejudicial, flagrant and ill-intentioned. Accordingly, Mr. Huezos ought to be granted a new trial.

(C) THE DECISION BELOW CONFLICTS WITH BINDING PRECEDENT PROHIBITING THE PROSECUTOR FROM SHIFTING THE BURDEN OF PROOF ONTO MR. HUEZO.

The decision below not only conflicts with precedent prohibiting the State from shifting the burden of proof onto the defendant, but it also ignores the record and mischaracterizes the prosecutor's misconduct as simply an attack on Mr. Huezo's credibility. Slip op. at 22-23.

The State bears the burden of proving "beyond a reasonable doubt, every element necessary to constitute the crime with which the defendant is charged." In re Glasmann, 175 Wn.2d 696, 713, 286 P.3d 673 (2012). It is improper for the prosecutor to argue or imply that the burden of proof rests with the defendant. State v. Thorgenson, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). Because the defendant has no duty to present evidence, the prosecutor generally cannot comment on the defendant's failure to present evidence. Id. at 453.

At Mr. Huezo's trial, the prosecutor stated the following during summation:

[Luna Huezo] took the stand and he told you, ...[t]hat there is also this thing that happened the morning of 2-8 where [Tammy] witnessed him pulling [Bonnie's] hair....And something about Tammy not wiping herself.

You know what's interest? Think about this.

No question was ever asked of Kelly about any of that. Huh. Don't you think that's weird? No question was asked of [Bonnie] about any of that. None of that was mentioned in opening statement. Why is that? Because it only came in through him. Nobody else was asked about any of that. Think about that. Because it's not true.

Slip op. at 22. Under State v. Dixon, 150 Wn.App. 46, 207 P.3d 459 (2009), the prosecutor's aforementioned summation was reversible error, for the prosecutor's statements suggested that Mr. Huezo had a duty to present testimonial evidence of independent witnesses in order to prove his innocence. In Dixon, the defendant was stopped for driving with a suspended or revoked license. Id. at 49. The officer arrested Dixon and searched her purse. Id. The purse con-

tained methamphetamine. Id. At trial, the officer testified that there was a passenger in Dixon's car, but the officer did not write down the passenger's name. Id. at 51.

During closing argument, defense counsel argued that there was doubt as to Dixon's control over the purse, because there was an unknown person in the car. Id. at 52. The prosecutor responded to this argument in rebuttal closing argument:

I want to pose this question to you: Why didn't [Dixon] bring that passenger into testify for her? She knew who he was. He was her friend, that's what Deputy Stewart said.

And if that assenger had anything at all to say, don't you think [Dixon] would have contacted him? She knew who he was. He was in car. She didn't call him.

That passenger-- what they're suggesting is that passenger put the drugs in her purse, but there's no evidence of that whatsoever, whatsoever...Did the defendant make any statement that "he put that in my purse"? No. We didn't hear any of that testimony. There's nothing, absolutely nothing that indicates that that passenger had anything to do with this.

SAG at 15-16.

The decision below that the prosecutor's statements was merely an attack on Mr. Huevo's credibility, and not an act of shifting the burden of proof, clearly conflicts with the above precedent, including but not limited to Dixon. Accordingly, Mr. Huevo ought to be granted a new trial.

(d) THE DECISION BELOW CONFLICTS WITH BINDING PRECEDENT BY LIMITING MR. HUEZO'S CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HIM FACE TO FACE.

Under the Sixth amendment to the United States Constitution, Mr. Huevo has the right to confront his accuser in court by cross-examing the witness on the witness stand. Ohio v. Roberts, 448 U.S. 56, 63, 100 S.Ct. 2531, 2537, 65 L.Ed.2d 597 (1980). The Washington State Constitution provides amore stringent

confrontation right, in that the accused has a constitutional right "to meet the witnesses against him face to face." Const. art. 1, § 22; State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998).

"Where cross-examination would serve to expose untrustworthiness or inaccuracy, denial of confrontation 'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Ryan, 103 Wn.2d at 175 (quoting Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)).

At Mr. Huevo's trial, the prosecutor was allowed to present Tammy's and Bonnie's testimonial evidence via written form. This was error, for it violated Mr. Huevo's right to confrontation by limiting his scope of cross-examination, See State v. Garcia, 179 Wn.2d 828, 844, 318 P.3d 266 (2014), and the trial court allowed it without first finding that both Tammy and Bonnie were unavailable.

The decision below agreed with the State that the trial court placed no limit on Mr. Huevo's right to cross-examine Tammy and Bonnie as to their written answers to questions. Slip op. at 9-10. The decision below recognized that an impermissible limitation on the scope of cross-examination violates a defendant's right to confrontation, Garcia, supra, but went on to erroneously state that Mr. Huevo cited to no authority supporting his contention that written answers to the State's questions violated the confrontation clause.

Overlooking Garcia, supra, the lower court further supported its decision by pointing out that the State may introduce as an exhibit various writings without breaching the confrontation clause, although said writings inculcate the accused; that ER 611(a) implicitly grants the trial court authority to permit a witness to answer a question in writing to prevent embarrassment and to effectuate the ascertainment of the truth; that Tammy's written answer was a result of her

embarrassment; that Bonnie's written answer was a result of Bonnie encountering difficulty in answering after sitting on the witness stand for twenty-five minutes; and that State v. Thomas H., 101 Conn.App. 363, 369-70 (2007)(out-of-state opinion) found no violation of the confrontation clause when a child victim provided a written answer to a question asked by the State in a sexual assault trial. Slip op. at 11-12.

In fine, the lower court's decision cited no authority for its policy-changing rule that ER 611(a) grants a trial court authority to permit a witness to answer a question in writing to prevent embarrassment and to effectuate the ascertainment of the truth, nor did the decision explain why it relied on non-binding precedent over our State's Supreme Court's decision -- Garcia, supra -- that an impermissible limitation on the scope of cross-examination violates a defendant's right to confrontation.

By allowing both Tammy and Bonnie to answer critical questions in writing, the trial court limited the scope of cross-examination by preventing the jury from evaluating those witnesses' demeanor and overall credibility, which cannot be properly judged by reviewing a piece of paper. This was done without the trial court first finding that Tammy and Bonnie were unavailable, a fact that the lower court overlooked.

The foregoing reasons demonstrate that the lower court's decision is in conflict with binding precedent and thus Mr. Huevo ought to be granted a new trial.

(e) THE DECISION BELOW CONFLICTS WITH BINDING PRECEDENT PERMITTING MR. HUEZO TO PRESENT EVIDENCE OF HIS SEXUAL MORALITY OR DECENCY.

