Supreme Court No. 100484-2

In the
Supreme Court of the State of Washington

STATE OF WASHINGTON,

Respondent,

v.

PIO AUGUSTINO FAGAAUTAU,

Appellant.

PETITION FOR REVIEW

Court of Appeals No. 54074-6-II;
Skamania County Superior Court No. 18-1-00060-30

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I. IDENTITY OF PETITIONER

Pio Augustino Fagaautau ("Mr. Fagaautau") is the Petitioner in this proceeding. Mr. Fagaautau was convicted by a Washington jury of two counts of second-degree rape of a child. Clerk's Papers ("CP") 1-2, 303-04; Verbatim Report of Proceedings ("VRP") 17-19. The trial court sentenced him to a minimum term of 102 months. CP 303-04.

II. DECISION

Mr. Fagaautau seeks this Court's review of the decision of the Court of Appeals, Division II, in Case No. 54074-6-11, dated November 16, 2021, affirming Mr. Fagaautau's convictions. A true and correct copy of the Court of Appeals' decision is appended hereto as Attachment "A".

III. ISSUE PRESENTED FOR REVIEW

Mr. Fagaautau seeks review of the Court of Appeals' decision pursuant to RAP 13.4 based on the following issues:

1. WHETHER THE PROSECUTOR COMMITTED MISCONDUCT BY ASSERTING IMPROPER OPINIONS ON CREDIBILITY AND PLACING THE JURORS IN THE VICTIM'S SHOES;

2. WHETHER MR. FAGAAUTAU WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO PRESENT EXCULPATORY EVIDENCE;

3. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING FOUR WITNESSES TO TESTIFY TO M.A.G.'S PRIOR CONSISTENT STATEMENTS BY EXCEEDING THE CONFINES OF THE FACT OF COMPLAINT RULE;

4. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING EXCESSIVE OTHER BAD ACTS EVIDENCE IN VIOLATION OF ER 403 AND/OR 404;

5. WHETHER THE TRIAL COURT ERRED IN GIVING INSTRUCTION NUMBER 13, DESPITE THE STATE'S ELECTION AS TO WHICH ACT COMPRISED WHICH COUNT;

6. WHETHER THE TRIAL COURT COMMITTED A MANIFEST ABUSE OF DISCRETION IN DENYING MR. FAGAAUTAU'S MOTION TO CONTINUE SENTENCING IN ORDER TO OBTAIN AN EXPERT REPORT REGARDING THE MITIGATING FACTOR OF YOUTH.

IV. STATEMENT OF THE CASE

For purposes of this petition, the circumstances of the proceedings and facts of the case are adequately summarized in the attached Court of Appeals opinion.

V. ARGUMENT

A. THE PROSECUTOR COMMITTED FLAGRANT AND ILL-INTENTIONED MISCONDUCT BY PRESENTING IMPROPER OPINIONS ON WITNESS CREDIBILITY AND INFLAMMATORY ARGUMENT.

This Court should grant discretionary review because the Court of Appeals decision involves a significant question of constitutional law under RAP 13.4 (b)(3). The prosecutor violated Mr. Fagaautau's constitutional right to a fair trial by expressing improper opinions as to witness credibility and presenting inflammatory argument. Alternatively, this Court should grant discretionary review under RAP 13.4 (b)(1) because the Court of Appeals opinion conflicts with a Supreme Court opinion. The Court of Appeals opinion in this case is contrary to *State v. Lindsay*, 180 Wn.2d 423, 437 (2014).

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, § 22 of the Washington State Constitution. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct.

1691, 48 L.Ed.2d 126 (1976); *State v. Finch*, 137 Wn.2d 792, 843 (1999). "A '[f]air trial' certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused." *State v. Monday*, 171 Wn.2d 667, 677 (2011) (quoting *State v. Case*, 49 Wn.2d 66, 71 (1956); *State v. Reed*, 102 Wn.2d 140, 145-47 (1984).) Prosecutorial misconduct deprives an accused person of this fundamental right. *State v. Davenport*, 100 Wn.2d 757, 762 (1984).

To establish that the prosecuting attorney committed misconduct during closing argument, Mr. Fagaautau must prove that the prosecuting attorney's remarks were both improper and prejudicial. *State v. Thorgerso*n, 172 Wn.2d 438, 443 (2011). "Although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record." *State v. Jones*, 144 Wn. App. 284, 293 (2008).

Once the Court finds that a prosecuting attorney's statements were improper, the Court must then determine whether the defendant was prejudiced under one of two standards of review. *State v. Emery*, 174 Wn.2d 741, 760 (2012). "If the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *Id*. However, if the defendant failed to object, "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." *Id*. at 760-61. Prejudice is established where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." *State v. Dhaliwal*, 150 Wn.2d 559, 578 (2003) (quoting *State v. Pirtle*, 127 Wn.2d 628, 672 (1995).)

Here, the prosecutor committed prejudicial misconduct when he spent closing argument bolstering M.A.G.'s testimony and calling Mr. Fagaautau a liar. "It is impermissible for a

prosecutor to express a personal opinion as to the credibility of a witness or the guilt of a defendant." *State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125, 132-33 (2014) (citing *Reed*, 102 Wn.2d at 145; Am. Bar Ass'n, Model Code of Professional Responsibility and Code of Judicial Conduct § DR 7-106(C)(4) (1980)). Such argument constitutes misconduct because "[w]hether a witness has testified truthfully is entirely for the jury to determine." *State v. Ish*, 170 Wn.2d 189, 196 (2010). Expressing personal opinions on credibility also violates the advocate-witness rule, which "prohibits an attorney from appearing as both a witness and an advocate in the same litigation." *Id*. (quoting *United States v. Prantil*, 764 F.2d 548, 552-53 (9th Cir. 1985)).

Applying these principles in *Lindsay*, the Washington Supreme Court held that a prosecutor engaged in prejudicial misconduct by referring to the defendant's testimony as "the most ridiculous thing I've ever heard," and a "crock." *Lindsay*, 180 Wn.2d at 438. The Court reversed the defendant's

convictions, holding "the prosecutor in this case impermissibly expressed his personal opinion about the defendant's credibility to the jury", among other acts of misconduct. *Id*.; *see also State v. Boehning*, 127 Wn. App. 511 (2005).

In this case, the prosecutor expressed his personal opinion that the "victim['s]" testimony was "the best evidence" in the case, that M.A.G. is "either the best child actress we've all ever seen or this happened to her." VRP 241. The prosecutor then expressly told the jury his opinion about M.A.G.'s credibility, stating, "I would argue, her testimony was credible and it was very appropriate for someone who had been through a traumatic event." VRP 242. He then attacked Mr. Fagaautau's credibility and concluded by telling the jury, "[h]er experience is the best evidence you heard in this case, and why would she go through all of this, if it was made up?" VRP 245-247. These statements of personal opinion as to credibility are analogous to those in *Lindsay*.

Further, the prosecutor in this case went beyond the improper comments on credibility, and inflamed the passions of the jury by implicitly asking them to put themselves in the victim's shoes:

> When ***you're*** being raped by your 20-year-old cousin, you may not remember exactly every place his hands touched. ***You*** will remember the most emotional parts, the most traumatic parts.

VRP 243 (emphasis added).

Washington courts have repeatedly held this line of argument to be improper. *See, e.g., State v. Pierce*, 169 Wn. App. 533, 554 (2012) (finding prejudicial misconduct when the prosecutor "invited the jury to imagine the crimes happening to themselves"). This is because it encourages jurors to depart from neutrality and decide the case on the basis of personal interest, rather than on the evidence. *State v. Binh Thach*, 126 Wn. App. 297, 317 (2005) (citing *Adkins v. Alum. Co. of Am.*, 110 Wn.2d 128, 139 (1988).)

The Washington Supreme Court has admonished prosecutors from making statements like the prosecutor did

here. The improper statements must be deemed flagrant and ill-intentioned. Otherwise, the Supreme Court's jurisprudence condemning the precise conduct in which the prosecutor engaged in Mr. Fagaautau's case would be rendered meaningless. The prosecutor had actual or at least constructive knowledge that he was forbidden from making such statements by virtue of the holding in *Lindsay* and other cases cited herein. To nonetheless present similar arguments, and worse, cannot be considered anything other than flagrant and ill-intentioned.

The misconduct here was highly prejudicial because the case turned entirely on the fact finder's assessment of Mr. Fagaautau's credibility versus that of M.A.G. A curative instruction under these circumstances would have been meaningless, and thus would not have resolved the issue. *See In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 707 (2012) ("'[t]he cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of

instructions can erase their combined prejudicial effect.'" (quoting *State v. Walker*, 164 Wn. App. 724, 737 (2011).)

These improper comments were not isolated, but rather repeated multiple times during the prosecution's discussion of the testimony of M.A.G. and Mr. Fagaautau.

The prosecutor's expressions of personal opinion regarding M.A.G. and Mr. Fagaautau's credibility, combined with inflammatory argument seeking to place the jurors in the victim's shoes, were sufficiently pervasive to require reversal, even under the higher standard applied when trial counsel fails to make a contemporaneous objection.

