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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

*Court of Appeals No. 38003-3-III*

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STATE OF WASHINGTON, Respondent,

v.

PHILIP NOLAN LESTER, Petitioner.

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# PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER

Philip Lester requests that this court accept review of the decision designated in Part II of this petition.

## II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on August 2, 2022, concluding that

(1) he did not preserve a Confrontation Clause objection to medical notes despite arguing that he could not cross-examine the author, and consequently declining to consider whether admission of the notes violated his confrontation rights;

(2) his trial counsel was not ineffective for failing to object to instances of vouching for the credibility of the accuser and failing to request a unanimity instruction to prevent a double jeopardy violation;

(3) the evidence was sufficient to prove the events took place within the specific time frame charged by the State and made the law of the case in the jury instructions; and

(4) the sentencing court did not improperly penalize Mr. Lester for exercising his constitutional rights when it explicitly considered the effect of testifying on the accuser in imposing the sentence.

A copy of the Court of Appeals' unpublished opinion is attached hereto as Appendix A.

## III. ISSUES PRESENTED FOR REVIEW

1. Whether a record prepared by a family doctor after examining the accuser for alleged sexual abuse is testimonial hearsay that should have been excluded.
2. Whether language in a medical record declaring that the accuser's history is convincing improperly opines on the guilt of the accused.

3. Whether trial counsel's performance was constitutionally deficient when he:
    a. Abandoned an objection to multiple statements by a law enforcement officer in a recorded interview that the accuser's report was credible and strong; and
    b. Failed to request a "separate and distinct acts" instruction when Mr. Lester was charged with both rape and child molestation on the basis of oral-genital contact, such that convictions for both charges could have been based on the same act;
4. Whether the State was required to present sufficient evidence that the charged conduct occurred on or between specific dates under the law of the case doctrine; and
5. Whether explicitly considering the accuser's reaction to testifying in imposing a sentence improperly penalizes

the accused for exercising his constitutional rights to a trial and to confront his accuser.

## IV. STATEMENT OF THE CASE

The State filed the charges after A.B., then four years old,[1] told her mother on New Year's Eve of 2014 that her playdough looked like Uncle Junior's pee pee. I RP 219-20, 236. "Uncle Junior" referred to Mr. Lester, a neighbor whose girlfriend Ashley occasionally babysat A.B. beginning in September while her mother worked. I RP 221, 224-26, 245. A.B. never spent the night there; her mother dropped her off around 5:00 or 5:30 a.m. and picked her up between 2:30 and 3:00 p.m. I RP 226-27, 250. After either December 15 or 24, Ashley no longer babysat A.B. I RP 246-47.

At trial, A.B.'s mother testified that sometime prior to November, she began noticing behavioral issues that caused her

[1] A.B. was originally found not competent to testify. CP (34806-7-III) 55-56. By the time of trial, she was 10 years old and testified. I RP 280.

concern. I RP 228-32, 235. A.B. complained that her privates hurt, began having more tantrums, and started having accidents despite being potty-trained. I RP 228-29, 231-32. A.B. also began to shy away from men she had known her whole life, which led her mother to begin counseling with her in November. I RP 235. And five or six times, A.B.'s underwear was gone when she came home. I RP 229-30. Not knowing what to think, her mother began using other babysitters more in November. I RP 230. A doctor confirmed that A.B.'s bedwetting was not caused by an infection. I RP 232.

After A.B. told her mother about Uncle Junior's pee pee and elaborated that he had shown it to her and touched her with it, her mother contacted police. I RP 222, 236. With CPS assistance, law enforcement conducted a forensic interview of A.B. I RP 334, 339-51; Ex. 6. During the interview, A.B. described several acts of contact between Mr. Lester and herself, including that he (1) put his pee pee in her mouth; (2) rubbed his pee pee on her; (3) slid down her butt; (4) touched

her butt using his tongue; (5) licked her butt; (6) touched her butt with his arm; (7) touched his butt with her face; (8) touched her foot, belly, boobs, hands, knees, and arms with his butt; and (9) put his pee pee in her butt. I RP 341-50. However, she also described fantastical events, such as that his pee came out purple and his poop came out of his pee pee. I RP 347. She also appeared to indicate that her mother told her what to say in the interview. I RP 351. According to A.B., the events took place more than one time at Mr. Lester's house and occurred after Christmas. I RP 343, 350.

On January 6, 2015, A.B.'s mother took her to a doctor to assess "suspected child sexual abuse." Ex. 7, at p. 1. Despite conducting a physical examination that observed no visible trauma, the examination notes report the doctor's impression that the "history is quite convincing" as well as a plan to work with law enforcement and CPS. *Id.*

At trial, A.B. testified that she told her mother she was creeped out and scared by Junior sticking his thing in her mouth. I RP 286. She recalled that the abuse occurred during the night when she slept over due to her mother's late work schedule, which conflicted with her mother's testimony that she never spent the night there. I RP 226-27, 250, 287. According to this account, she was sleeping on the couch and woke up during the night to get a glass of water when Junior touched her in inappropriate ways and licked her vagina. I RP 287-88. She also claimed that he did it for two days until she told her mother because she did not want it happening anymore. I RP 286-87. A.B. also alleged that Junior threatened to hurt her and her mother while they slept if she told anybody, which she had never previously mentioned. I RP 288. According to her trial testimony, he did not touch her anywhere else or at any other time, in contrast to the statements she made to CPS years earlier. I RP 293.

Mr. Lester gave police a recorded interview in which he denied any wrongdoing toward A.B. I RP 367, 369. He described a holiday dinner in which A.B.'s mother was rude to him, after which she reported him to CPS. I RP 361-62, 370; 444-45. Mr. Lester reported that he was working during the times when Ashley babysat A.B. and he was never alone with her. I RP 364-65; 439-40, 446; Ex. 6. He contended that A.B.'s mother had coached her to make the accusations. I RP 369.