Evidence of a person's character generally is inadmissible, but a criminal defendant may present evidence of a "pertinent trait of character." ER 404(a)(1). Sexual morality is a pertinent trait character trait in cases involving sexual

offenses. State v. Griswold, 98 Wn.App. 817, 991 P.2d 657 (2000); State v. woods, 117 Wash.app. 278, 280, 70 P.3d 976, 977 (2003).

Mr. Huevo moved to admit evidence through four witnesses regarding his sexual morality or decency. The trial court excluded the testimony and most of the witnesses, despite the fact that both Griswold and Woods, supra, indicate that the question of whether testimonial evidence is admissible or not should focus on whether the trait for sexual morality is pertinent to the underlying crime, not whether the defendant's reputation for sexual morality is based on perception in the community, as the State argued.

The decision below misreads Woods and Griswold and interprets them to stand for the proposition that a defendant seeking to prove sexual morality must "properly proffer reputation testimony". Slip op. at 14-15. The Court of Appeals cited to State v. Thach, 126 Wn.App. 297, 315, 106 P.3d 782 (2005) for the proposition that, in order to offer reputation testimony, a witness may lay a foundation establishing that she bases the subject's reputation on perceptions in the community. Slip op. at 13. Proceeding, the lower court then found that although Mr. Huevo's offer of proof qualified his sister-in-law with knowledge of his reputation for sexual decency, said reputation was not formed within a generalized and neutral community and therefore his sister-in-law's testimony was inadmissible. Slip op. at 15,

In reaching this decision, the lower court not only overlooked the fact that it is absurd and unworkable to require witnesses from a generalized and neutral community to testify about a defendant's trait for sexual morality or decency, but the decision below also ignores that Wood and Griswold indicate, correctly, that Mr. Huevo was not required to lay a foundation for community perception concerning his sexual morality or decency (trait of character).

For the foregoing reasons, Mr. Huevo ought to be granted a new trial, where he can properly put on a complete defense to the accusations of sexual misconduct.

(f) THE DECISION BELOW CONFLICTS WITH PRECEDENT GUARANTEEING MR. HUEZO HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

A criminal defendant's right to the assistance of counsel derives from the Sixth Amendment to the U.S. Constitution and article 1, section 22 of the Washington State Constitution. Under those provisions, a criminal defense attorney has the constitutional duty to provide assistance that is effective. Where a defense attorney makes errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment, the attorney's performance is constitutionally deficient. Where that deficiency deprives the defendant of fair proceedings, the defendant has suffered prejudice because there is a breakdown in the adversary process that renders the result unreliable. Unreliable results caused by defense counsel's prejudicial deficient performance are constitutionally intolerable. In re Yung-Cheng Tsai, 183 Wn.2d 91, 351 P.3d 138 (2015).

Claims of ineffective assistance of counsel are reviewed de novo. To prevail on a claim of ineffective assistance of counsel, the appellant must show both (1) that defense counsel's representation was deficient, and (2) that the deficient representation prejudiced the defendant. Representation is deficient if after considering all the circumstances, the performance falls below an objective standard of reasonableness. Prejudice exists if there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have differed. State v. Estes, 193 Wn.App. 479, 488, 372 P.3d 163 (2016).

(i) MR. HUEZO'S COUNSEL FAILED TO CROSS-EXAMINE BONNIE AND IMPEACH BOTH HER AND TAMMY WITH THEIR RESPECTIVE PRIOR INCONSISTENT STATEMENTS AND THIS CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

TAMMY'S PRIOR INCONSISTENT STATEMENT

Mr. Huevo's counsel knew that Tammy originally told the police that Mr. Huevo actually penetrated her first with his finger and then his penis, but he refused to confront her with these statements of hers despite the fact that she, at trial, never once stated that Mr. Huevo penetrated her vagina. Mr. Huevo's counsel also knew that the State's own doctor found no physical evidence supporting Tammy's original allegation that Mr. Huevo penetrated her vagina. In fact, Dr. Phipps averred that she would not expect to see tears or lesions in the vaginal area if a penis rubbed against the area, rather than entered the vagina. Slip op. at 7. Tammy told the police before trial that Mr. Huevo penetrated her vagina with both his fingers and his penis, and Dr. Phipps found no evidence of this, but his counsel did not impeach Tammy on the issue and thereby make these facts known or clear to the jury.

BONNIE'S PRIOR INCONSISTENT STATEMENT

Mr. Huevo's counsel also knew that Bonnie originally told the police that (1) Mr. Huevo touched her on several occasions between the ages of 8 and 9; (2) Mr. Huevo would come into her bedroom and touch her vagina; and (3) Mr. Huevo, on another occasion, carried her into her room, took his clothes off and touched her vagina, but when Bonnie testified at trial that Mr. Huevo only touched her once, counsel declined to impeach her with her prior inconsistent statements: he refused to cross-examine Bonnie at all, but instead let her unimpeached testimony go straight to the jury without any kind of adversarial testing.

Mr. Huevo's trial was essentially a credibility contest: would the jury believe Tammy and Bonnie's accusations, or would it believe Mr. Huevo's claim of innocence? There was no physical evidence that Mr. Huevo sexually assaulted Tammy or Bonnie, just Tammy and Bonnie's new version of abuse. Accordingly, it

was objectively unreasonable for Mr. Huevo's counsel to fail to impeach Tammy and Bonnie with their prior inconsistent statements to the police, and therefore his performance was deficient.

Courts generally entrust cross-examination techniques, like other matters of trial strategy, to the professional discretion of counsel. In assessing a claim that counsel did not effectively cross-examine a witness, the court need not determine why trial counsel did not cross-examine if that approach falls within the range of reasonable representation. In re Davis, 152 Wn.2d 647, 720, 101 P.3d 1 (2004).

A lawyer shall provide competent representation to a client. Competent representation requires thoroughness and preparation reasonably necessary for the representation. State v. A.N.G., 158 Wn.2d 91, 225 P.3d 956 (2010) (citing RPC 1.1).

The decision below excuses Mr. Huevo's counsel's deficient performance thus:

"...counsel may have deemed that the testimony of the victims by itself raised questions of their credibility, that cross-examining the victims more would have obtained no additional helpful information, and that a cross-examination young girls might dismay the jury."

Slip op. at 24. But the record, objectively viewed as a whole, supports a finding (1) that counsel had no reasonable basis to conclude that the testimony of the victims by itself raised questions of their credibility; and (2) that Mr. Huevo's claim of innocence would have been significantly bolstered if counsel would have showed the jury that his stepdaughters lied to the police about what he allegedly did to them. After all, if the jury was provided evidence that Tammy and Bonnie lied about Mr. Huevo in the beginning, it likely would have, when weighing the evidence and determining the credibility of these

witnesses, determined that they were also lying in the end when they testified to the new version of sexual abuse.