B. MR. FAGAAUTAU WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO PRESENT AVAILABLE EXCULPATORY EVIDENCE.

This Court should grant discretionary review because the Court of Appeals decision involves a significant question of constitutional law under RAP 13.4 (b)(3). Mr. Fagaautau was denied his constitutional right to effective assistance of counsel

because counsel failed to impeach M.A.G. with available evidence.

The Sixth Amendment and article I, section 22 guarantee every criminal defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). Washington uses *Strickland*'s two-part test for evaluating ineffective assistance claims. *State v. Grier*, 171 Wn.2d 17, 32 (2011) (reaffirming Washington's' use of the *Strickland* test for ineffective assistance claims). To prevail, the defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33; *Strickland*, 466 U.S. at 688.

The prejudice prong of the Strickland test is met if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *In re Pers. Restraint of Davis*, 152 Wash. 2d 647, 672-73 (2004). "A reasonable probability is a probability

sufficient to undermine confidence in the outcome.'" *In re Crace*, 174 Wn.2d 835, 840 (2012) (quoting *Strickland*, 466 U.S. at 694). Claims of ineffective assistance of counsel can prevail on the basis of a single prejudicial error, or the cumulative effect of multiple errors. *See State v. Coe*, 101 Wn.2d 772, 789 (1984).

The measure of an attorney's performance is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. Where counsel's trial conduct cannot be characterized as legitimate trial strategy or tactics, it constitutes ineffective assistance of counsel. *State v. Maurice*, 79 Wn. App. 544, 552 (1995). Effective representation entails certain basic duties, such as the overarching duty to advocate the defendant's cause and the more particular duty to assert such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland*, 466 U.S. at 688; *In re Personal Restraint of Yung-Cheng Tsai*, 183 Wn.2d 91, 100 (2015) .

There was no physical or other evidence to corroborate her testimony, aside from M.A.G.'s statements and Sebastina Shantz's testimony that she remembered seeing Mr. Fagaautau sleeping on a couch next to M.A.G. Thus, the State's case depended heavily, if not entirely, upon whether the jury found M.A.G.'s testimony to be credible beyond a reasonable doubt. Photographic and testimonial evidence, as well as inconsistencies that could have been explored on cross-examination, would have cast serious doubt on MAG's credibility.

M.A.G.'s assertion that she avoided Mr. Fagaautau after the alleged rape on March 28, 2015, was provably false. CP 239-271. To the contrary, had defense counsel called Ms. Fagaautau, Ms. Lange, and Ms. Monroe as witnesses, the jury would have heard (and seen in photographs) that M.A.G. actively and eagerly sought out Mr. Fagaautau's company in the years following March 28, 2015. CP 239-271. The jury would have also heard M.A.G.'s parents' testimony that

M.A.G. became unhappy for the first time following the March 28, 2015 incident was untrue, and that in fact M.A.G. had emotional problems since childhood and engaged in self-destructive activities in years prior. CP 256-258.

Other testimony would have established a motive for M.A.G. to lie in that she sought to retaliate against Mr. Fagaautau for threatening to report her relationship with a 19-year-old to M.A.G.'s parents. CP 239- 255. Testimony supported by photographs would have further called into question whether M.A.G. was even present at Ms. Lange's residence on or around March 28, 2015, and would also have called into question whether Mr. Fagaautau ever spent the night at the residence in that timeframe. CP 256-271.

Defense counsel also failed to use M.A.G.'s prior inconsistent statements, and statements that were inconsistent in her testimony, during cross-examination to challenge the veracity of her allegations. Had he done so, the jurors would have heard that in one account, M.A.G. was forced to sleep on

the couch because all of the beds were taken, while in another, there was a vacant bedroom because her brothers and cousin were sleeping in a tent outside. VRP 114; CP 178-182. They also would have noticed that M.A.G. reported both that she only told one friend, and no one else, and that she also told her boyfriend at the time. VRP 128, 134. They would have heard she was substantially inconsistent on the fundamental issue of how and from what side Mr. Fagaautau penetrated her vagina with his penis. VRP 121; CP 178-182.

There was no conceivable or tactical reason for failing to impeach M.A.G. on this point, given the State's entire case rested on her testimony. The failure to introduce this evidence violated the basic duties to advocate the defendant's cause and assert such skill and knowledge as to render the trial a reliable adversarial testing process. *Strickland*, 466 U.S. at 688; *Yung-Cheng Tsai*, 183 Wn.2d at 100. Accordingly, Mr. Fagaautau was denied his state and federal constitutional rights to effective assistance of counsel and is entitled to a new trial.

C. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED FOUR WITNESSES TO TESTIFY TO M.A.G.'S PRIOR CONSISTENT STATEMENTS.

This Court should grant discretionary review because the Court of Appeals decision involves a significant question of constitutional law under RAP 13.4 (b)(3). Under the Washington and federal constitutions, every defendant has a constitutional right to a fair trial. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). Part of that fairness requires the State to prove all criminal charges with reliable evidence. *State v. Ortiz Martinez*, 196 Wn.2d 605, 607 (2020) (citing U.S. Const. amend. VI; Wash. Const. art. I, §§ 9, 22.). Here, the trial court allowed the State to present testimony from Ms. Shantz, Mr. Gutridge, and H.C. regarding M.A.G.'s prior statements under the "fact of complaint" rule. However, the testimony provided far exceeded the scope of the rule, and allowing this testimony was an abuse of discretion and violated Mr. Fagaautau's right to a fair trial based on reliable evidence.

"Prior consistent statements are not admissible to merely reinforce or bolster the testimony." *State v. Purdom*, 106 Wash. 2d 745, 750 (1986) (citing *Thomas v. French*, 99 Wn.2d 95, 103 (1983).) This rule exists because "[r]epetition generally is not a valid test of veracity." *Purdom*, 106 Wn. 2d at 750 (citing *State v. Harper*, 35 Wn. App. 855 (1983).)

The hearsay exception for the fact of the complaint doctrine "allows the prosecution in sex offense cases to present evidence that the victim complained to someone after the assault. But '[t]he rule admits only such evidence as will establish that the complaint was timely made.'" *State v. Chenoweth*, 188 Wn. App. 521, 532 (2015) (alteration in original) (quoting *State v. Ferguson*, 100 Wn.2d 131, 135-36 (1983); *see State v. Murley*, 35 Wn.2d 233, 237 (1950) ("[W]e permit the state to show in its case-in-chief when the woman first made a complaint consistent with the charge.") (Emphasis omitted.) The rule excludes "evidence of the details of the

complaint, including the identity of the offender and the nature of the act." *Ferguson*, 100 Wn.2d at 136.

After describing the rape, M.A.G. testified she spoke to H.C. about it, that she was upset about it, and that she did not talk to anyone else about it for a long time, but that she ultimately told more people about it. VRP 127-128, 134, 149-150. H.C. then corroborated this testimony by testifying that M.A.G. confided in her about an incident that happened in Carson, and that she told M.A.G. to tell her family. VRP 178-181. M.A.G.'s father then testified that M.A.G. was apologetic that she did not tell her parents about the incident sooner. VRP 186-187. Finally, her mother testified that M.A.G. "told [her] everything that happened". VRP 160. Each witness testified about M.A.G.'s distraught state as she relayed the details of the incident.

This level of detail of the testimony of prior reports of the incident, repeated by four witnesses, exceeded what is permitted under the fact of complaint doctrine. Because

M.A.G.'s credibility was the key issue in the case and this prior consistent statement evidence unfairly bolstered her credibility, the trial court abused its discretion in allowing this testimony under the narrow fact of complaint doctrine. This error was highly prejudicial because, as set forth above, M.A.G.'s credibility was the key issue in this case.

D. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING EXCESSIVE "OTHER BAD ACTS" EVIDENCE.

This Court should grant discretionary review because the Court of Appeals decision involves a significant question of constitutional law under RAP 13.4 (b)(3). Mr. Fagaautau was denied his constitutional right a fair trial based on reliable evidence because the trial court allowed the State to introduce improper evidence against him.

The trial court abused its discretion in allowing the State to present other bad acts evidence alleged to have taken place both prior to and after the charged conduct. Under ER 404 (b), evidence of other crimes, wrongs or acts, is inadmissible to

show the defendant's "character." *See State v. Halstein*, 122 Wn.2d 109, 126 (1993). ER 404 (b) provides that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion[.]"

Evidence of other crimes, wrongs or acts may be admissible for "other purposes," including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404 (b); *see State v. Saltarelli*, 98 Wn.2d 358, 361 (1982). For evidence to be admissible for any of those limited purposes, however, it must be both relevant and necessary to prove an essential part of the State's case. *State v. Kelly*, 102 Wn.2d 188, 198 (1984); *State v. White*, 43 Wn. App. 580, 587-88 (1986). Even if evidence is relevant and necessary for such purposes, it must still be excluded if its probative value is outweighed by the potential it has to cause unfair prejudice. ER 401, 403; *see Kelly*, 102

Wn.2d at 198; *State v. Boot*, 89 Wn. App. 780, 788, review denied, 135 Wn.2d 1015 (1998).