Mr. Lester objected to the admission of portions of his recorded interview that contained extensive commentary on the credibility of A.B.'s accusations. I RP 275-79. In response to the first objection, the State contended that it was a standard interrogation technique for police to lie about what they know. I RP 277-78. Trial counsel indicated he would be satisfied with that explanation but maintained his objection to a portion of the interview in which the detective referred to a previous accusation. I RP 278. Accordingly, the State agreed not to play

a ten-second portion of the interview referring to the prior accusation. I RP 278-79, 358. Prior to playing the recording, the detective testified that she does not always tell a suspect the truth and in order to make the accused "feel that it's better to tell the truth," she will tell the suspect that the results of the investigation clearly indicate that the crime has been committed. I RP 359.

As a result of this ruling, the following statements by the detective during the interview were played for the jury:

> DETECTIVE: Well, what you need to understand is when [A.B.] was interviewed and I -- you know that I've done this now for a long time.
>
> MR. LESTER: Yeah.
>
> DETECTIVE: And in this interview, she knows things that she shouldn't know. Okay? So, you know, I don't -- I'm not here to -- I'm not judging you. I'm not here to -- but [A.B.] is extremely credible in what she had to say, even though she's only four. Okay? It was digitally recorded and audio recorded and it was an extremely good disclosure on her part of some of the things that happened with you at your house.
>
> MR. LESTER: Huh.

> DETECTIVE: And there's -- I got no -- no -- everything she told me I felt was very credible. It was very true. I mean it was -- there's absolutely no reason for her to be lying. And actually, I didn't even have to ask too many questions. She was ready to talk.
>
> . . .
>
> There's absolutely no reason somebody would make this up against you just to pick on you. This isn't something people do. Not -- not this. And that little girl is not able to hold a lie continuously when you ask questions. That little girl would not be able to lie about what she said. Okay? She's not capable of doing that. We would have tripped her up. So, something happened at your house with [A.B.]. And that's why I'm here to talk to you because this is the only time that I can talk to you and find out what exactly you did with [A.B.] so that I make sure that we deal with this correctly.

I RP 365-67. The jury also heard the detective ask Mr. Lester to explain A.B.'s accusation:

> DETECTIVE: Okay. So, how do you think she'd come up with this statement -- why would she, why do you think [A.B.] would do this?
>
> MR. LESTER: She's been told because her mom's been telling her to do this and do this and she -- she, you know, [A.B.] don't hardly listen half the time anyways.
>
> DETECTIVE: Right, so --

> MR. LESTER: When her mom corrects her.
>
> DETECTIVE: -- why would she be able to keep a lie like that? She wouldn't. She's four. She wouldn't be able to keep a lie.
>
> MR. LESTER: I don't know, Behymer. I'm just saying is I haven't done anything. I haven't touched her, I haven't done anything to her. I haven't abused her. I don't -- I'm not a violent person, especially with kids. Even if it was my own kid, I wouldn't even spank them. So, these allegations that do -- they're doing or how they do it, I don't know how they're doing it. I can't be honest to tell you the truth. I don't know.
>
> DETECTIVE: Okay.

I RP 369; Ex. 6.

Mr. Lester also objected to admission of the portion of the notes of A.B.'s 2015 medical examination stating that the history was convincing, indicating that he had a problem with that language. I RP 382-83; Ex. 7. The State argued the records were admissible as a medical record under ER 803(a)(4). I RP 384. Trial counsel further objected that he was unable to cross-examine the author of the impression because the doctor who performed the examination was deceased. I RP 386, 395. The

trial court admitted the document without redaction as a medical record. I RP 387; Ex. 7. Accordingly, the State proffered the document through a medical assistant who worked for him and took the vital statistics reported in the document. I RP 390, 394-95, 397, 401-02.

Defense counsel did not propose any instructions and did not object or except to any of the court's instructions. I RP 454, 457-58. The court did not give any unanimity instruction. CP 78-97. The "to convict" instruction required the jury to find that the charged acts occurred "on or between December 1, 2014 and January 1, 2015." CP 88, 90. The jury convicted Mr. Lester on both counts. CP 100-01.

The trial court imposed a standard range sentence above the midpoint. II RP 553. In explaining its reasoning, the trial court stated:

> I do weigh heavily the fact that this young lady, who was 10 at the time of the trial, faced cross examination, faced reliving and having to explain

> what occurred and to deal with that, has exacerbated and actually escalated psychological emotional and the Court is taking that into consideration.

II RP 553.

The Court of Appeals affirmed Mr. Lester's conviction and sentence in an unpublished opinion filed on August 2, 2022. *Appx. A*. It held that Mr. Lester failed to object to the violation of his confrontation rights in admitting the medical notes, despite complaining that he would not be able to cross-examine the author of the notes, *Appx. A* at pp. 7, 11, 14; RP 386; that Mr. Lester's attorney was not ineffective for abandoning an objection to plainly improper opinion testimony that vouched for the credibility of the child accuser, *Appx. A* at pp. 14-16; that a "separate and distinct acts" instruction was not required, *Appx. A* at pp. 16-17; that the State presented sufficient evidence that the charged conduct occurred in the month of December, 2014, *Appx. A* at pp. 17-18; and that the sentencing court's express consideration of the fact that the

child accuser was required to testify at the trial in determining the length of Mr. Lester's sentence was not improper, *Appx. A* at pp. 18-20.

## V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted under RAP 13.4(b)(3), and (4), for the reasons set forth particularly below.