Moreover, it is objectively unreasonable to jettison one's strongest piece of impeachment evidence, and argument for destroying Tammy and Bonnie's credibility before the jury on the speculative basis that showing the jury Tammy and Bonnie lied in an egregious way about their stepdad would dismay the jury. Allowing Tammy and Bonnie's new version of sexual abuse to go to the jury uncontested was the most certain way to turn Mr. Huezco's jury against him.

In fine, it cannot be said, on this record, that the lower court's rationalizations for counsel's decision not to cross-examine Bonnie, and to not impeach Bonnie and Tammy with their prior inconsistent statements fall within the range of reasonable representation. Accordingly, the decision below conflicts with precedent requiring counsel to provide Mr. Huezco effective assistance of counsel, and Mr. Huezco ought to be granted a new trial.

(ii) MR. HUEZO'S COUNSEL FAILED TO MOVE FOR DISMISSAL IN RESPONSE TO THE STATE'S FAILURE TO PRESERVE POTENTIALLY USEFUL EVIDENCE.

Tammy told the police that Mr. Huezco stuffed a blanket in her mouth to keep her quiet while sexually assaulting her. Detective Santoy chose not to secure and preserve this piece of material evidence because, according to him, it wouldn't have any part in helping the case because it was possible that saliva would be on the blanket anyway.

Due process requires the State to disclose exculpatory evidence to the defense, as well as a related duty to preserve such evidence for use by the defense. State v. Donahue, 105 Wn.App. 67, 77, 18 P.3d 608 (2001). Material exculpatory evidence must possess an exculpatory value that was apparent. But if the evidence is only "potentially useful" due process is not violated unless the defendant can show bad faith on the part of the police. Id. at 477. Potentially

useful evidence is that "of which no more can be said than it could have been subjected to tests, the results of which might have exonerated the defendant." State v. Groth, 163 Wn.App. 548, 557, 261 P.3d 183 (2011).

Here, the blanket was immediately recognizable as having potentially exculpatory value to Detective Santoy, but he unilaterally made the decision to not preserve it for testing by the defense; this prevented the defense from testing and using the potentially favorable test results to discredit Tammy, a key to procuring Mr. Huevo's exoneration. Detective Santoy's decision constitutes bad faith.

Accordingly, Mr. Huevo's counsel had a duty under the due process prong of the Washington State and U.S. Constitutions (amendments V & XIV) and CrR 8.3 (b) to move the trial court for dismissal due to governmental misconduct in failing to preserve the blanket, especially since the governmental misconduct was prejudicial to Mr. Huevo's right to a fair trial. However, Mr. Huevo's counsel made no such motion, and therefore his performance, coupled with his other deficiencies in the trial, fell below the standard of reasonableness and deprived Mr. Huevo the right to effective representation; this, in turn, caused Mr. Huevo significant prejudice: he was thus forced to face Tammy's inculpatory allegations at trial without any independent evidence showing or tending to show that she was unworthy of belief.

The decision below merely asserts that Mr. Huevo did not show that the State's preservation of the blanket would have advanced his defense, or that the State's failure to preserve the blanket was in bad faith. Slip op. at 24-25.

But this view illustrates Mr. Huevo's point: the State's failure to preserve the blanket prevented him from advancing his factual-innocence defense. Mr. Huevo denied the allegations against him, maintained his innocence, and if the blanket would have been tested and such test showed that it did not contain

Tammy's DNA, this would have supported his claim of innocence (i.e., advanced his defense). Moreover, Detective Santoy knew the blanket was potentially exculpatory evidence, and the law was clear that he had a duty to preserve it, but he chose not to because he decided it wouldn't help the case. This wasn't his decision to make, and he had no authority to make it, and it was prejudicial to Mr. Huezos's right to a fair trial. Hence the State's failure to preserve the blanket was a due process violation committed in bad faith.

In failing to move for dismissal due to the government's bad faith failure to preserve the blanket, Mr. Huezos's counsel's performance was both deficient and prejudicial, and therefore the lower court's decision conflicts with precedent not only requiring Mr. Huezos's counsel to be thorough and reasonably prepared in his representation of Mr. Huezos, but also requiring counsel to provide Mr. Huezos effective representation. Accordingly, Mr. Huezos ought to be granted a new trial.

(iii) MR. HUEZOS'S COUNSEL FAILED TO MOVE THE TRIAL COURT FOR PERMISSION TO WITHDRAW FROM MR. HUEZOS'S CASE DUE TO MENTAL IMPAIRMENT.

At the time of Mr. Huezos's trial, his counsel had lost three (3) siblings to cancer (within the last 13 months), and during the trial counsel's niece died. The record reflects that these familial tragedies materially affected counsel's mental condition and hence his ability to adequately represent Mr. Huezos. In fact, counsel disclosed to the court that he was not able to focus on preparing for Mr. Huezos's trial, and the record bears this out: he failed to cross-examine Bonnie and impeach her with her prior inconsistent statement to the police; he failed to impeach Tammy with her prior inconsistent statement to the police; and he failed to move for a dismissal when the State committed misconduct by failing to preserve the blanket for testing.

RPC 1.16 required Mr. Huevo's counsel to withdraw from representing him, but he did not. Instead, the trial court gave counsel one day to rest, and allowed counsel to proceed with the trial without looking into his mental ability to adequately represent Mr. Huevo. The deaths of counsel's family members materially impaired his ability to adequately represent Mr. Huevo, and he ought to have moved to withdraw from the case; his failure to do so constitutes deficient performance that was prejudicial to Mr. Huevo's right to effective assistance of counsel.

The decision below found that the record does not evidence that any of the tragedies impacted Mr. Huevo's counsel's ability to represent Mr. Huevo during trial. Slip op. at 23-24. This finding conflicts with not only the evidentiary record, but also the precedent guaranteeing Mr. Huevo a right to effective representation. Accordingly, Mr. Huevo ought to be granted a new trial.

(iv) THE DECISION BELOW CONFLICTS WITH PRECEDENT PROVIDING THAT AN ACCUMULATION OF ERRORS MAY DENY A DEFENDANT A FAIR TRIAL.

An accumulation of errors that do not individually require reversal may still deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Here, Mr. Huevo argues that cumulative error deprived him of a fair trial. Under the cumulative error doctrine, the court may reverse an appellant's convictions if the combined effect of trial errors effectively denied the appellant his right to a fair trial, even if each error alone would be harmless. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair. State v. Emery, 174 Wn.2d 741, 766, 278 P.3d 653 (2012).