In general, the admissibility of evidence under ER 404(b) is reviewed for abuse of discretion. *See State v. DeVincentis*, 150 Wn.2d 11, 17 (2003). But the trial court should begin its analysis with the presumption that the evidence is inadmissible. *See id.*

Before admitting evidence of other crimes, wrongs or acts, the trial court must 1) identify the purpose for which the evidence is offered, 2) determine if the evidence is relevant to an essential element of the crime, 4) balance the probative value of the evidence against the prejudicial effect it will have and 4) determine that the alleged other crime or bad act was proven by a preponderance of the evidence. *See State v. Lough*, 125 Wn.2d 847, 853 (1995). All doubts must be resolved in favor of excluding the evidence. *State v. Thang*, 145 Wn.2d 630, 643 (2002); *State v. Trickler*, 106 Wn. App. 727, 733 (2001). Further, even if ER 404 (b) evidence is relevant for one of the

purposes allowed in the rule, such as identity, the evidence must still be excluded unless it is "necessary to prove an essential ingredient of the crime." *White*, 43 Wn. App. at 587-88.

In this case, the prior acts testimony greatly exceeded the quantum of evidence necessary to provide proof of lustful disposition or motive. M.A.G. testified to a series of uncharged acts when Mr. Fagaautau was living in her home. VRP 106-107, 140-141. She also testified to another incident occurring after the charged conduct in which she resisted his sexual advances. VRP 129-132. Although some of this evidence may have been relevant for a permissible purpose, the depth in which M.A.G. described these other incidents, and the number of incidents she described, caused the unfair prejudicial impact of this evidence to substantially outweigh its probative value. Accordingly, this evidence violated ER 403 and 404 and the trial court abused its discretion in allowing the State to introduce this prior and subsequent criminal misconduct

evidence over defense counsel's objection. This misstep deprived Mr. Fagaautau of his constitutional right to a fair trial and a trial based upon reliable, relevant evidence.

E. THE TRIAL COURT ERRED IN GIVING A *PETRICH* INSTRUCTION.

This Court should grant discretionary review because the Court of Appeals decision involves a significant question of constitutional law under RAP 13.4 (b)(3). Mr. Fagaautau was denied his constitutional right to a unanimous jury verdict when the trial court issued a *Petrich* instruction. *State v. Petrich*, 101 Wn.2d 566, 570 (1984) Further, this Court should grant discretionary review under RAP 13.4 (b)(1), because the Court of Appeals decision was contrary to its guidance regarding *Petrich* instructions in *State v. Carson*, 184 Wn.2d 207, 217 & n.5 (2015).

The to-convict instructions for counts one and two (instruction numbers eight and nine) failed to specify the act or acts upon which the counts were based. Instead, they instructed the jury to convict on count one if it found, "That on or about

March 28, 2015, on an occasion separate and distinct from Count 2, the defendant had sexual intercourse with [M.A.G.]" and to convict on count two if it found, "That on or about March 28, 2015, on an occasion separate and distinct from Count 1, the defendant had sexual intercourse with [M.A.G.]". The State then argued in its closing that count one related to the digital penetration and count two related to the penile penetration. The trial court elected to give a *Petrich* instruction as instruction number thirteen, which is intended to ensure a unanimous verdict in single charge cases with multiple alleged acts. Defense counsel objected, but the court overruled the objection and gave the *Petrich* instruction.

The jurors were confused by the instructions and argument, as shown by their written question about which act corresponded to which charge. Given this confusion, there is no way to ascertain from the record that the jury unanimously agreed as to the occurrence of a single act as to each count.

A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Stephens*, 93 Wn.2d 186, 190 (1980). "When the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act." *State v. Kitchen*, 110 Wn.2d 403, 409 (1988); *see also State v. Petrich*, 101 Wn.2d 566, 570 (1984). Failure to do so violates a defendant's state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial. *State v. Kitchen*, 110 Wn. 2d 403, 409 (1998); *see also State v. Carson*, 184 Wn.2d 207, 217 & n.5 (2015) (quoting 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.25, at 110-12 (3d ed. 2008)).

In *Carson*, the defendant argued he received ineffective assistance of counsel as a result of his attorney's objection to giving a *Petrich* instruction. The Court found defense

counsel's decision to refuse a *Petrich* instruction was reasonable because where the State "clearly and explicitly" tells the jury during closing argument which acts the State is relying on for conviction, no *Petrich* instruction is required. *Carson*, 184 Wn.2d at 228- 29. The *Carson* Court further emphasized that giving a *Petrich* instruction in a case with multiple charges is confusing and inappropriate. *See Carson*, 184 Wn.2d at 219-20.

In Mr. Fagaautau's case, defense counsel appropriately objected to the *Petrich* instruction. Given that there were multiple counts of the same offense and the State elected which acts corresponded with which counts, it was erroneous to provide the jury with instruction number thirteen. As recognized in *Carson*, giving the *Petrich* instruction can cause confusion, and in fact did cause confusion as evidenced by the jury's question to the court during deliberations. This confusion, coupled with the statement in the Petrich instruction that "[y]ou need not unanimously agree that the defendant

committed all the acts of Rape of a Child in the Second Degree," there is no way to ascertain from the record that the jury unanimously agreed as to the occurrence of a single act for each count. Accordingly, Mr. Fagaautau was denied his constitutional right to a unanimous jury verdict, and he is entitled to a new trial.

F. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. FAGAAUTAU'S MOTION TO CONTINUE SENTENCING.

This Court should grant discretionary review under RAP 13.4 (b)(1) and (b)(2) because the trial court's denial of a continuance was in contrast with published decisions approving of continuances in similar cases.

The trial court committed a manifest abuse of discretion in denying Mr. Fagaautau's motion to continue sentencing to obtain an expert evaluation and further evidence regarding the mitigating factor of youth. VRP 337-341; *see State v. O'Dell*, 183 Wn.2d 680, 695 (2015) ("we now know that age may well

mitigate a defendant's culpability, even if that defendant is over the age of 18").

Washington courts review a denial of a motion to continue for manifest abuse of discretion. *In re Dependency of V.R.R.*, 134 Wn. App. 573, 580-81 (2006). In considering a continuance, the trial court considers various factors, "including diligence, due process, the need for an orderly procedure, the possible effect on the trial, and whether prior continuances were granted." *V.R.R.,* 134 Wn. App. at 581.

Awaiting expert analysis of evidence is a valid ground for continuing a hearing. *See, e.g., State v. Osborne*, 18 Wn. App. 318, 321 (1977) (pending expert analysis of evidence may be considered in whether to continue a trial date).

Substitute counsel acted diligently by promptly retaining Dr. Stanulis upon himself being retained. VRP 291-292, 326-327. Dr. Stanulis diligently attempted to evaluate Mr. Fagaautau but was unable to do so due to jail policies. CP 299. Based on the work he was able to do, Dr. Stanulis expressed

justifiable concern over the sparse record available to the court at sentencing, including a lack of a psycho-sexual evaluation, lack of law enforcement records, and lack of a psychological assessment of Mr. Fagaautau's knowledge and cognitive abilities. CP 299. Dr. Stanulis concluded that "a reasonably accurate sentencing report cannot be done without obtaining these materials." CP 299.

The trial court's denial of Mr. Fagaautau's motion to continue sentencing prevented Dr. Stanulis from completing his evaluation and report and from appearing at sentencing. CP 288-290. The record contained evidence that Mr. Fagaautau had an unusually traumatic childhood, involving severe abuse from his father, being kicked out of his home, and attempting suicide. CP 290-291.

Courts routinely grant continuances to allow for expert analysis and to accommodate an expert's testimony where, as here, the witness is unavailable for a valid reason, would become available in a reasonable amount of time, and would

cause no prejudice to the other party. *See, e.g., Osborne*, 18 Wn. App. at 321. There was no compelling reason to deviate from this practice in this case. The result was a sentencing hearing in which the court lacked basic information about Mr. Fagaautau's mental state and the role Mr. Fagaautau's youth and background may have played in the offense.

Without the benefit of this background evidence, the court filled in the blanks with unsupported assumptions about Mr. Fagaautau's level of maturity before imposing a high-end sentence of 102 months. CP 305; 9.26.2019 VRP at 22-27. Based on Dr. Stanulis's letter, there is reason to believe the outcome at sentencing would have been different had Mr. Fagaautau been afforded the opportunity to present his case in full. CP 288-299. Accordingly, the trial court manifestly abused its discretion and Mr. Fagaautau was prejudiced.

VI. CONCLUSION

For the foregoing reasons, Mr. Fagaautau respectfully requests that this Court grant discretionary review of the Court of Appeals' decision pursuant to RAP 13.4.

This document contains 4,841 words, excluding the parts of the documents exempted by the word count by RAP 18.17.

Respectfully submitted this 16th day of December 2021.

THE APPELLATE LAW FIRM

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PROOF OF SERVICE

I, the undersigned declare: I am over the age of eighteen years and not a party to the cause; I certify under penalty of perjury under the laws of the United States and of the State of Washington that on December 16, 2021 I caused the following document(s):

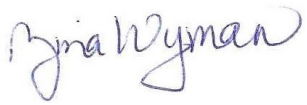
PETITION FOR REVIEW

To be served on the following via Email through the Courts E-service.