### *A. Whether the medical examination was testimonial under the "primary purpose" test elaborated in State v. Scanlon is a significant question of constitutional law under RAP 13.4(b)(3).*

This Court held in *State v. Scanlon*, 193 Wn.2d 753, 766, 767, 445 P.3d 960 (2019), that whether statements to medical providers are "testimonial" within the meaning of the Confrontation Clause jurisprudence depends on whether the primary purpose of the statements was "to meet an ongoing emergency and obtain medical treatment" or "to create an out-

of-court substitute for trial testimony." In *Scanlon*, statements to emergency room medical personnel in the course of receiving treatment for extensive bruising, broken fingers, and tears to his skin were made primarily for purposes of treating the injuries such that their admission did not violate the Confrontation Clause. 193 Wn.2d at 757, 767.

Then, in *State v. Burke*, 196 Wn.2d 712, 478 P.3d 1096 (2021), the Court examined statements made to a sexual assault nurse examiner during a rape examination and held that some were testimonial while others were not. In that case, the Court concluded that while a sexual assault nurse examiner's exam "contains both forensic and medical purposes," the examiner's principal charge is not uncovering and preserving evidence for prosecution. *Id.* at 729. Consequently, the majority of the statements made to the nurse examiner by the accuser were, according to the *Burke* Court, for purposes of medical treatment. *Id.* at 736-37. However, the Court concluded that a statement providing a physical description of the assailant did

not provide any guidance for medical treatment and was testimonial. *Id.* at 737-38.

In the present case, approximately two weeks after the last time the child had any contact with Mr. Lester, the mother took her to a doctor for the purpose of assessing "suspected child sexual abuse." Ex. 7 at p. 1. The medical notes reflected that while a physical examination revealed no visible trauma, the doctor believed that the "history is quite convincing" and recognized the need to work with law enforcement and Child Protective Services. *Id.*

This case presents a significant constitutional question concerning the application of the primary purpose test to medical providers because it falls in a middle ground between the emergency room treatment at issue in *Scanlon* and the formalized sexual assault examination at issue in *Burke*. The examination occurred after significant time had elapsed from the reported abuse and for the primary purpose of assessing the

accusations. Thus, the case provides a vehicle to define the outer limits of the "primary purpose" test's application to medical examinations.

*B. Whether the medical record's language that the accuser's history was "quite convincing" constitutes an improper opinion on the accuser's credibility is a significant question of constitutional law under RAP 13.4(b)(3).*

While Washington courts permit expert witnesses to offer opinion testimony on ultimate issues, their opinions may not be based solely on the expert's opinion of a witness's veracity. *State v. Fitzgerald*, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985). While the Courts of Appeal have previously recognized limits on a medical provider's ability to offer opinion testimony on the credibility of sexual abuse accusations, this Court has not done so. *See, e.g., id.* (testimony that accusers had been molested was improper when there was

no medical evidence of abuse and the opinion rested solely on the physician's evaluation of the accounts); *State v. Carlson*, 80 Wn. App. 116, 805 P.2d 999 (1995) (medical opinion based "almost entirely" on accuser's interview was improper).

In the present case, Mr. Lester objected to the admission of the opinion language and relied upon *State v. Redmond*, 150 Wn.2d 489, 78 P.3d 1001 (2003), which held that the trial court abused its discretion in not requiring the redaction of medical records that contained attributions of fault. RP 382-83, 385. This was sufficient to raise the issue of whether the comment should have been excluded due to its commentary on the veracity of the accusations against Mr. Lester, and this Court should accept review to address the constitutional limits on medical opinion testimony that relies upon determinations of credibility.

*C. Whether trial counsel's abandonment of his objection to improper comments on the accuser's credibility falls*

*below reasonable professional standards is a significant question of constitutional law under RAP 13.4(b)(3).*

The touchstone in evaluating claims of ineffective assistance of counsel is not whether the choice was strategic but whether it was reasonable. *State v. Crow,* 8 Wn. App. 2d 480, 509, 438 P.3d 541, *review denied*, 193 Wn.2d 1039 (2019). In the present case, the comments at issue explicitly set forth the investigating detective's opinion that the accuser was "extremely credible," gave "an extremely good disclosure" that was "very true, and "would not be able to lie about what she said," comments that improperly place the prestige of the State behind the accuser's account. RP 365-67; *see State v. Coleman*, 155 Wn. App. 951, 957, 231 P.3d 212 (2010), *review denied*, 170 Wn.2d 1017 (2011) (describing impermissible vouching).

Here, defense counsel raised the admissibility of the statements outside of the presence of the jury, eliminating the risk that the objection would harmfully highlight the evidence.

RP 274-75. However, counsel abandoned the objection after the State offered to have the detective testify that she might lie about evidence as part of a standard interrogation technique. RP 277, 278. This concession was unreasonable because the curative testimony failed to remedy the harm of the vouching when it did not inform the jury whether the detective's statements specifically about the accuser's credibility were truthful or not.

Whether it is reasonable attorney performance to abandon an objection to highly damaging and plainly inadmissible statements vouching for the credibility of the accuser presents a significant question of constitutional law warranting review by this Court.

*D. Whether failing to request a "separate and distinct acts" instruction when the charged conduct could constitute both crimes and result in a double jeopardy violation was*

*deficient performance is a significant question of constitutional law under RAP 13.4(b)(3).*

Because Mr. Lester was charged with both rape of a child based on oral-genital contact and child molestation, the same act can support a conviction for both crimes, creating the potential for a double jeopardy violation. *See State v. Land*, 172 Wn. App. 593, 600, 295 P.3d 782, *review denied*, 177 Wn.2d 1016 (2013). Consequently, in such cases when the jury is not instructed that both crimes must be based on separate and distinct acts, the reviewing court must conduct a strict and rigorous review of the entire record to determine whether it was manifestly apparent to the jury that the State was not seeking punishments for the same offense. *State v. Mutch*, 171 Wn.2d 646, 664, 254 P.3d 803 (2011).