Mr. Huevo's trial was a parade of errors: the jury saw the trial court

allow the State to question Mr. Huevo in a manner that had him vouching for his accusers' credibility; saw the prosecutor comment on and use Mr. Huevo's right to remain silent as substantive evidence of his guilt; saw the prosecutor shift the burden of proof onto Mr. Huevo so it became, in the jury's mind, his duty to prove his innocence; and saw Mr. Huevo's attorney let the alleged victims' trial testimony go untested as if it was beyond question.

And what the jury saw is not all: there are the errors it did not see: both Tammy and Bonnie made other serious allegations against Mr. Huevo that were not supported by the examining doctor, and that were inconsistent with what they told the jury at trial; the jury did not see a blanket that did not contain Tammy's DNA; the jury did not see the lack of focus and preparation by Mr. Huevo's counsel because of his mental impairment associated with the death of his loved ones. The jury's verdict was distorted by the errors it saw and did not see; this renders the jury's verdict unreliable. State v. Lindsay, 180 Wn.2d 423, 326 P.3d 125 (2014):

The cumulative effect of repetitive prejudicial prosecutor misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.


Id. at 443. The decision of the lower court found that even if it assumed errors in Mr. Huevo's trial they were nevertheless minimal and harmless. This finding conflicts with both the precedent on cumulative error doctrine and the evidentiary record, which shows that the combined effect of all the errors renders Mr. Huevo's trial fundamentally unfair. Mr. Huevo ought to be granted a new trial so that he can receive a fair trial.

E. CONCLUSION

For the reasons discussed above, Mr. Huevo respectfully requests that this court grant his petition for review and (1) allow further briefing on the issues, or (2) grant him a new trial.

DATED this 18th day of MARCH, 2021.

Respectfully submitted,


JUAN JOSE HUEZO LUNA #405454

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the date below I served the Prosecuting attorney for Benton County (Andy Miller and/or Terry J. Bloor) this document by having my institution's law librarian scan and email it to the Court of Appeals, Division Three, and by sending it, postage prepaid, via the U.S. mail via my institution's legal mail system to the following address:

Mr. Andy Miller
Benton County Prosecuting Attorney
7122 West Okanogan Place, Bldg A
Kennewick, WA 99336

Dated this 18th day of MARCH, 2021.


JUAN JOSE HUEZO LUNA

APPENDIX A

APPENDIX A

FILED
DECEMBER 1, 2020
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

STATE OF WASHINGTON,)	
)	No. 36001-6-III
Respondent,)	
)	
v.)	UNPUBLISHED OPINION
)	
JUAN JOSE LUNA HUEZO,)	
)	
Appellant.)	

FEARING, J. — Juan Luna Huevo appeals from convictions for raping and molesting two stepdaughters. He challenges the sufficiency of evidence. He also claims the trial court committed error when permitting the stepdaughters to answer some questions in writing and when excluding testimony from family members of his sexual morality and decency. We find no error and affirm.

FACTS

We gather our facts from trial testimony. We expand on some of the facts when describing the case's procedure.

Juan Luna Huevo is the stepfather of Tammy, born April 5, 2005, and Bonnie, born July 31, 2006, both pseudonyms. The girl's mother began dating Luna Huevo in

November 2009 and married him in January 2010. Luna Huevo is more than two decades older than the girls.

At age nine, Tammy became the subject of sexual abuse by Juan Luna Huevo. Luna Huevo began sexually abusing Bonnie when she was eight years old.

At trial, Tammy testified that Juan Luna Huevo sexually touched her on several occasions and in multiple locations in Kennewick, including at an apartment her family rented at the Hawaiian Village Apartments, at her family's home on Steptoe Street, at her aunt Niashia Morales Enriquez's residence, and in a vehicle. The sexual touching included Luna Huevo placing his hand on Tammy's private parts, placing his private parts against her body, and placing his penis inside her mouth.

Tammy further testified that Juan Luna Huevo tied her hands behind her back with duct tape. Luna Huevo obtained a condom from a blue and gray backpack in the bathroom and placed it on his penis. Luna Huevo also rubbed oil on his penis. During trial, Luna Huevo confirmed that he used condoms and oil when engaging in sexual activity.

According to Tammy, Juan Luna Huevo also sexually abused her sister. Once Tammy asked Luna Huevo whether he was "doing the same thing [to Bonnie]," and he responded that he was. Report of Proceedings (RP) at 271.

Bonnie testified that Juan Luna Huevo touched her private area once. Bonnie further testified that she witnessed Juan Luna Huevo touch Tammy's private parts while

Tammy slept at the Steptoe house. Bonnie witnessed Luna Huevo take Tammy into his bedroom, at which time she heard Tammy crying.

On February 8, 2017, friends of eleven-year-old Tammy saw her crying during fifth grade music class. After speaking with Tammy, her friends informed their teacher about their concerns. Tammy's teacher then contacted Sarah McMullin, the school counselor, who spoke with Tammy.

Tammy and her ten-year-old sister, Bonnie, disclosed to Sarah McMullin that Juan Luna Huevo sexually abused them. McMullin contacted the Kennewick Police Department. On February 8, 2017, Mauri Murstig, a forensic child interviewer at the Sexual Advocacy Response Center, interviewed both children.

On the night of February 8, 2017, Kennewick Police Department Detective Jose Santoy obtained warrants to search Tammy and Bonnie's home and the residence of their aunt, Niashia Morales Enriquez. Police found condoms, duct tape, zip ties, and a zebra blanket. Law enforcement neither preserved nor tested the blanket for DNA.

At some unidentified date, Dr. Shannon Phipps, later a trial witness, examined Tammy. Tammy was fearful and withdrawn while relating her history to Dr. Phipps. Tammy informed the physician that "she [Tammy] was too small," such that Juan Luna Huevo's penis did not fit inside her. RP at 161. Dr. Phipps' found no physical abnormalities in Tammy.

PROCEDURE

The State of Washington charged Juan Luna Huevo with one count of rape of a child in the first degree for conduct involving Tammy and three counts of child molestation in the first degree, with one count involving Tammy and two counts involving Bonnie. The one count of rape of a child in the first degree and the first count of child molestation in the first degree alleged aggravating circumstances of an ongoing pattern of sexual abuse and breach of a position of trust. The second count of child molestation in the first degree alleged the aggravating circumstance of violation of a position of trust.

During a pretrial interview with defense counsel, Tammy disclosed that sexual contact imposed by Juan Luna Huevo occurred fifty-eight times at the Hawaiian Village apartment and that her mother was home on about thirty of the occasions. Tammy also disclosed that sexual contact occurred twenty times at Niashia Morales Enriquez's residence and thirty times at the Steptoe house.