Erica Eggertsen, WSBA# 40447 Deputy Prosecuting Attorney 930 Tacoma Ave., Rm 946 Tacoma, WA 98402	erica.eggertsen@piercecountywa.gov

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on December 16, 2021.



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Filed
Washington State
Court of Appeals
Division Two

November 16, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. PIO AUGUSTINO FAGAAUTAU, Appellant.	No. 54074-6-II UNPUBLISHED OPINION

LEE, C.J. — Pio A. Fagaautau appeals his convictions and sentence for two counts of second degree rape of a child. Fagaautau argues that (1) the State committed prosecutorial misconduct during closing arguments by stating personal opinions and making arguments that ask the jurors to place themselves in the position of the victim, (2) he received ineffective assistance of counsel because his trial counsel did not present testimony or evidence to impeach the victim, (3) the trial court abused its discretion by allowing testimony relating to the victim's prior consistent statements, (4) the trial court abused its discretion in allowing evidence of other bad acts, (5) the trial court erred in giving a *Petrich*[1] instruction, (6) the trial court erred in denying his motion for a new trial, (7) the cumulative errors deprived him of his right to a fair trial, and (8) the trial court abused its discretion in denying his motion to continue sentencing.

We disagree with Fagaautau's arguments and affirm his convictions and sentence.

[1] *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), *abrogated on other grounds by State v. Kitchen*, 110 Wn.2d 403, 405, 756 P.2d 105 (1988).

FACTS

A. PRE-TRIAL HISTORY

The State charged Fagaautau with two counts of second degree rape of a child for an alleged incident in March 2015 involving his cousin, M.A.G.[2] Count I was based on Fagaautau putting his hand on or in M.A.G.'s vagina. Count II was based on Fagaautau with putting his penis in M.A.G.'s vagina. Fagaautau pleaded not guilty.

In June 2019, the trial court held a pretrial hearing to discuss motions in limine. The State moved to admit prior consistent statements to corroborate witness testimony. The State requested that these statements be allowed if defense counsel attacked the credibility of their witnesses or pointed to any inconsistencies between a witness's trial testimony and any prior statements. The trial court granted the motion, with the condition that the State could not offer prior consistent statements unless Fagaautau opened the door

> by going down some avenue that would incur, imply or infer some kind of recent fabrication, improper influence or motive, so I will go ahead and grant it to that extent, obviously subject to change, if there is a change and the defense essentially opens the door.

1 Verbatim Report of Proceedings (VRP) (June 5, 2019) at 37. Later, the trial court ruled that statements M.A.G. made to her friend, H.C., about the incident would not be admissible unless the defense opened the door by "saying this is some type of recent fabrication or something along those lines." 1 VRP (June 5, 2019) at 53.

[2] Because M.A.G. and her friend H.C. were both under 18 at the time of the events and the trial we use their initials to protect their privacy. General Order 2011-1, *In re the Use of Initials or Pseudonyms for Child Witnesses in Sex Crime Cases* (August 23, 2011).

The State also moved to admit evidence of Fagaautau's other bad acts.[3] The trial court ruled that the evidence was relevant because it showed lustful disposition towards M.A.G. as well as information regarding whether or not Fagaautau was grooming M.A.G., and any prejudice did not substantially outweigh the probative value of the evidence.

B. TRIAL

The case was tried to a jury. The State called M.A.G., Sebastina Shantz, H.C., D.G.,[4] and Deputy Jennifer Vejar of the Skamania County Sheriff's Office to testify. Fagaautau testified on his own behalf.

1. M.A.G.'s Testimony

M.A.G. testified that she was born in August 2002, making her 12 years old when the incident occurred. Fagaautau is her cousin and she has known him since she was a baby. Prior to the incident for which he was charged, he lived with MAG's family. Fagaautau was 20 years old at the time of the incident.

On multiple occasions when M.A.G. was 10 years old, Fagaautau would enter her room while she was sleeping and look under her shirt. She would pretend like she was sleeping the whole time. Fagaautau objected to this testimony, but the trial court overruled the objection.

[3] These bad acts include an incident when M.A.G. was nine or ten years old, and Fagaautau entered her bedroom at night, lifted up her shirt, and exposed her chest, as well as an incident that occurred two months after the March 2015 incident where Fagaautau allegedly got in bed with M.A.G., touched her vagina, and attempted to get M.A.G. to touch his penis.

[4] D.G. is M.A.G.'s father. He shares a last name with M.A.G. Therefore, we refer to him as D.G. to protect M.A.G.'s privacy.

M.A.G. then testified that, on March 28, 2015, her family went camping at her cousin's house in Carson, Washington. After a family bonfire, everyone went to bed. M.A.G. was lying on the couch when Fagaautau laid next to her. She was lying facing Fagaautau. Fagaautau told M.A.G. she needed to practice her kissing for when she had a boyfriend. He kissed her and started touching her "everywhere." 1 VRP (June 10, 2019) at 117. Fagaautau then put his hands on her breasts and put his fingers in her vagina. After telling her to turn around and bend over, Fagaautau put his penis inside her vagina.

Afterwards, Fagaautau and M.A.G. went to the bathroom. M.A.G. was "confused and shocked and scared," and she "didn't know what to do, other than to just listen to whatever he said." 1 VRP (June 10, 2019) at 124. They returned to the couch and went to sleep.

The next morning they woke up on the couch together. M.A.G. pretended it did not happen because she did not want to worry about it and was not sure exactly what happened.

A week after the incident, M.A.G. told H.C. what happened. M.A.G. did not tell anyone else for a very long time because she was scared and did not want her mother to know that she had lost her virginity. M.A.G. did not tell her parents about the incident until one year before the trial.

A couple of months later, an incident involving Fagaautau occurred at M.A.G.'s mother's house. M.A.G. testified that Fagaautau came to her mother's house to hang out. M.A.G. tried to stay in her room in order to avoid him, but Fagaautau kept messaging her to come to the family room. Later, at bedtime, Fagaautau came in to her room and he "made it pretty clear that he wanted me to sleep on the bottom bunk with him." 1 VRP (June 10, 2019) at 131.

M.A.G. testified that Fagaautau "did the same thing." 1 VRP (June 10, 2019) at 131. He told her that she needed practice kissing and began touching her vagina both over and under her

underwear. This time, M.A.G. told him it was wrong because "he was [her] cousin." Fagaautau pulled his pants down and tried to get her to touch his penis. Eventually, he left after she kept telling him no.

M.A.G. testified, "I would just try to avoid him." 1 VRP (June 10, 2019) at 134. But she would see him "[o]nly once in a while when [they] hung out with the whole family." 1 VRP (June 10, 2019) at 134. Specifically, she remembered that she saw Fagaautau on another camping trip.

During cross-examination, defense counsel questioned M.A.G. about the date of the incident. M.A.G. stated that she wasn't sure of the exact date because it was so long ago, but that it occurred during her spring break. Defense counsel also questioned M.A.G. about a discrepancy between her statement to a detective and her testimony because her statement to the detective does not talk about Fagaautau touching her breasts.

With regard to the incident that occurred at MAG's mother's house, defense counsel questioned M.A.G. about her little brothers sleeping on the top bunk. Specifically, defense counsel asked M.A.G. whether her little brothers had issues wetting the bed. Further, defense counsel questioned M.A.G. about her Quinceanera. She said that Fagaautau attended her Quinceanera because her "mom wanted him to." 1 VRP (June 10, 2019) at 146. Defense counsel then asked M.A.G. if she had ever gone over to Fagaautau's house after the incident. She responded, "Yes." VRP (June 10, 2019) 147.

2. Shantz's Testimony

Shantz, M.A.G.'s mother and Fagaautau's cousin, confirmed that Fagaautau lived with her family when M.A.G. was 10 years old. She said she saw some interactions between the two that alarmed her, but she never reported anything.

Shantz and M.A.G. were at their cousin's house on March 28, 2015. She stated that M.A.G. slept on the couch. When she woke up the next morning, she saw that M.A.G. was next to Fagaautau on the couch. She felt this was weird "because there was [sic] two couches and I thought he was gonna sleep on the other couch." 1 VRP (June 10, 2019) at 157.

Shantz confirmed that Fagaautau came to their home after the incident and that this was not unusual. She also stated that she insisted that M.A.G. invite Fagaautau to her Quinceanera because he was family.

Shantz testified that M.A.G. behaved differently after the incident. M.A.G. was "just like not herself, very down, she started cutting herself." 1 VRP (June 10, 2019) at 159. Before the incident, M.A.G. was very happy and that they always had fun.

Shantz remembered talking to M.A.G. about the incident. Shantz said that when M.A.G. told her about the incident, she seemed very sad. M.A.G. started crying and shaking.

On cross-examination, defense counsel asked if her sons had issues wetting the bed. Shantz responded yes.