In the present case, the State's sole distinction between the charges came in a brief discussion of the meaning of the jury instruction defining "sexual contact," where he advised the

jury that rubbing the accuser's breasts was sexual contact. RP 487. At no point did the prosecutor elect specific acts to support the different charges as occurred in *Mutch*, 171 Wn.2d at 665-66, and in *State v. Fuentes*, 179 Wn.2d 808, 825-26, 318 P.3d 257 (2014). The passing reference to a definitional instruction would not have made it manifestly apparent to the jury that the charges were based on separate conduct in the absence of a unanimity instruction.

Under these facts, whether trial counsel was ineffective for failing to propose an instruction needed to prevent a potential double jeopardy violation is a significant question of constitutional law under RAP 13.4(b)(3).

*E. Whether the State met its burden to present sufficient evidence that the charged crime occurred within the specific time frame set forth in the jury instructions presents a question of substantial public interest under*

*RAP 13.4(b)(4) implicating the application of the law of the case doctrine to charges based on specific dates.*

Under the law of the case doctrine, the State assumes the burden to prove the specific elements set forth in the jury instructions even if they are otherwise legally unnecessary. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). In general, if the State employs general "on or about" charging language, it is sufficient to prove that the charged act took place anytime within the statute of limitations. *State v. Hayes*, 81 Wn. App. 425, 432, 914 P.2d 788, *review denied*, 130 Wn.2d 1013 (1996). Here, because the State did not employ the general "on or about" language in either the charging document or the instructions to the jury, it assumed the burden of proving criminal conduct within the specific date range alleged under the law of the case doctrine. Recognition that the law of the case doctrine applies to specifically-charged date ranges is an issue of first impression that presents a question of substantial public interest warranting review.

*F. Whether the trial court's consideration of the accuser's emotional reaction to testifying improperly penalizes the defendant's exercise of his constitutional rights to a trial and to confront his accuser is a significant question of constitutional law under RAP 13.4(b)(3).*

It is well-established that punishing somebody for exercising his legal rights is a fundamental due process violation. *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978); *State v. Sandefer*, 79 Wn. App. 178, 181, 900 P.2d 1132 (1995). It is also beyond dispute that Mr. Lester had a Sixth Amendment right to confront his accuser as part of his right to a fair trial. *See Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965).

Here, the Court of Appeals reasoned that "[t]he relived trauma of courtroom testimony is an extension of the trauma inflicted by a defendant's crimes against a victim" that may be considered by a sentencing court as part of the effect of the

crime on the victim. *Appx. A* at p. 19. But this conclusion permits the sentencing court to treat Mr. Lester's exercise of his due process rights as part of his criminal conduct, contrary to fundamental notions of fairness and the explicit constitutional guarantees afforded to the criminally accused.

Under the facts presented here, the sentencing court's frank acknowledgment that Mr. Lester's exercise of his Sixth Amendment right to confront his accuser factored into its decision to impose a higher-end sentence presents a significant question of constitutional law under RAP 13.4(b)(3) that conflicts with long-standing authority prohibiting the punishment of one's exercise of constitutional rights. Review is warranted and should be granted.

## VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(3) and (4) and this Court should

enter a ruling reversing Mr. Lester's convictions or,

alternatively, vacating his sentence.

RESPECTFULLY SUBMITTED this 1st day of

September, 2022.

*This document contains 4,090 words, excluding the parts of the document exempted from the word count by RAP 18.17.*

TWO ARROWS, PLLC

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

## CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare under penalty of perjury under the laws of the State of Washington that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Philip N. Lester, Jr., DOC# 830473
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Melanie R. Bailey
Okanogan County Prosecuting Attorney
PO Box 1130
Okanogan, WA 98840

Signed this 1st day of September, 2022 in Kennewick, Washington.

Andrea Burkhart

Court of Appeals Opinion no. 38003-3-III (filed 8/2/2022)

# APPENDIX A

**FILED**
**AUGUST 2, 2022**
**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. 38003-3-III |
| Respondent, | ) | |
| | ) | |
| v. | ) | UNPUBLISHED OPINION |
| | ) | |
| PHILIP NOLAN LESTER, | ) | |
| | ) | |
| Appellant. | ) | |

FEARING, J. — Philip Lester assigns various errors to the trial court proceeding, during which a jury convicted him of one count of rape of a child in the first degree and one count of child molestation in the first degree. He also assigns error to his sentence. We affirm Lester's convictions and sentence, but remand for the striking of two community custody conditions.

FACTS

The State alleged that Philip Lester raped and molested a four-year-old neighbor, who we pseudonymously name Jane. We gather the important facts from trial testimony.

On December 31, 2014, Jane played with playdoh when she told her mother, Miranda Bishop, that the playdoh looked like "Uncle Junior's pee pee." Report of Proceedings (RP) at 220. "Uncle Junior" was Jane's name for Philip Lester, whose

girlfriend, Ashley Lamont, babysat Jane. Jane's comment prompted Bishop to contact law enforcement.

On January 2, 2015, Okanogan County Sheriff Detective Deborah Behymer recorded an interview of Jane. Jane remarked that Lester put his penis in her mouth and rubbed it on her. Lester licked her butt with his tongue and put his butt onto Jane's face. Lester touched her belly, breasts, feet, hands, knees, and arms. Jane disclosed that these incidents occurred after Christmas and had happened more than one time.