Before trial, the trial court granted the State's motion in limine precluding a witness from assessing the credibility of another witness. Also at the beginning of trial, the court entertained the State's motion to exclude character and reputation evidence. Juan Luna Huevo intended to have four witnesses testify to his sexual morality and decency: his ex-spouse, Laura Martinez; his daughter, Alexis Huevo; and his two sisters-in-law, Nancy Morales Enriquez and Niashia Morales Enriquez. The trial court allowed

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Luna Huevo to present offers of proof before ruling on the State's motion to exclude the family member's testimony. During the offer of proof, Luna Huevo did not ask Alexis Huevo questions regarding his reputation for sexual morality. He conceded that he failed to establish a sufficient foundation for Nancy Morales Enriquez and Niashia Morales Enriquez to testify to his reputation in the community. The trial court denied any testimony from the four witnesses as to Luna Huevo's morality.

During her testimony, the State asked Tammy to describe Juan Luna Huevo's penis. Tammy did not respond. The State then asked Tammy whether she would prefer to write her answer, to which Tammy nodded affirmatively. Defense counsel objected to a written answer, but the trial court overruled the objection. Tammy's written answer read, "It was long and tiny hair." RP at 264. Defense counsel cross-examined Tammy, but did not question her about the one written answer.

During trial, Tammy did not testify to the the number of times of sexual contact she earlier reported to defense counsel. Rather, she testified that Juan Luna Huevo touched her privates one time at the Hawaiian Village apartment, put his penis against her vagina more than once at the Hawaiian Village apartment, and touched her vagina one time at Niashia Morales Enriquez's residence.

Bonnie testified with difficulty during trial. Bonnie did not answer some questions and responded to other questions with "I don't know" or "I don't remember." RP at 216-44. Bonnie testified that Juan Luna Huevo touched her private part on one

occasion.

Bonnie did not respond to a State's question of why she did not tell her mother about her stepfather's conduct. When she hesitated to answer, the State asked Bonnie to write her answer. The trial court overruled defense counsel's objection to a written answer. The court commented:

This child is 11 and has been on the stand since a little after 11 o'clock. It's now 11:28. This witness is clearly having a difficult time responding and answering to questions. . . .

RP at 228. Bonnie wrote that she did not tell her mother because she thought her mother would not believe her.

When the State asked Bonnie why she did not inform her mother about Tammy's crying while being molested by Juan Luna Huevo, Bonnie replied that she was scared. When asked by the State why she was scared, Bonnie did not respond. Bonnie wrote her response over the defense's objection. The State showed Bonnie's response to the jury. Our record does not include the response. Defense counsel chose not to cross-examine Bonnie.

During trial, the forensic child interviewer, Mauri Murstig, explained the concept of episodic memory versus script memory:

[A]sking a child who has experienced that [sexual abuse] for a long period of time, you know, they're not going to be able to give you an exact number that happened over months or years. And so, you know, what we try to do is just one time, more than one time and then try to get them to provide as many, you know, if there were specific times they could

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remember, specific episodes, we try to focus on that. But, you know, it's going to be impossible to have them describe every time something happened, if it happened, you know, over a long period of time.

RP at 132.

Dr. Shannon Phipps, D.O. testified about the physical examination she conducted on Tammy. The State's attorney questioned Phipps: "because you don't find any kind of physical manifestations in her body, does that mean that no sexual abuse occurred?" RP at 154. Dr. Phipps answered:

No, it doesn't. The body is incredible for healing. And I would relate this back to the example that I gave between an acute and a non-acute visit.

If you're walking down the street and you twist your knee. You might have some swelling initially. If you go immediately for something, that might be perceived. Whereas if you wait three or four days, the swelling may have resolved, there may not be a physical finding yet the injury still occurred, so the body can heal.

RP at 154. Phipps averred that she would not expect to see tears or lesions in the vaginal area if a penis rubbed against the area, rather than entered the vagina. Finally, Dr. Phipps declared that "[i]t's more typical not to find findings than to find findings" in sexual assault exams. RP at 161.

Kennewick Police Department Detective Jose Santoy testified during trial. He explained the reason for not testing or preserving for evidence the zebra blanket.

[T]he blanket, like I said, it was in a general area of the bedroom and any of the children could have touched it, to include the defendant and the victims.

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RP at 205. After resting its case at trial, the State dismissed count 4, a child molestation charge involving Bonnie.

Juan Luna Huevo testified on his behalf. He denied any inappropriate sexual contact with either Tammy or Bonnie. During cross-examination, the State asked:

Isn't it true during that interview you told Detective Santoy that [Tammy] would never lie about anything this serious; isn't that true?

RP at 401. On defense counsel's objection and the trial court's overruling the objection, the State proceeded to ask the question two more times, once about Tammy and once about Bonnie. The State also asked Luna Huevo about his comment about Tammy's hygiene issues the morning of his arrest:

This is the first we're hearing about all this; Isn't that true?

RP at 399.

Trial defense counsel suffered the death of his niece during the trial. In response to the niece's death, counsel stated that "a brief continuance would be sufficient" in order to ensure his effectiveness at trial. RP at 105. The trial court granted a one-day recess for counsel to rest before continuing with trial. On return from the one-day recess, trial counsel made no further mention of his need for additional continuances. Trial counsel had tragically lost three siblings to cancer in the thirteen months preceding his niece's death.

During summation, the State's attorney commented:

[Juan Luna Huevo] took the stand and he told you, . . . [t]hat there is also this thing that happened the morning of 2-8 where Tammy witnessed him pulling Bonnie's hair. . . . And something about Tammy not wiping herself.

You know what's interest? Think about this.

No question was ever asked of Kelly about any of that. Huh. Don't you think that's weird? No question was asked of Bonnie about any of that. None of that was mentioned in opening statement. Why is that? Because it only came in through him. Nobody else was asked about any of that. Think about that. Why? Because it's not true.

RP at 463-64. The prosecuting attorney added:

He [Juan Luna Huevo] waited an entire year to now tell his side. Didn't tell it that day. Maybe he's had some time to think about it.

RP at 464.

The jury found Juan Luna Huevo guilty on all three counts and further found the presence of the aggravating circumstances.

LAW AND ANALYSIS

On appeal, Juan Luna Huevo asserts the State presented insufficient evidence to convict him of any of the three crimes. He also assigns error to the trial court's permission to Tammy and Bonnie to write answers to some of the State's questions and to the trial court's exclusion of testimony about his sexual morality and decency.