3. Other Witness Testimony

H.C., M.A.G.'s friend, testified that M.A.G. reported an incident to her within a week of it happening. She stated that M.A.G. was acting upset; M.A.G. was crying and clearly not happy.

D.G., M.A.G.'s father, confirmed that Fagaautau had lived with his family for a while. He also stated it was common for Fagaautau to stop by M.A.G.'s mother's home after he and Shantz divorced.

D.G. testified that before the incident, M.A.G. was an "[o]verall happy, . . . normal, great kid." 1 VRP (June 10, 2019) at 185. After the incident, M.A.G. had behavioral challenges: issue

with depression, self-harm, and overall sadness. When M.A.G. told him about the incident, she was "sad and scared and apologetic." 1 VRP (June 10, 2019) at 186.

Deputy Vejar testified that she interviewed M.A.G. about the incident involving Fagaautau. She stated that M.A.G. was nervous and began crying during the interview.

4. Fagaautau's Testimony

Fagaautau testified that he knew M.A.G. all her life and lived with M.A.G.'s parents when she was 10 years old. He denied ever going into her room and looking under her shirt while he was living there.

Fagaautau stated that he spent the night of the alleged incident at his sister's house, not at M.A.G.'s cousin's house with everyone else, and that his sister dropped him off the following morning at his cousin's home. After his sister dropped him off at his cousin's house, he laid on the couch. Then, M.A.G. came in and laid down next to him. Fagaautau denied having sexual intercourse with M.A.G. on the couch. He also denied kissing her, touching her breasts, touching her vagina, or putting his penis in her vagina.

After the alleged incident, Fagaautau said he would go over to M.A.G.'s house and that M.A.G. would be there. M.A.G.'s brothers peed the bed so it was unlikely that he would sleep on the bottom bunk with the brothers on the top bunk. He denied touching M.A.G. in a sexual or inappropriate way. Fagaautau confirmed that he attended M.A.G.'s Quinceanera.

Fagaautau was somewhat close to M.A.G. and was like a big brother to her. M.A.G. told him that she was depressed before the time of the alleged incident.

C. JURY INSTRUCTIONS

When the trial court reviewed the proposed jury instructions with the parties, the trial court stated that a *Petrich* instruction would be given as jury instruction number 13. Fagaautau objected. The trial court overruled the objection.

The trial court instructed the jury in Instruction Number 13 as follows:

> The State alleges that the defendant committed acts of Rape of a Child in the Second Degree on multiple occasions. To convict the defendant on any count of Rape of a Child in the Second Degree, one particular act of Rape of a Child in the Second Degree as to that count, must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Rape of a Child in the Second Degree.

Clerk's Papers (CP) at 113.

D. CLOSING ARGUMENTS AND VERDICTS

The trial proceeded to closing arguments. During closing arguments, the State focused on M.A.G.'s testimony. The State argued that it wanted the jury to consider the fact that "the victim's experience is the best evidence you heard today." 1 VRP (June 11, 2019) at 241. The State continued, "I want you to think about why would she fabricate this, what does she gain by potentially making this up?" 1 VRP (June 11, 2019) at 241. The State then argued:

> I would argue that her experience, the details she provided, the emotions she showed to friends and family and on the stand, those all lend to her credibility. That emotion that she provides, she's either the best child actress we've all ever seen or this happened to her.

1 VRP (June 11, 2019) at 241. The State asked the jury to "keep all those things in mind when you consider her testimony, when you consider these minor inconsistencies that [Fagaautau's

counsel] pointed to." 1 VRP (June 11, 2019) at 242. In discussing the minor inconsistencies, the State argued:

> When you're being raped by your 20 year old cousin, you may not remember exactly every place his hands touched. You will remember the most emotional parts, the most traumatic parts.

1 VRP (June 11, 2019) at 243. Defense counsel did not object to this argument.

During rebuttal, the State said, "I'd ask you to divorce yourself from the emotion of that decision. Your job is to write on that piece of paper, guilty or not guilty." 1 VRP (June 11, 2019) at 264. The State then argued:

> I want you to consider her story one more time. She's a child who grows up with her cousin. At ten years old, the defendant sneaks into her room, she's frozen, she's afraid and doesn't know what to do, so just like a child who just saw a horror movie, she pretends to be asleep. You can picture kids who put the covers over their face, hoping the monster won't get them.

1 VRP (June 11, 2019) at 264-65. Defense counsel did not object to this argument.

The jury was then sent to deliberate. During deliberations, the jury asked, "Which count refers as [sic] the hand and which count refers as [sic] penis?" 1 VRP (June 11, 2019) at 271. The trial court responded, "You will need to rely on your memories and/or notes as to the evidence and arguments of counsel." 1 VRP (June 11, 2019) at 273.

The jury found Fagaautau guilty on both counts of second degree rape of a child. The trial court set sentencing for July 11, 2019.

E. SENTENCING

Before the July 11 sentencing date, Fagaautau retained new counsel and an expert to prepare an evaluation report for sentencing and requested a 6-week continuance at the July 11 sentencing hearing. The trial court granted the additional time, but stated, "We do have a victim

in this matter that needs to have some closure with regards to this case." 1 VRP (July 11, 2019) at 287-88. The trial court set a new sentencing date for August 15, 2019.

At the August 15 sentencing hearing, Fagaautau moved for a new trial. Fagaautau argued that he received ineffective assistance of counsel, that the trial court erred in allowing a *Petrich* instruction, and that the trial court erred in allowing three witnesses to testify regarding prior statements made by M.A.G.[5]

Fagaautau presented declarations from Kera Monroe, Luciana Lange, and Sebastiana Fagaautau. Each declared that they were available to testify, but Fagaautau's defense counsel did not call them as witnesses.

Monroe, a friend of Fagaautau, declared that she would have testified that photographs existed of Fagaautau and M.A.G. embracing during family gatherings. Monroe also declared that M.A.G. sought out Fagaautau's company on a number of occasions. Specifically, M.A.G. invited herself on a trip to the lake that Fagaautau and Monroe had planned on taking with M.A.G.'s brothers and cousin. Monroe also declared that M.A.G. accepted an invitation to spend the night at Fagaautau's house with her brothers.

Monroe also declared that Fagaautau disclosed that M.A.G. told him she was seeing a 19-year-old boy. Fagaautau said he told M.A.G. that he was going to tell her mom and dad. This happened shortly before M.A.G. went to the police about the March 2015 incident.

Lange, Fagaautau's sister, declared she would have testified that she never saw any inappropriate behavior between Fagaautau and M.A.G. Regarding the night of the incident, Lange

[5] Fagaautau made other claims in his motion for a new trial, but only argues the above three issues in his appeal.

declared she would have testified that she did not "believe [Fagaautau] ever spent the night at [her] home." CP at 258. After the incident, Lange declared that M.A.G. never acted afraid or avoided Fagaautau. She also declared that M.A.G.'s parents' testimony that M.A.G. was happy and untroubled before the incident was false.

Sebastiana,[6] also Fagaautau's sister, declared that she would have testified that M.A.G.'s testimony that she spent two nights at Lange's home and that the incident occurred on the second night was false because M.A.G. never spent more than one night at Lange's house and Fagaautau never spent the night at Lange's home. Sebastiana also declared that she would have testified regarding M.A.G.'s behavior after the incident. Sebastiana declared that M.A.G. always "engaged happily with [Fagaautua] and spent time taking photos with him" after the incident. CP at 261. Sebastiana further declared that photographs existed that showed M.A.G. had contact with Fagaautau after the incident.

The trial court denied the motion. In denying Fagaautau's claim of ineffective assistance of counsel, the trial court stated that "the court is hamstrung with regards to being able to determine [the first prong] since [defense counsel] was not providing a reason for the decisions not to call any witnesses." 1 VRP (August 15, 2019) at 322. Further, the trial court stated that "there may have been grounds for the reasons not to call those witnesses." 1 VRP (August 15, 2019) at 322. Ultimately, the trial court found that Fagaautau did not receive ineffective assistance of counsel because Fagaautau was not prejudiced by any potentially deficient performance.

[6] We refer to Sebastiana by her first name to avoid confusion because she shares the same last name with defendant Fagaautau. We mean no disrespect.

At that same hearing, Fagaautau also asked for a continuance of the sentencing date because he was not able to obtain the expert report in time. According to Fagaautau, the expert was only allowed a restricted visit at the jail, and therefore, was only able to do a limited evaluation through the glass. Fagaautau stated he would need a couple more weeks to get the evaluation. The trial court granted the request for a continuance but stated, "That'd be the last time this matter will be allowed to continue." 1 VRP (August 15, 2019) at 331. The trial court continued the sentencing date for a third time to September 12.

At the September 12 sentencing hearing, Fagaautau appeared with new counsel. Fagaautau's new counsel said that he was not prepared to move forward with sentencing. When the trial court said they would go forward with the hearing despite the request, counsel withdrew his representation. As a result, the trial court set sentencing over a fourth time to September 26. The trial court remarked that, "these attempts to go ahead and continue these cases at the last moment, is just a gamesmanship here, with regards to this matter." 1 VRP (September 12, 2019) at 340.