On January 6, 2015, Jane visited Family Health Centers, where health care assistant Karen Cagle and Dr. James Weber examined her. Exhibit 7 at trial was the notes of the visit. Under the "Assessment/Plan" section, exhibit 7 read:

| # | Detail Type | Description |
|---|---|---|
| 1. | Assessment | Suspected child sexual abuse (V71.81). |
| | Impression | History is quite convincing –exam normal but that does not rule out any abuse it merely indicates that there is no visible trauma at this time. There may not have been significant penetration, but this cannot be ruled out also. |
| | Patient Plan | Will work with law enforcement as well as CPS as required and needed |

Exhibit (Ex.) 7 at 1 (spelling and grammar corrected). Under "History of Present Illness," the medical notes declared:

> 1. Sore bottom
>
> The symptoms began 6 days ago and generally lasts 1 Week. The symptoms occur randomly. On New Year's Eve she was playing with playdoh—and showed her mother a phallic shaped structure and told mom "This is what Uncle hurts my bottom with." Evidently she went on to tell her mom that he put it in her mouth and peed on her bottom with it. Her

> uncle and his girlfriend have been babysitting her while mom has been working since the beginning of October. No blood noticed in panties, clothes, or visualized stool. No complaints of dysuria. [Jane] has already been interviewed by the police and the CPS worker.

Ex. 7 at 1 (spelling and grammar corrected). The notes ended with: "Document generated by: Karen L. Cagle HCA/ACE 01/08/2015 03:07 PM." Ex. 7 at 3.

On January 7, 2015, Detective Deborah Behymer recorded an interview of Philip Lester. During portions of the interview, Detective Behymer mentioned the credibility of the accusations against Lester:

> DETECTIVE: Okay. Okay. Well, what you need to understand is when [Jane] was interviewed and I—you know that I've done this now for a long time.
> MR. LESTER: Yeah.
> DETECTIVE: And in this interview, she knows things that she shouldn't know. Okay? So, you know, I don't—I'm not here to—I'm not judging you. I'm not here to—but [Jane] is extremely credible in what she had to say, even though she's only four. Okay? It was digitally recorded and audio recorded and it was an extremely good disclosure on her part of some of the things that happened with you at your house.
> MR. LESTER: Huh.
> DETECTIVE: And there's—I got no—no—everything she told me I felt was very credible. It was very true. I mean it was—there's absolutely no reason for her to be lying. And actually, I didn't even have to ask too many questions. She was ready to talk.

RP at 365-66.

Later in the interview, Detective Deborah Behymer broached Jane's capacity to lie about the allegations:

> DETECTIVE: There's absolutely no reason somebody would make this up against you just to pick on you. This isn't something people do.

> Not—not this. And that little girl is not able to hold a lie continuously when you ask questions. That little girl would not be able to lie about what she said. Okay? She's not capable of doing that. We would have tripped her up. So, something happened at your house with [Jane].

RP at 367.

> DETECTIVE: Okay. So, how do you think she'd come up with this statement—why would she, why do you think [Jane] would do this?
> MR. LESTER: She's been told because her mom's been telling her to do this and do this and she—she, you know, [Jane] don't hardly listen half the time anyways.
> DETECTIVE: Right, so—
> MR. LESTER: When her mom corrects her.
> DETECTIVE: —why would she be able to keep a lie like that? She wouldn't. She's four. She wouldn't be able to keep a lie.

RP at 369.

PROCEDURE

Philip Lester's first trial resulted in convictions for first degree child rape and first degree child molestation. This court reversed the convictions and remanded for a new trial due to the erroneous admission of a forensic interview with Jane despite Jane not testifying at the trial. *State v. Lester*, No. 34806-7-III, slip op. (Wash. Ct. App. June 19, 2018) (unpublished), https://www.courts.wa.gov/opinions/pdf/348067_unp.pdf.

The second trial began with testimony from Miranda Bishop, Jane's mother. Bishop averred that she left Jane with Ashley Lamont for babysitting while Bishop worked. When Bishop returned to retrieve Jane, Philip Lester would sometimes be present. Bishop testified that Jane began to report pain in her butt and she began

returning from Lamont's home without underwear. Bishop concluded that insufficient wiping caused the pain in the buttocks.

> Q But you noticed that she started coming home without her underwear?
> A Yes.
> Q And do you recall approximately how many times this happened?
> A Maybe 5 or 6.
> Q And this would have been from when to when?
> A October/November.
> Q . . . So, what's going through your mind? Your daughter is starting to come home missing underwear. What—what's going through your mind?
> A I didn't know what to think.
> Q I mean were—were you concerned about it?
> A At the time, no. I thought it was just her, you know, because of everything else that was happening. But then it started to worry me so she wasn't going there as much.
> Q And I'm sorry, I'm not following you.
> A I had two other people that were babysitting. So, she started going to the other babysitters more after November.

RP at 229-30.

Miranda Bishop testified that Lamont continued to babysit Jane in December 2014:

> Q So, I want to focus your attention to the time period December 1, 2014 to January 1, 2015. How many times was your daughter babysat at [Philip] Lester's residence or trailer? In December, how many times was your daughter babysat by Ashley [Lamont]?
> A From December 1st and up until probably December, what was it, 24th, 2 to 3 times a week, if not a little more.

RP at 245. Bishop later declared that Jane probably spent less time at Lamont's abode in December and Lamont last babysat Jane on December 24.

Jane testified during trial. She recalled telling her mother that Philip Lester had put his penis into her mouth. Jane averred that, while sleeping on the couch during babysitting, Lester licked her vagina. The State played the video recording of Detective Deborah Behymer's January 2 interview with Jane.

Philip Lester objected to introduction of his January 7 recorded interview conducted by Detective Deborah Behymer. He complained about Behymer's statements concerning Jane's credibility during the interview. The State responded that Behymer would testify that law enforcement often lies to interrogation suspects. Lester then abandoned the objection as to the statements by Behymer about Jane's credibility. Behymer testified that she does not always tell interrogation subjects the truth, because she gains an advantage by telling a suspect that clear evidence already supports the criminal allegations. The State played portions of the recorded interview for the jury, including Behymer's comments on Jane's credibility.