Right to Confrontation

Juan Luna Huevo asserts that the trial court denied him his right to confront Tammy and Bonnie as witnesses when it permitted each to testify via writing. He maintains that written answers limited his scope of cross-examination. He adds that the

trial court should have found the witnesses unavailable before allowing them to write their responses.

The State responds that the trial court did not breach Juan Luna Huevo's confrontation rights because Luna Huevo still had the opportunity to cross-examine each witness regarding her written answers. According to the State, the trial court placed no limits on the cross-examination. We agree with the State.

The United States Constitution states that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. CONST. amend. VI. The Washington State Constitution provides the accused the right "to meet the witnesses against him face to face." CONST. art. I, § 22. The Washington State Supreme Court applies the state constitution clause consistent with the reading of the federal confrontation clause. *State v. Lui*, 179 Wn.2d 457, 469, 315 P.3d 493 (2014).

The confrontation clause primarily secured the right of cross-examination. *State v. Foster*, 135 Wn.2d 441, 456, 957 P.2d 712 (1998). An impermissible limitation on the scope of cross-examination violates a defendant's right to confrontation. *State v. Garcia*, 179 Wn.2d 828, 844, 318 P.3d 266 (2014). The confrontation clause is generally satisfied, however, "if defense counsel receives wide latitude at trial to question witnesses." *State v. Dye*, 170 Wn. App. 340, 346, 283 P.3d 1130 (2012) *aff'd* 178 Wn.2d 541, 309 1109 (2013) (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 53, 107 S. Ct

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989, 94 L. Ed. 2d 40 (1987)). The trial court placed no limit on Juan Luna Huevo's counsel cross-examining Tammy and Bonnie as to their written answers to questions.

Juan Luna Huevo cites no authority to support his contention that written answers to the State's questions violate the confrontation clause. We note that the State may introduce as an exhibit various writings, without breaching the confrontation clause, even though the content of the writing inculcates the accused. *Miller v. Stovall*, 742 F.3d 642, 651 (6th Cir. 2014); *State v. Price*, 154 Wn. App. 480, 491, 228 P.3d 1276 (2009). In *State v. Thomas H.*, 101 Conn. App. 363, 369-70, 922 A.2d 214 (2007), the reviewing court found no confrontation clause violation when the trial court permitted a child victim to provide a written answer to a question asked by the state on direct examination in a sexual assault trial, which question asked what happened after defendant ordered her to get in bed with him. The writing of the response occurred in the presence of the defendant during trial, and defendant was given the opportunity to cross-examine the victim regarding the response.

ER 611(a) provides:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

This rule impliedly grants the trial court authority to permit a witness to answer a question in writing to prevent embarrassment and to effectuate ascertainment of the truth.

A girl could understandably be embarrassed when asked to describe a man's penis. The court also possessed the authority to permit some written answers from Bonnie after she had sat in the witness stand for twenty-five minutes and encountered difficulty answering.

Evidence of Sexual Morality and Decency

Juan Luna Huevo next asserts that the trial court erred by excluding evidence of his sexual morality and decency. He argues that the trial court applied the wrong analysis when requiring a foundation to establish a community perception of morality.

We review the trial court's ruling on admissibility of evidence for abuse of discretion. *State v. Woods*, 117 Wn. App. 278, 280, 70 P.3d 976 (2003). Generally, evidence of a person's character is inadmissible, but a criminal defendant may present evidence of a "pertinent trait of character." ER 404(a)(1). In cases involving sexual offenses, sexual morality is a pertinent character trait. *State v. Woods*, 117 Wn. App. at 280; *State v. Harper*, 35 Wn. App. 855, 859-60, 670 P.2d 296 (1983).

ER 405 controls the methods of proving a person's character. The rule declares:

(a) Reputation. In all cases in which evidence of character or a trait of character of a person is admissible, proof *may be* made by testimony as to reputation. On cross examination, inquiry is allowable into relevant specific instances of conduct.

(Emphasis added.) Although the rule does not state that inquiry into a person's character *shall be* by testimony to reputation, Washington follows the traditional common law rule

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that proof of character is limited to testimony concerning reputation. Rule 405. Methods of Proving Character, 5D KARL B. TEGLAND, WASHINGTON PRACTICE: COURTROOM HANDBOOK ON WASHINGTON EVIDENCE ER 405 author's cmt. 405:1.(2020 ed.). One cannot express a personal opinion as to a witness's veracity. *State v. Woodard*, 26 Wn. App. 735, 738, 617 P.2d 1039 (1980).

A party seeking to admit evidence bears the burden of establishing a foundation for that evidence. *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993). One Washington Court of Appeals case stands for the proposition that, in order to offer reputation testimony, a witness must lay a foundation establishing that he or she bases the subject's reputation on perceptions in the community. *State v. Thach*, 126 Wn. App. 297, 315, 106 P.3d 782 (2005), *overruled on other grounds by State v. Case*, 13 Wn. App. 2d 657, 466 P.3d 799 (2020). A Washington Supreme Court decision reads that, to establish a valid community, the party seeking to admit the reputation evidence must show that the community is both neutral and general. *State v. Land*, 121 Wn.2d 494, 500 (1993). ER 405 does not limit the reputation to the person's residential neighborhood. The witness can testify to a reputation among business associates or coworkers. *State v. Land*, 121 Wn.2d 494, 500-01 (1993); *State v. Callahan*, 87 Wn. App. 925, 936, 943 P.2d 676 (1997). Nevertheless, as already stated, to be admissible, the reputation must exist within a "neutral and generalized community." *State v. Gregory*, 158 Wn.2d 759, 805, 147 P.3d 1201 (2006), *overruled on other grounds by, State v. W.R., Jr*, 181 Wn.2d 757,

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336 P.3d 1134 (2014); *State v. Callahan*, 87 Wn. App. at 934. Reputation among a limited group of persons may not accurately reflect the witness's general character for truthfulness. Rule 405. Methods of Proving Character, 5D TEGLAND, *supra*, ER 405 author's cmt. 405:2.

A person's reputation among members of a family is inadmissible. *State v. Thach*, 126 Wn. App. 297, 315. A "family is not 'neutral enough [and] generalized enough to be classed as a community.'" *State v. Thach*, 126 Wn. App. at 315 (alteration in original); *State v. Lord*, 117 Wn.2d 829, 874, 822 P.2d 177 (1991). In *State v. Gregory*, 158 Wn.2d 759, 805, 147 P.3d 1201 (2006), the Supreme Court affirmed the trial court's exclusion of testimony of the victim's family members as to the victim's reputation of honesty among family. The Washington Supreme Court noted:

First, the inherent nature of familial relationships often precludes family members from providing an unbiased and reliable evaluation of one another. In addition, the "community" with which Larson had discussed R.S.'s reputation included only two people, Larson and R.S.'s sister. Any community comprised of two individuals is too small to constitute a community for purposes of ER 608.