On September 26, Fagaautau appeared with counsel and stated that he was ready to proceed with sentencing. Fagaautau did not present an expert report, but he argued that his age should be a mitigating factor. The trial court found that the two counts of second degree rape of a child were the same criminal conduct for the purposes calculating Fagaautau's offender score. As a result, the trial court sentenced Fagaautau to 102 months of confinement and imposed 36 months of community custody.

Fagaautau appeals his convictions and sentence.

ANALYSIS

A. PROSECUTORIAL MISCONDUCT

Fagaautau argues that the prosecutor engaged in misconduct during closing arguments by offering a personal opinion regarding the witnesses' credibility of the witnesses and by improperly inviting the jurors to place themselves in the position of the victim.

To prevail on a claim of prosecutorial misconduct, the defendant must show that the prosecutor's conduct was improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). When the defendant fails to object to a prosecutor's improper conduct, the error is waived unless "the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760-61. The defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). "Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762.

1. Prosecutor's Personal Opinion Regarding Credibility

Fagaautau argues that the prosecutor's conduct was improper because they offered their personal opinion regarding the credibility of M.A.G. and Fagaautau. We disagree.

It is improper for a prosecutor "to express a personal opinion as to the credibility of a witness or the guilt of a defendant." *State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125 (2014). It must be clear and unmistakable that the prosecutor is expressing a personal opinion. *State v. McKenzie*, 157 Wn.2d 44, 54, 134 P.3d 221 (2006); *see also Lindsay*, 180 Wn.2d at 438 (holding

the statement "the most ridiculous thing I've ever heard" and, in particular, the phrase "I've ever heard" was an obvious expression of personal opinion as to credibility). A prosecutor may argue the defendant is lying when the defendant's testimony contradicts other evidence. *State v. McKenzie*, 157 Wn.2d 44, 59, 134 P.3d 221 (2006). In addition, a prosecutor may present reasons why a jury should believe one witness over another. *State v. Copeland*, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). Further, a prosecutor enjoys wide latitude when making a closing argument. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

Fagaautau compares his case to *Lindsay*, arguing that the outcome should be similar because the language used in closing in *Lindsay* is similar to the language used in this case. In *Lindsay*, the prosecutor referred to the defendant's testimony as funny, disgusting, comical, and "the most ridiculous thing I've ever heard." 180 Wn.2d at 438. The prosecutor also referred to the defendant's theory of the case as a "crock." *Id.* The court found that the statement "the most ridiculous thing I've ever heard" and, in particular, the phrase "I've ever heard" was an obvious expression of personal opinion as to credibility and that there was no other way for the jury to interpret the language. *Id.*

Here, contrary to Fagaautau's argument, the prosecutor's language is distinguishable from that used in *Lindsay*. The prosecutor in this case did not call the defendant names, comment on the defendant's testimony, or offer a clear and unmistakable expression of personal opinion. While the prosecutor in *Lindsay* improperly used the phrase "I've ever heard," the prosecutor here used general statements such as "the victim's experience is the best evidence you heard today," and "she's either the best child actress we've all ever seen or this happened to her." 1 VRP (June 11,

2019) at 241. And the prosecutor properly argued that under the circumstances and given the content of the testimony, M.A.G.'s testimony was credible and had only minor inconsistencies.

Further, as Fagaautau admits, the prosecutor's case relied on M.A.G.'s credibility. Therefore, it was reasonable for the prosecutor to argue the credibility of the victim versus the defendant. Also, the prosecutor merely presented reasons why the jury should believe one witness over another, which it was entitled to do. *Copeland*, 130 Wn.2d at 290. The prosecutor enjoys wide latitude in arguing from the evidence during closing arguments. That is what the State did here.

We hold that the prosecutor did not present personal opinions during closing arguments. Therefore, Fagaautau's prosecutorial misconduct claims on this basis fails.

2. Inviting The Jurors To Place Themselves In The Position Of The Victim

Fagaautau argues that the prosecutor improperly invited the jurors to place themselves in the position of the victim during closing statements. We disagree.

Generally, arguments inviting the jurors to put themselves in the position of the victim are improper. *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 139, 750 P.2d 1257 (1988). However, a prosecutor is allowed to use the rhetorical "you" in a situation where they are not asking the jury to put themselves in the victim's shoes. *State v. Thach*, 126 Wn. App. 297, 317, 106 P.3d 782 (2005), *overruled on other grounds by State v. Case*, 13 Wn. App. 2d 657, 678, 466 P.3d 799 (2020).

During closing arguments, the prosecutor discussed the credibility of M.A.G.'s statements. In acknowledging the minor inconsistencies in her testimony, the prosecutor argued:

> When you're being raped by your 20-year-old cousin, you may not remember exactly every place his hands touched. You will remember the most emotional parts, the most traumatic parts.

1 VRP (June 11, 2019) at 243.

Here, the prosecutor did not ask the jury to put themselves in M.A.G.'s position. Instead, the prosecutor used the rhetorical version of the word "you" to explain why there may be inconsistencies in M.A.G.'s story, not to invoke sympathy from the jury. *See Thach*, 126 Wn. App. at 317 (holding rhetorical use of the word "you" "did not ask the jury to put itself in the position of the victim"). Therefore, the prosecutor did not ask the jury to put themselves in the position of the victim and its argument was not improper.

The prosecutor then argued during rebuttal:

> I want you to consider her story one more time. She's a child who grows up with her cousin. At ten years old, the defendant sneaks into her room, she's frozen, she's afraid and doesn't know what to do, so just like a child who just saw a horror movie, she pretends to be asleep. You can picture kids who put the covers over their face, hoping the monsters won't get them.

1 VRP (June 11, 2019) at 264-65. Again, the prosecutor did not ask the jury to put themselves in M.A.G.'s position by saying "You can picture kids." 1 VRP (June 11, 2019) at 265. This language specifically asks the jury to picture kids, not themselves. Therefore, the prosecutor's arguments on rebuttal were not improper, and Fagaautau's prosecutorial misconduct claim on this basis fails.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Fagaautau argues that he was denied his constitutional right to effective counsel because defense counsel refused to impeach M.A.G. with available evidence despite his urging. We disagree.

The right to effective assistance of counsel is guaranteed by the Sixth Amendment of the U.S. Constitution and Article I, Section 22 of the Washington Constitution. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert. denied*, 574 U.S. 860 (2014). We review claims of ineffective assistance of counsel de novo. *State v. Vasquez*, No. 98928-1, slip op. at 8 (Wash. Sept. 9, 2021), http://www.courts.wa.gov/opinions/pdf/989281.pdf. To establish ineffective assistance of counsel, a defendant must show that their attorney's performance was both deficient and prejudicial. *Grier*, 171 Wn.2d at 32-33. An ineffective assistance of counsel claim fails if the defendant fails to establish either deficient performance or prejudice. *Id.* at 33.

1. Deficient Performance

Fagaautau argues that defense counsel's performance was deficient because he failed to present evidence through cross-examination and other witnesses to impeach the testimony of M.A.G. We hold that Fagaautau has not shown deficient performance.[7]

Performance is deficient if counsel's representation falls below an objective standard of reasonableness based on consideration of all the circumstances. *Grier*, 171 Wn.2d at 33. There is a strong presumption that counsel's representation was effective. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). To overcome this presumption, the defendant must show that there was no legitimate strategic or tactical rationale for the counsel's conduct. *Grier*, 171 Wn.2d at 33.

On appeal, Fagaautau argues that defense counsel's performance was deficient because he did not call Monroe, Lange, and Sebastiana to impeach M.A.G. and to show that M.A.G. had a

[7] The State argues that an evidentiary hearing is necessary to properly evaluate whether Fagaautau's trial counsel was ineffective. We disagree because the record is sufficient to address the issue.

motive to falsify her claim. Fagaautau contends that "[t]here was no conceivable reasonable tactical reason for failing to impeach [M.A.G.] on this point given the importance of her credibility." Br. of Appellant at 36.

Whether trial counsel decides to call a witness generally "is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel." *State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995). The trial court recognized this when it stated that "there may have been grounds for the reasons not to call the witnesses." 1 VRP (August 15, 2019) at 322. In its pretrial ruling, the trial court specifically stated that the State may not admit prior consistent statements to corroborate the witness's testimony unless Fagaautau opened the door "by going down some avenue that would incur, imply or infer some kind of recent fabrication, improper influence or motive." 1 VRP (June 5, 2019) at 37. Therefore, defense counsel may have decided, after considering all the potential evidence, that presenting testimony that would have established a motive for M.A.G. to fabricate the incident was not in Fagaautau's best interest, which is a conceivable reasonable tactical reason for not impeaching M.A.G. Therefore, Fagaautau has failed to overcome the strong presumption that counsel's representation was effective.

2. Prejudice

Moreover, Fagaautau has failed to show any prejudice resulting from any deficient performance by counsel. Deficient performance is prejudicial if there is a reasonable probability that the result of the trial would have been different but for the counsel's errors. *Kyllo*, 166 Wn.2d at 862. This standard requires that the defendant "*affirmatively prove prejudice*, not simply show that 'the errors had some conceivable effect on the outcome.'" *State v. Crawford*, 159 Wn.2d 86,

99, 147 P.3d 1288 (2006) (quoting *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Second degree rape of a child requires a showing that the person had sexual intercourse with another who is at least 12 years old but less than 14 years old and not married to the perpetrator and the perpetrator is at least 36 months older than the victim. Former RCW 9A.44.076 (1) (1990).