Philip Lester objected to the introduction of exhibit 7, the medical notes from Jane's January 6 visit to Family Health Centers. Lester complained about the report's entry: "History is quite convincing." RP at 383. The report's content failed to identify the nature or extent of this purported "history." Lester also noted that the State intended to introduce the medical report through health care assistant, Karen Cagle, not the physician, James Weber. According to Lester, Cagle was merely the custodian of the

record and admission should be denied because Cagle could not verify the accuracy of the statement within.

In response to Philip Lester's objection, the State commented that it did not seek introduction of exhibit 7 under the business records exception to the hearsay rule. The State sought admission under the medical records exception found in ER 803(a)(4). The State claimed Dr. James Weber was no longer available, because he had moved and may be dead.

In reply, Philip Lester cited *State v. Redmond*, 150 Wn.2d 489, 78 P.3d 1001 (2003), a Washington decision, which held that the trial court must redact a portion of the medical record that assigned fault for an assault. After the trial court distinguished the *Redmond* decision, the court ruled the exhibit admissible as a medical record exception. Lester's counsel then exclaimed that he could not "cross[-]examine the author of this impression." RP at 386.. The trial court held to its decision and added the business record exception as a ground for admission.

Karen Cagle, certified medical assistant at Mid Valley Orthopedics, testified to Jane's January 6 visit. Cagle testified that she had "generated" the medical report listed as exhibit 7. RP at 396. The State questioned Cagle as to who had prepared the medical report:

> Q And you prepared this?
> A A portion of it, yes.
> Q Well, I'm sorry. Maybe I misunderstood then. Who—who

> prepared the rest of it?
> A It's both Dr. [James] Weber and I. It's mainly his notes that he—that he documents his movement, his comments, his observation.
> Q And does he do that contemporaneously while he's examining the patient?
> A Correct. He writes—he generally writes his notes on—on paper and then he comes out to his—his office and dictates.

RP at 401.

Karen Cagle read the contents of exhibit 7's "Assessment/Plan" and "History of Present Illness" sections to the jury. On cross-examination, Cagle admitted her absence from the examination room while Dr. James Weber conducted the exam. Cagle testified that she was only responsible for checking and recording Jane's vital signs. Defense counsel questioned Cagle:

> Q Did you have any role in obtaining the history prior to the exam?
> A I'm trying to remember. Generally, I—generally, I do, if we have the time to do that. When it's an urgent visit sometimes we don't have the time to do a background.

RP at 402.

Jury instruction 4 read:

> A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Clerk's Papers (CP) at 86. Jury instructions 8 and 10 required the jury to find that the alleged criminal acts had occurred "on or between December 1, 2014 and January 1, 2015." CP at 90, 92.

In closing argument, the prosecuting attorney commented:

> Jury Instruction Number 10. Sexual contact. And that's defined for you. So and [sic] I hate to put this bluntly. Rubbing her breasts, that's sexual contact. Just as intercourse can be vaginal, anal, can be the mouth.

RP at 487. The jury returned guilty verdicts on both charges.

During sentencing, the trial court commented:

> I do weigh heavily the fact that this young lady, who was 10 at the time of the trial, faced cross examination, faced reliving and having to explain what occurred and to deal with that, has exacerbated and actually escalated psychological emotional [sic] and the Court is taking that into consideration.

RP at 553.

The trial court imposed a sentence below the statutory maximum for each conviction. The trial court imposed as conditions of community custody:

> (20) That you do not access the Internet without an [sic] safety plan that has been approved in advance by your sex offender therapist and your community corrections officer;
>
> . . . .
>
> (23) That you do not possess photographic equipment without prior approval from your sex offender therapsit [sic] and your community corrections officer.

CP at 153.

## LAW AND ANALYSIS

On appeal, Philip Lester assigns numerous errors leading to his convictions. He contends the trial court erroneously admitted exhibit 7, his attorney performed ineffectively when failing to object to introduction of his recorded statement wherein

Detective Deborah Behymer spoke about Jane's credibility, he suffered double jeopardy by the two convictions, his attorney performed deficiently when failing to ask for a separate and distinct acts jury instruction or a jury unanimity instruction, and insufficient evidence supported a finding that he committed the alleged acts during the charging period. He also challenges his sentence and two community custody conditions.

Philip Lester objects to language in exhibit 7 that read: "history is quite convincing" and "will work with law enforcement as well as CPS as required and needed." Ex. 7 at 1. Lester maintains that the first phrase contained testimonial statements of Dr. Weber, who was not subjected to cross-examination. Therefore, admission of the exhibit violated his rights under the confrontation clause. He also argues that this same phrase constituted an impermissible opinion as to the credibility of the alleged victim. We first address the confrontation clause and then vouching.

Confrontation Clause

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The testimonial statements of a witness who does not appear at trial are inadmissible unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 54-55, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Only testimonial out-of-court statements fall within the scope of the confrontation clause. *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224

(2006). Statements become testimonial if made for the primary purpose of establishing or proving past events potentially relevant to later criminal prosecution. *Davis v. Washington*, 547 U.S. 813, 822 (2006). Washington courts apply the primary purpose test to determine whether any out-of-court statements are testimonial, regardless of to whom they are made. *State v. Burke*, 196 Wn.2d 712, 725-26, 478 P.3d 1096 (2021), *cert. denied*, 142 S. Ct. 182, 211 L. Ed. 2d 74 (2021).