State v. Gregory, 158 Wn.2d at 805.

Juan Luna Huevo argues that the trial court erred because the court focused on his reputation rather than on whether the trait of sexual morality was pertinent to the underlying crimes. He contends that laying a foundation for community perception is not required to introduce evidence of sexual decency. He relies on *State v. Woods*, 117 Wn.

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App. 278 (2003) and *State v. Griswold*, 98 Wn. App. 817, 991 P.2d 657 (2000),
abrogated on other grounds by State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003).

Neither case stands for this proposition. In both decisions, this court affirmed the exclusion of testimony of the accused's decency because of the failure to properly proffer reputation testimony.

Juan Luna Huevo wished for his ex-wife, his daughter, and his two sisters-in-law to testify to his reputation for sexual morality. With offers of proof, Luna Huevo only qualified a sister-in-law with any knowledge of any reputation for sexual decency. This relative, Nancy Morales Enriquez, based Luna Huevo's reputation solely on family or holiday gatherings. Thus, the reputation was not formed within a generalized and neutral community.

Sufficiency of Evidence

Juan Luna Huevo asserts that the State presented insufficient evidence to convict him of any of the three charges. In so arguing, he emphasizes that Tammy and Bonnie uttered conflicting statements about the alleged crimes and that Dr. Shannon Phipps found no physical evidence during Tammy's exam to support the allegations of sexual misconduct. When reviewing a challenge to the sufficiency of evidence, we must determine, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The jury convicted Juan Luna Huevo of one count of rape of a child in the first degree, for conduct against Tammy, and two counts of child molestation in the first degree, one count each against Tammy and Bonnie. For the count of rape and child molestation of Tammy, the jury found the aggravating circumstance of an ongoing pattern of sexual abuse. For all three counts, the jury found the aggravating circumstance of breach of a position of trust.

RCW 9A.44.073(1) governs rape of a child in the first degree. The statute declares:

A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

RCW 9A.44.010(1) defines "sexual intercourse" for purposes of sex offenses:

'Sexual Intercourse' (a) has its ordinary meaning and occurs upon any penetration, however slight. . . .

Tammy, the victim of the rape charge, testified that Juan Luna Huevo placed his penis next to her vagina in his bedroom and in a vehicle. More importantly, she averred that Luna Huevo put his penis in her mouth. She was eleven years old when the act occurred. Tammy has never been married to Luna Huevo. Luna Huevo was more than twenty-four months older than Tammy. Thus, the State presented evidence to fulfill all elements of the crime of rape of a child.

RCW 9A.44.083(1) governs child molestation in the first degree. The statute reads:

A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.010(2) defines "Sexual contact" as:

'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

Tammy, the victim of one of the counts child molestation, declared, during her testimony, that Juan Luna Huezo made sexual contact with her on several occasions. As already indicated, Tammy was under twelve years old and more than thirty-six months younger than Luna Huezo at the time of the sexual misconduct. Thus, the State presented sufficient evidence to convict on count 2.

Bonnie, the alleged victim of count 3, testified that, on one occasion, Juan Luna Huezo touched her private area and moved his fingers around. Bonnie was then ten years old. She has never married Luna Huezo. Luna Huezo was at least thirty-six months older than Bonnie. Thus, the State presented sufficient evidence to convict on count 3.

RCW 9.94A.535 lists the relevant aggravating circumstances of an ongoing pattern of sexual abuse and a position of trust:

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range.

....
(g) 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.

....
(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

RCW 9.94A.535(3)(g) and (n).

The State presented sufficient evidence to support the aggravating circumstances findings. Juan Luna Huevo sexually abused Tammy on multiple occasions over the course of years. Luna Huevo was the stepfather to Tammy and Bonnie when he engaged in the criminal behavior. He thus used his position of trust to facilitate the crimes.

Juan Luna Huevo highlights that Tammy told his attorney that her mother was present in the home at the Hawaiian Village apartment thirty times when he sexually touched her. Tammy also told defense counsel that Luna Huevo touched her fifty-eight times at the apartment, twenty times at Niashia Morales Enriquez's residence, and thirty times at the Steptoe house. Tammy, during trial testimony, significantly limited the number of times of molestation. Luna Huevo further highlights that Tammy and Bonnie, at one point in their respective testimony, each testified that nothing happened or that they could not remember what happened.

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Despite occasional and understandable difficulty in testifying, both Tammy and Bonnie identified and described occasions when Juan Luna Huevo sexually touched them. We have already repeated some of that testimony. Inconsistent testimony of a witness does not equate to insufficient evidence. *State v. West*, 2017-Ohio-4055, 91 N.E.3d 365, 376.

Although the State need not have presented evidence beyond the children's testimony to convict Juan Luna Huevo, circumstantial evidence bolstered Tammy's accusations. According to Tammy, Luna Huevo used a condom he obtained from a backpack, which police later found in that backpack. She also stated that he used oil on his penis, which he admitted to using during sexual activities. Tammy described an occasion when Luna Huevo duct-taped her hands, and police found duct tape and zip ties in his backpack. Finally, Tammy testified that she confronted Luna Huevo about abusing Bonnie, to which he admitted.

Juan Luna Huevo next challenges the sufficiency of evidence due to Dr. Shannon Phipps' examination of Tammy uncovering no physical evidence in support of sexual contact. Nevertheless, Dr. Phipps explained that the lack of medical evidence does not rule out rape or molestation. Luna Huevo cites this court no case law supporting the proposition that the State must present medical testimony of physical injury in order to convict an accused of rape. The law is to the contrary. *State v. Boyd*, 84 N.M. 290, 502 P.2d 315, 317 (Ct. App. 1972).

STATEMENT OF ADDITIONAL GROUNDS

Juan Luna Huevo raises numerous issues in a statement of additional grounds (SAG). We discuss and reject each ground.

Opinion Testimony Regarding Victim Credibility

Juan Luna Huevo asserts that the State elicited opinion testimony from him that created an inference that he vouched for the credibility of Tammy and Bonnie. He argues that the trial court erred by allowing the State to engage in prosecutorial misconduct by violating the motion in limine.

Prosecutorial misconduct “requires a new trial only if the misconduct was prejudicial.” *State v. Stith*, 71 Wn. App. 14, 19, 856 P.2d 415 (1993). Such misconduct is prejudicial when “there is a ‘substantial likelihood’ that the misconduct ‘affected the jury’s verdict.’” *State v. Stith*, 71 Wn. App. at 1-9. Cross-examination “designed to compel a witness to express an opinion as to whether other witnesses were lying constitutes misconduct.” *State v. Stith*, 71 Wn. App. at 18.