"A witness cannot be impeached on an issue collateral to the issues being tried." *State v. Fankhouser*, 133 Wn. App. 689, 693, 138 P.3d 140 (2006). "[A] witness may be impeached on only those facts directly admissible as relevant to the trial issue." *Id*. Relevant evidence is any evidence that makes a fact that is of consequence to the determination of the action more or less probable. ER 401.

The evidence that Fagaautau claims defense counsel should have presented involved collateral issues. Fagaautau argues that M.A.G.'s statement that she avoided Fagaautau after the alleged rape was false and could be proved by testimony from Fagaautau's mother, Lange, and Monroe, as well photographs of M.A.G. and Fagaautau together. However, a conviction of second degree rape of a child does not require a showing that the victim avoided, or attempted to avoid, the perpetrator after the incident.

Fagaautau further argues that defense counsel could have countered M.A.G.'s parents' statements that she became unhappy for the first time after the March 2015 incident. Again, second degree rape of a child does not require a showing that the victim was "unhappy" after the incident. Therefore, Fagaautau fails to show that the impeachment evidence would have been allowed if defense counsel had proffered it. We hold that Fagaautau has failed to show any prejudice resulting from the alleged deficient performance because he has not shown that there is a

reasonable probability that the result of the trial would have been different but for the counsel's errors.

C. PRIOR CONSISTENT STATEMENTS

Fagaautau argues that the trial court abused its discretion in allowing H.C., D.G., and Shantz to testify about M.A.G.'s prior consistent statements. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *State v. McWilliams*, 177 Wn. App. 139, 147, 311 P.3d 584 (2013), *review denied*, 179 Wn.2d 1020 (2014). A trial court abuses its discretion if "no reasonable person would have decided the matter as the trial court did." *Id*.

Prior consistent statements are not admissible to merely reinforce or bolster testimony. *State v. Purdom*, 106 Wn.2d 745, 750, 725 P.2d 622 (1986). "Repetition generally is not a valid test of veracity." *Id*. But an exception exists for sex offense cases. *State v. Chenoweth*, 188 Wn. App. 521, 532, 354 P.3d 13, *review denied*, 184 Wn.2d 1023 (2015). The fact of complaint exception "allows the prosecution in sex offense cases to present evidence that the victim complained to someone after the assault," but only to establish that a complaint was timely made. *Chenoweth*, 188 Wn. App. at 532. The prosecution may not present "evidence of the details of the complaint, including the identity of the offender and the nature of the act." *State v. Ferguson*, 100 Wn.2d 131, 136, 667 P.2d 68 (1983).

The prosecution may also present fact of complaint evidence to show how allegations came to the attention of law enforcement. *Chenoweth*, 188 Wn. App. at 533. This type of testimony is properly admissible not for the truth of the allegations, but to show what the witnesses did next and to provide a basis for their testimony. *Id*. at 534.

1. H.C.'s Testimony

H.C. testified that M.A.G. reported an incident to her within a week of it happening. She stated that M.A.G. was acting upset: she was crying and clearly not happy. This testimony falls within the fact of complaint exception because it establishes a timely complaint occurred. *See id.* at 532 (allowing evidence that will establish the complaint was timely made).

Fagaautau argues that the testimony from H.C. that M.A.G. confided in her about an incident, that M.A.G. was clearly upset when she told H.C. about the incident, and that H.C. told M.A.G. to tell her family was too much detail and exceeded what is permitted under the fact of complaint doctrine. But this information does not exceed the fact of complaint exception because it does not reveal any details about the actual incident. *See Ferguson*, 100 Wn.2d at 136 ("Excluded is evidence of the details of the complaint, including the identity of the offender and the nature of the act."). Therefore, the trial court did not abuse its discretion in allowing the testimony from Cargile.

2. M.A.G.'s Parents' Testimony

Shantz and D.G. testified that M.A.G. told them about the March 2015 incident. Unlike H.C.'s testimony, this testimony does not fall under the fact of the complaint exception because M.A.G. told her parents nearly three years after the incident. *Chenoweth*, 188 Wn. App. at 533 (holding the rule applies only to evidence that will establish that a complaint was timely made, and disclosures made nearly a year later cannot be considered timely).

The State argues that the testimony "was simply innocuous testimony explaining how the case developed." Br. of Resp't at 34. We agree.

Shantz stated that she remembered talking to M.A.G. "about what happened in Carson" the previous summer. 1 VRP (June 10, 2019) at 160. D.G. gave similar testimony, stating he found out about the incident at the same time as Shantz. D.G. also stated that he went to Shantz's home after hearing about the incident and they "planned what to do from there." 1 VRP (June 10, 2019) 186. Neither Shantz and D.G. provided any details about the incident, Fagaautau was not identified as the perpetrator, and the nature of the acts was not disclosed. Thus, the testimony is innocuous because it only shows when and how M.A.G.'s parents learned of the incident and merely provided context for the jury. The trial court did not abuse its discretion in allowing the testimony from Shantz and D.G.

D. EVIDENCE OF OTHER BAD ACTS

We review a trial court's decision to admit evidence for an abuse of discretion. *McWilliams*, 177 Wn. App. at 147. A trial court abuses its discretion if no reasonable person would have decided the matter as the trial court did. *Id*.

1. ER 404(b)

Fagaautau argues that the trial court abused its discretion in allowing the State to present evidence of alleged other bad acts committed by Fagaautau against M.A.G. both before and after the incident. We disagree.

Other acts of a person are excluded from evidence if offered "to prove the character of a person in order to show action in conformity therewith." ER 404(b). But other acts may be admissible for other purposes. ER 404(b). "[E]vidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the

offended female." *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). Such evidence makes it more probable that the defendant committed the offense charged. *Id.*

The trial court has discretion to determine the limits of how old evidence must be to be admissible, and incidents alleged from 10 years prior have been considered admissible. *Id.* at 547-48. Further, incidents that occur after the charged offense also may be admissible. *See Ferguson*, 100 Wn.2d at 134 ("'The *kind of conduct* receivable to prove this desire at such prior or subsequent time is *whatever would naturally be interpretable* as the expression of sexual desire.'" (alterations in original) (quoting *State v. Thorne*, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953))). "'The important thing is whether it can be said that it evidences a sexual desire for the particular female.'" *Ferguson*, 100 Wn.2d at 134 (quoting *Thorne*, 43 Wn.2d at 60-61).

Here, M.A.G. testified as to incidents between her and Fagaautau that occurred when she was 10 years old and he was living with her family. Specifically, M.A.G. stated that on multiple occasions Fagaautau would enter her room while she was sleeping and look under her shirt when she was 10.

M.A.G. also testified that Fagaautau came into her room and told her that she needed to practice kissing and began touching her vagina both over and under her underwear. This time M.A.G. told him it was wrong because "he was [her] cousin." 1 VRP (June 10, 2019) at 131. Fagaautau pulled his pants down and tried to get her to touch his penis. Eventually Fagaautau left after M.A.G. kept telling him no.

This testimony is admissible as evidence of lustful disposition because the incidents are directly connected to M.A.G. and show that Fagaautau was drawn to M.A.G. before and after the

charged incident occurred. *See Ray*, 116 Wn.2d at 547. Therefore, the trial court did not abuse its discretion in admitting this testimony.

2. ER 403

Fagaautau next argues that "the prior acts testimony greatly exceeded the quantum of evidence necessary to provide proof of lustful disposition." Br. of Appellant at 42. We disagree.

The balancing of the probative versus the prejudicial value of evidence is left to the discretion of the trial court. *State v. Gunderson*, 181 Wn.2d 916, 922-23, 337 P.3d 1090 (2014). "[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

The purpose of allowing evidence of lustful disposition is to show that it is more probable that the offense charged was committed. *Thorne*, 43 Wn.2d at 61. This is especially important here where there was no physical evidence and the jury had to rely only on the testimony of witnesses.

Here, the trial court found, "[T]he court cannot find that the prejudicial effect is substantially outweighed by the probative value in this case." 1 VRP (June 5, 2019) at 46-47. The trial court stated that the evidence of other bad acts was relevant because it showed lustful disposition towards M.A.G. as well as information regarding whether or not he was grooming M.A.G. With regard to the prejudicial effect, the trail court stated, "[T]here's always going to be prejudicial effect with any evidence as presented." 1 VRP (June 5, 2019) at 46.

Fagaautau argues that the depth in which M.A.G. described his other bad acts was unfairly prejudicial. But M.A.G. did not describe in depth the incidents that occurred before Fagaautau's

alleged rape. M.A.G. only stated, "I remember him coming upstairs and lifting up my shirt and I would just pretend like I was sleeping the whole time." 1 VRP (June 10, 2019) at 107. This evidence had probative value because it showed evidence of lustful disposition, which makes it more probable that Fagaautau committed the alleged rape. Further, there was only enough information to show that Fagaautau was engaging in an act that was sexual in nature. Therefore, the trial court did not abuse its discretion in determining the prejudicial effect of the testimony did not substantially outweigh its probative value.