We do not address whether the challenged medical notes qualify as testimonial in nature because Philip Lester did not object, before the trial court, to the exhibit's admission on the basis of the confrontation clause. Trial counsel instead asserted the hearsay rule and argued that no exception applied to the hearsay rule. He cited *State v. Redmond*, 150 Wn.2d 489 (2003), which only concerns a violation of the hearsay rule.

RAP 2.5(a) formalizes a fundamental principle of appellate review. The first sentence of the rule reads:

> Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court.

(Boldface omitted.) No procedural principle is more familiar than that a constitutional right, or a right of any other sort, may be forfeited in criminal cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944).

Good sense lies behind the requirement that arguments be first asserted at trial. The prerequisite affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). The rule serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address. *State v. Strine*, 176 Wn.2d 742, 749-50 (2013); *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988).

ER 103(a)(1) requires an objection to admission of evidence to state "the specific ground of objection, if the specific ground was not apparent from the context." The appellant may not assign error to an evidentiary ruling when the objection at trial failed to apprise the trial judge of the grounds of objection asserted on appeal. *State v. Maule*, 35 Wn. App. 287, 291, 667 P.2d 96 (1983).

An appellant may raise some constitutional errors for the first time on appeal if the appellant shows a manifest constitutional error. RAP 2.5(a)(3). This exception does not apply, however, to confrontation clause assignments. *State v. Berniard*, 182 Wn. App. 106, 124, 327 P.3d 1290 (2014). The defendant must timely raise the issue in the trial court or waive the right to confrontation. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305,

327, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009); *State v. Burns*, 193 Wn.2d 190, 210-11, 438 P.3d 1183 (2019). The defendant always has the burden of raising his confrontation clause objection before the trial court. *State v. Berniard*, 182 Wn. App. 106, 124 (2014).

In *State v. Burns*, 193 Wn.2d 190 (2019), the Washington Supreme Court adopted the purposes behind the confrontation clause rule as expressed by this court in *State v. O'Cain*, 169 Wn. App. 228, 279 P.3d 926 (2012). Allowing a defendant to assert a confrontation claim for the first time on appeal places the trial judge in a compromising position. The judge would be faced with the decision to sua sponte identify and rule on a confrontation clause violation, which may disrupt trial or defense tactics or risk presiding over a trial that could be reversed on appeal. Whether defense counsel will object on confrontation grounds can unquestionably be a trial tactic. Requiring an objection also has a practicable aspect: the trial court judge will rule on the objection, giving the appellate courts an actual trial court decision to review.

Philip Lester objected to exhibit 7, the medical note, on the ground of hearsay. A hearsay objection does not also constitute a confrontation clause objection. Although a confrontation clause challenge requires the trial court to engage in a hearsay analysis, the former challenge comprises a more lengthy and sophisticated analysis. Even hearsay with an applicable exception becomes inadmissible if its admission violates a defendant's confrontation clause rights precluding testimonial hearsay. *Davis v. Washington*, 547 U.S. 813, 821 (2006). The trial court must also determine whether the hearsay is

testimonial hearsay, whether the out of court declarant is unavailable to testify, and whether the defendant had a prior opportunity for cross-examination of the declarant. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004); *State v. Beadle*, 173 Wn.2d 97, 107, 265 P.3d 863 (2011). The trial court lacked an opportunity to address these elements of a confrontation clause challenge and thus denying review of Philip Lester's assignment of error serves a primary purpose behind RAP 2.5(a).

Vouching

On appeal, Philip Lester alternatively argues that exhibit 7's admission formed error because the exhibit contained impermissible comments regarding Jane's credibility. He highlights the entry: "history is quite convincing." Ex. 7 at 1. We also decline to address this contention for failure to preserve the error before the trial court. Lester did not object to the exhibit, before the superior court, on the basis of impermissible vouching. On appeal, he does not assert manifest constitutional error.

Opinion of Law Enforcement Officer

Philip Lester argues that his trial counsel provided ineffective assistance when abandoning an objection to multiple, repeated opinions by Detective Deborah Behymer during the recorded interview of Lester that Jane posited credible accusations.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation fell below an objective standard of reasonableness and (2) defense counsel's deficient representation prejudiced the

defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Vazquez*, 198 Wn.2d 239, 247-48, 494 P.3d 424 (2021). Courts indulge a strong presumption that counsel is effective. *State v. Vazquez*, 198 Wn.2d 239, 247 (2021).

Deficient performance occurs when counsel's performance cannot be attributed to any conceivable legitimate tactic. *State v. Carson*, 184 Wn.2d 207, 218, 357 P.3d 1064 (2015). The law imposes a strong presumption that counsel exercised reasonable professional judgment to render adequate assistance. *State v. Carson*, 184 Wn.2d 207, 216 (2015). To rebut this presumption, the defendant carries a burden to establish no legitimate strategic or tactical reasons explaining counsel's performance. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

A classic example of trial tactics is when and how an attorney makes the decision to object during trial testimony. *State v. Vazquez*, 198 Wn.2d 239, 248 (2021). Defense counsel engages in legitimate trial tactics when forgoing an objection in circumstances when counsel wishes to avoid highlighting certain evidence. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

We discern a legitimate trial strategy behind trial defense counsel's withdrawal of an objection to Detective Deborah Behymer's testimony beyond the possibility of not wanting to emphasize some evidence. Counsel could have wanted to emphasize that Behymer conceded she was lying to Philip Lester when she insisted to him that Jane

related a credible story or was a credible witness. This testimony showed that law enforcement officers lack any compunction for telling lies when they wish to accomplish some goal such as convicting an accused.