During the cross-examination, the State asked Juan Luna Huevo:

Isn't it true during that interview you told Detective Santoy that [Tammy] would never lie about anything this serious; isn't that true?

RP at 401. The trial court overruled an objection to the question and later permitted the State's attorney to ask whether he made a similar statement about Bonnie.

Juan Luna Huevo presents the court no authority that the State may not question the accused about statements he uttered to another regarding the truthfulness of the victim. Regardless, we find no prejudice in the questions and answer because of the overwhelming evidence, including circumstantial evidence, of the crimes and Luna Huevo's concession to Tammy of the abuse of Bonnie.

Right to Remain Silent

Juan Luna Huevo argues that the State extensively commented on his right to remain silent and thus committed misconduct by using his silence as substantive evidence of guilt. Luna Huevo did not object to any purported misconduct during trial.

A defendant waives a claim of prosecutorial misconduct when failing to object to the conduct during trial, unless he or she demonstrates that the "misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice." *In re the Personal Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). The State may not use a defendant's silence as substantive evidence of guilt. *State v. Burke*, 163 Wn.2d 204, 206, 181 P.3d 1 (2008).

When cross-examining Juan Luna Huevo about his comments about the hygiene of Tammy, the prosecutor asked or commented: "This is the first we're hearing about all this; Isn't that true?" RP at 399. During summation, the prosecuting attorney remarked:

He waited an entire year to now tell his side. Didn't tell it that day.
Maybe he's had some time to think about it.

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RP at 464.

We agree that the questioning and closing remarks at least indirectly criticized Juan Luna Huevo for remaining silent before trial. Nevertheless, we do not find any misconduct flagrant or prejudicial because of the overwhelming evidence of guilt.

Shift of Burden of Proof

Juan Luna Huevo contends that the State improperly shifted the burden of proof to him. He references the prosecuting attorney remarks during summation:

[Luna Huevo] took the stand and he told you, . . . [t]hat there is also this thing that happened the morning of 2-8 where [Tammy] witnessed him pulling [Bonnie's] hair. . . . And something about Tammy not wiping herself.

You know what's interest? Think about this.

No question was ever asked of Kelly about any of that. Huh. Don't you think that's weird? No question was asked of [Bonnie] about any of that. None of that was mentioned in opening statement. Why is that? Because it only came in through him. Nobody else was asked about any of that. Think about that. Why? Because it's not true.

RP at 463-64.

During closing argument, the prosecution may not suggest that the burden of proving innocence rests with the defendant. *State v. Thorgerson*, 172 Wn.2d 438, 453, 258 P.3d 43 (2011). Nevertheless, a prosecutor holds wide latitude to argue reasonable inferences from the evidence. *State v. Thorgerson*, 172 Wn.2d at 453. The prosecutor may attack the credibility of the accused. *State v. Berube*, 171 Wn. App. 103, 117, 286

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P.3d 402 (2012). By attacking Juan Luna Huevo's credibility, the State did not shift the burden of proof.

Ineffective Assistance of Counsel

Juan Luna Huevo argues that he received ineffective assistance of counsel due to defense counsel's failure to (1) withdraw, (2) cross-examine and impeach witnesses, and (3) move for dismissal for spoliation of evidence. To prevail on a claim of ineffective assistance of counsel, the accused must show that defense counsel's representation was deficient and the deficient representation prejudiced him. *State v. Estes*, 193 Wn. App. 479, 488, 372 P.3d 163 (2016), *aff'd* 188 Wn.2d 450, 395 P.3d 1045 (2017). Prejudice exists if there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have differed. *State v. Estes*, 193 Wn. App. at 488.

Juan Luna Huevo argues that defense counsel should have withdrawn as counsel after suffering the tragic death of his niece during the trial and because of other family deaths preceding trial. In response to the niece's death, the trial court granted a one-day recess in order to give counsel a chance to rest before proceeding further with trial. Counsel stated that a brief continuance would be sufficient. Counsel tragically lost three siblings to cancer in the thirteen months prior to his niece's death. Nevertheless, the record does not evidence that any of these tragedies impacted defense counsel's ability to represent Luna Huevo during trial.

RPC 1.16 provides:

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall, notwithstanding RCW 2.44.040, withdraw from the representation of a client if:

....
(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.

No evidence supports the violation of this rule of ethical conduct.

Juan Luna Huevo argues that his trial counsel's failure to cross-examine Bonnie and to impeach Tammy with her prior inconsistent statement prejudiced him. Generally, courts entrust cross-examination techniques to the professional discretion of counsel. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 720, 101 P.3d 1 (2004). In determining a claim of ineffective cross-examination of a witness, a court need not determine why trial counsel did not cross examine if that approach falls within the range of reasonable representation. *In re Personal Restraint of Davis*, 152 Wn.2d at 720. Luna Huevo's counsel may have deemed that the testimony of the victims by itself raised questions of their credibility, that cross-examining the victims more would have obtained no additional helpful information, and that a cross-examination of young girls might dismay the jury.

Finally, Juan Luna Huevo maintains that his trial counsel should have moved for dismissal in response the State's failure to preserve the zebra blanket. The zebra blanket was at most potentially useful, not exculpatory, evidence. Luna Huevo allegedly used

this blanket to silence Tammy by stuffing it into her mouth. Detective Santoy decided not to preserve the blanket or test it for DNA because of its access to numerous children.

Due process requires the State to disclose material exculpatory evidence to the defense and to preserve such evidence for use by the defense. *State v. Donahue*, 105 Wn. App. 67, 77, 18 P.3d 608 (2001). Failure to preserve potentially useful evidence does not constitute a denial of due process unless a criminal defendant can show bad faith on the part of the State. *State v. Donahue*, 105 Wn. App. at 78. Juan Luna Huevo does not show bad faith or that the blanket would have advanced his defense.

Cumulative Error

Juan Luna Huevo argues that the combined effect of the aforementioned errors denied him a fair trial under the cumulative error doctrine. The cumulative error doctrine may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). The doctrine does not apply when the errors are few and have little or no effect on the outcome of the trial. *State v. Weber*, 159 Wn.2d 252, 279 (2006). Assuming any errors in Juan Luna Huevo's trial, we deem any errors minimal and harmless.

CONCLUSION

We affirm Juan Luna Huevo's three convictions.

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A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

Fearing, J.

WE CONCUR:

Korsmo, A.C.J.

Korsmo, A.C.J.

Lawrence-Berrey, J.

Lawrence-Berrey, J.

INMATE

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Appellate Court Case Title: State of Washington v. Juan Jose Luna Huezo

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