M.A.G. went into more detail regarding the incident that occurred after the alleged rape. But she testified in only enough detail to show that Fagaautau attempted to have sexual intercourse with her. On the other hand, this evidence was highly probative because it showed Fagaautau's lustful disposition for M.A.G. Therefore, the trial court did not abuse its discretion in determining the prejudicial effect of the testimony did not substantially outweigh its probative value.

Fagaautau also argues that the number of incidents described by M.A.G. was unduly prejudicial. M.A.G. testified that Fagaautau lifted up her shirt "[j]ust a few times" and attempted to have sexual intercourse with her once. 1 VRP (June 10, 2019) at 108. While this evidence is prejudicial, it is probative because it again shows that Fagaautau had lustful disposition both before and after the alleged incident. The trial court did not abuse its discretion in determining that the prejudicial effect of the testimony did not substantially outweigh its probative value.

E. *PETRICH* INSTRUCTION

Fagaautau argues that the trial court erred in giving a *Petrich* instruction because it caused the jurors confusion and consequentially may have resulted in a non-unanimous verdict. We disagree.

The standard of review applied depends on whether the decision to include a jury instruction was based on a matter of law or a matter of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). We review alleged errors of law in jury instructions de novo. *Id.* at 772. A trial court's factual decisions are reviewed for an abuse of discretion. *Id.* at 771-72. Here, Fagaautau's argument that the trial court erred in giving a *Petrich* instruction involves a matter of law.

"'Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury and, properly inform the jury of the applicable law.'" *State v. Hayward*, 152 Wn. App. 632, 641, 217 P.3d 354 (2009) (quoting *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005)). An erroneous instruction is a reversible error if it prejudices a party. *State v. Torres*, 151 Wn. App. 378, 384, 212 P.3d 573 (2009), *review denied*, 167 Wn.2d 1019 (2010).

A *Petrich* instruction must be given when "'evidence indicates that several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct.'" *State v. Carson*, 184 Wn.2d 207, 217, 357 P.3d 1064 (2015) (quoting *Petrich*, 101 Wn.2d at 572. If this occurs, the jury must be instructed that they must all agree that the same underlying criminal act has been proved. *Id.*

In *Carson*, the defendant claimed ineffective assistance of counsel because their attorney objected to the inclusion of a *Petrich* instruction. *Id.* at 216. The defendant was charged with three separate counts of child molestation and the jury was given a *Petrich* instruction. *Id.* at 218-19. The court held that, though the *Petrich* instruction was an accurate statement of law, "an accurate statement of law can be confusing when it is applied to circumstances different from those

that existed when the statement of law was first made." *Id.* at 219. The *Petrich* instruction was created for single-count cases and is "confusing when read in a multicount case." *Id.*

However, this confusion may be avoided if the State elects which act is associated with each count charged. *See State v. Noltie*, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991) (to preserve unanimity in a multicount case, the State must either elect the acts on which it will rely for conviction or receive an effective unanimity instruction); *see also Carson*, 184 Wn.2d at 227 (a multiple acts unanimity instruction is required "only when the State fails to 'elect the act upon which it will rely for conviction.'" (quoting *Petrich*, 101 Wn.2d at 572)).

Here, Fagaautau was charged with two separate counts of second degree rape of a child. At the conclusion of trial, the trial court gave the jury a *Petrich* instruction, stating:

> The State alleges that the defendant committed acts of Rape of a Child in the Second Degree on multiple occasions. To convict the defendant on any count of Rape of a Child in the Second Degree, one particular act of Rape of a Child in the Second Degree as to that count, must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all acts of Rape of a Child in the Second Degree.

CP at 113.

During closing arguments the State stated:

> [T]he state has charged two counts. Count one, is for the defendant putting his hand on and in her vagina. Count two, is for when she changed positions, he had her bend over and he put his penis in her vagina. That's why there's two counts here.

1 VRP (June 11, 2019) at 246. Any confusion that the *Petrich* instruction may have created was avoided when the State expressly stated which act was associated with which count charged. *See Noltie*, 116 Wn.2d at 842-43.

Fagaautau also argues that the jury was prejudiced because the jury asked during deliberations, "Which count refers as [sic] the hand and which count refers as [sic] penis?" 1 VRP (June 11, 2019) at 271.

The jury's question does not show confusion regarding the unanimity of a verdict. Rather, the jury's question shows an understanding that the counts were separate and needed to be decided separately. Further, the jury found Fagaautau guilty on both counts of second degree rape of a child. Therefore, Fagaautau's challenge to the *Petrich* instruction fails.

F. MOTION FOR A NEW TRIAL

Fagaautau claims that the trial court erred in denying him a motion for a new trial. We disagree.

We review a motion for a new trial for an abuse of discretion. *State v. Lopez*, 190 Wn.2d 104, 117, 410 P.3d 1117 (2018). Factual findings are reviewed for substantial evidence and legal conclusions are reviewed de novo. *Id.* at 118.

Fagaautau filed a motion for a new trial arguing that he was denied his right to effective assistance of counsel, that the trial court erred in giving a *Petrich* instruction, and that the trial court erred in allowing testimony regarding M.A.G.'s prior consistent statements. As discussed in Sections B, C, and E, Fagaautau was not denied effective assistance of counsel, the trial court did not err in allowing testimony regarding M.A.G.'s prior consistent statements, and the trial court did not err in giving a *Petrich* instruction. Therefore, we hold that the trial court did not abuse its discretion in denying Fagaautau's motion for a new trial.

G. CUMULATIVE ERROR DOCTRINE

Fagaautau claims that the cumulative errors deprived him of his right to a fair trial. We disagree.

"The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial even where any one of the errors, taken individually, may not justify reversal." *In re Detention of Coe*, 175 Wn.2d 482, 515, 286 P.3d 29 (2012). Here, the cumulative error doctrine does not apply because the trial court made no errors.

H. MOTION TO CONTINUE SENTENCING

Fagaautau claims that the trial court committed a manifest abuse of discretion by denying his motion to continue sentencing on September 12. We disagree.

"[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court." *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). We do not disturb such a decision unless there is "'a clear showing . . . [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005) (internal quotations omitted) (alterations in original) (quoting *Downing*, 151 Wn.2d at 272.)

The trial court may consider all relevant factors when deciding whether to grant a continuance. *Flinn*, 154 Wn.2d at 199. This may include "surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure." *Downing*, 151 Wn.2d at 273. The court may also consider whether prior continuances had been granted. *In re V.R.R.*, 134 Wn. App. 573, 581, 141 P.3d 85 (2006).

Here, Fagaautau appeared at sentencing on September 12 with new counsel, who stated he was unprepared to proceed with sentencing in part because Fagaautau's expert had not been able to complete an expert evaluation. The trial court did not abuse its discretion in denying Fagaautau's request for a continuance because the trial court had already granted two other requests to continue to obtain the expert report, which had delayed sentencing from July 2019 to September 2019. After granting the first continuance, the trial court noted that there is a victim who needs closure in the case. At the hearing on Fagaautau's September 12 motion to continue sentencing, the trial court noted, "These attempts to go ahead and continue these cases at the last moment, is just gamesmanship here, with regards to this matter." 1 VRP (Sept. 12, 2019) at 340. Indeed, the trial court's statement was supported when Fagaautau's new counsel forced the trial court to grant a two week continuance of sentencing to September 26, when Fagaautau's counsel withdrew and left Fagaautau without any representation for sentencing on September 12. This forced continuance allowed additional time for the expert evaluation to be completed. Also, Fagaautau counsel stated that he was prepared to go forward with sentencing at the hearing on September 26. Given all the relevant factors, the trial court did not abuse its discretion by denying the motion to continue sentencing on September 12.

CONCLUSION

We hold that (1) because the prosecutor did not state any personal opinions or ask the jurors to place themselves in the position of the victim, there was no prosecutorial misconduct; (2) Fagaautau has failed to overcome the strong presumption that counsel's representation was effective and has failed to show any prejudice resulting from any alleged deficient performance; (3) the trial court did not abuse its discretion by allowing witnesses to testify about the challenged

consistent statements; (4) the trial court did not abuse its discretion in allowing testimony about other bad acts to show lustful disposition; (5) the challenge based on the *Petrich* instruction fails because the State expressly stated which act was associated with which count charged; (6) the trial court did not abuse its discretion in denying Fagaautau's motion for a new trial, in which he argued ineffective assistance of counsel, error in giving a Petrich instruction, and error in allowing testimony regarding M.A.G.'s prior consistent statements; (7) there is no cumulative error, and (8) the trial court did not abuse its discretion in denying Fagaautau's motion for a new trial. Therefore, we affirm Fagaautau's convictions and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

, C.J.

I., C.J.

We concur:

Maxa, J.

Maxa, J.

J.P.T. Sutton

Sutton, J.P.T.

THE APPELLATE LAW FIRM

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