Double Jeopardy

Philip Lester argues that the failure to provide a separate and distinct acts jury instruction constituted prejudicial error. The United States Constitution and Washington State Constitution both protect the right of individuals to be free from double jeopardy. U.S. CONST. amend. V; WASH. CONST. art. I, § 9. Double jeopardy may be raised for the first time on appeal. *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011). This court reviews the entire record to consider whether insufficient jury instructions actually effected a double jeopardy error and need not find error if it was manifestly apparent to the jury that each count represented a separate act. *State v. Peña Fuentes*, 179 Wn.2d 808, 824, 318 P.3d 257 (2014).

We need not ask whether rape of a child and child molestation can arise from the same act. The State, during closing argument, can inform the jury which separate and distinct acts the prosecution relied on to prove the charges of child rape and child molestation. *State v. Peña Fuentes*, 179 Wn.2d 808, 825-26 (2014). The State, in Philip Lester's prosecution, informed the jury during closing argument that "sexual contact" under the child molestation charge was based on Philip Lester's touching of Jane's

breasts. The jury knew that the State based the child rape and child molestation charges on separate and distinct acts.

Ineffective Assistance for Failure to Propose a Jury Instruction

Philip Lester also contends that his trial counsel performed ineffectively when failing to request a separate and distinct act jury instruction. Such an instruction would require the jury to unanimously agree to one distinct act as constituting each of the separate crimes. For the same reason that we reject Lester's double jeopardy contention, we reject his assignment of ineffective assistance of counsel. The trial court need not deliver a jury unanimity instruction when the State elects what particular act forms the basis for the separate charges and informs the jury of that election during closing. *State v. Carson*, 184 Wn.2d 207, 227 (2015); *State v. Lee*, 12 Wn. App. 2d 378, 393, 460 P.3d 701 (2020), *review denied*, 195 Wn.2d 1032, 468 P.3d 622 (2020).

Charging Period

Philip Lester next argues that the State failed to demonstrate sufficient evidence that the charged crimes occurred "on or between" December 1, 2014 and January 1, 2015, the date range indicated in the jury instructions for both charges. The State assumes the burden of proving otherwise unnecessary elements made part of a "to convict" instruction. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998).

Accepting, without deciding, that the State was required to prove that the charged acts occurred within the provided date range, sufficient evidence supported Philip

Lester's convictions. When determining whether sufficient evidence proves an added element, this court inquires whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103 (1998). This court defers to the finder of fact in resolving conflicting evidence and credibility determinations. *State v. Camrillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), *abrogated on other grounds by State v. Crossguns*, 199 Wn.2d 282, 505 P.3d 529 (2022).

Miranda Bishop testified that Jane had stayed overnight at Ashley Lamont's home in December 2014, although she answered inconsistently as to how many stays occurred. In her interview with Detective Deborah Behymer, Jane said that the abuse occurred after Christmas, although Bishop averred that Jane did not visit Lamont's residence after Christmas Eve. Bishop's testimony also suggested, however, that the criminal acts occurred before December 2014, when Jane began returning home without her underwear. The jury, acting as fact finder, was tasked to resolve the conflicting testimony and determine the credibility of the witnesses. Drawing all inferences in favor of the State, the jury could reasonably have found that the criminal acts occurred at some time between December 1, 2014 and January 1, 2015.

Sentencing Court Remarks

Philip Lester argues that the sentencing court's consideration of the emotional toll experienced by Jane when testifying punished him for exercising his right to trial. The

State responds that Lester's ultimate sentence fell within the standard range and is therefore not appealable. We reject the State's request to deny appellate review of this assigned error, but we affirm the sentence nonetheless.

Under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, a sentence within the standard range shall not be appealed. RCW 9.94A.585(1). But the SRA does not bar this court's review of a sentencing court's constitutional error. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993); *State v. McNeair*, 88 Wn. App. 331, 335-37, 944 P.2d 1099 (1997). The imposition of a penalty for the exercise of a defendant's legal rights violates due process. *State v. Sandefer*, 79 Wn. App. 178, 181, 900 P.2d 1132 (1995).

No constitutional principle precludes the sentencing court from consideration of a crime's impact on a victim. A court may properly consider the details, flavor, and impact on victims of the offense as presented at trial. *United States v. Carter*, 804 F.2d 508, 514 (9th Cir. 1986). The relived trauma of courtroom testimony is an extension of the trauma inflicted by a defendant's crimes against a victim.

In *State v. Sandefer*, 79 Wn. App. 178 (1995), a jury convicted Paul Sandefer on one count of first degree child molestation. The trial court sentenced Sandefer to the top of the standard range. The court informed Sandefer that, if he had entered a guilty plea, he may have received a more lenient sentence as it would have saved the child victim from having to testify at trial. This court rejected a challenge to the sentence, reasoning

that the sentencing court had properly exercised its discretion. *State v. Sandefer*, 79 Wn. App. 178, 184 (1995).

Community Custody Conditions

Philip Lester asks that we strike community custody conditions 20 and 23 as not being crime related. The State concedes the assignment of error. We accept the State's concession.

A sentencing court may impose crime-related prohibitions. RCW 9.94A.505(9); RCW 9.94A.703(3)(f). This court reviews sentencing conditions for abuse of discretion and will uphold conditions that are reasonably crime related. *State v. Nguyen*, 191 Wn.2d 671, 683, 425 P.3d 847 (2018). A condition will be upheld if "some basis for the connection" between the condition and the crime exists. *State v. Irwin*, 191 Wn. App. 644, 657, 364 P.3d 830 (2015).

No evidence at trial linked Philip Lester's criminal acts to internet use or to the use of photographic equipment. This court previously struck down a condition prohibiting internet use when no evidence in the record suggested that internet use contributed to the crime. *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

CONCLUSION

We affirm Philip Lester's convictions and his sentence. We remand to the sentencing court to strike community custody conditions 20 and 23.

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.

WE CONCUR:

Siddoway, C.J.

Staab, J.

## BURKHART & BURKHART, PLLC

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