Supreme Court No. 101438-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALEX MIYARES,

Appellant.

MOTION FOR DISCRETIONARY REVIEW

Court of Appeals No. 834088-I; Snohomish County Superior Court No. 19-1-00165-31

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I. IDENTITY OF PETITIONER

Alex Miyares ("Mr. Miyares") is the petitioner in this Petition for Discretionary Review. Mr. Miyares was convicted of two counts of child molestation and sentenced to an indeterminate sentence of 75 months to life following a jury trial in Snohomish County Case No. 19-1-00165-31.

II. DECISION

Mr. Miyares seeks this Court's review of the decision of the Court of Appeals, Division I, in Case No. 834088-I, dated October 24, 2022, affirming Mr. Miyares' convictions. A copy of the Court of Appeals decision is appended hereto as Attachment A.

III. ISSUES PRESENTED FOR REVIEW

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

A. WHETHER THE TRIAL COURT'S ADMISSION OF B.B.'S HEARSAY STATEMENTS VIOLATED RCW 9A.44.120, ER 403, AND THE PROHIBITION ON VOUCHING TESTIMONY.

B. WHETHER MR. MIYARES RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO OBJECT TO DR. BENSEN'S RECITATION OF B.B.'S HEARSAY STATEMENTS.

C. WHETHER THE COURT ERRED IN REJECTING MR. MIYARES' CLAIM THAT THE CUMULATIVE ERRORS DEPRIVED HIM OF HIS RIGHT TO A FAIR TRIAL.

IV. STATEMENT OF THE CASE

Mr. Miyares is a 30-year-old man with no criminal history prior to this case. Clerk's Papers (CP) 279. He was charged with three counts of child molestation in the first degree for allegedly having sexual contact with B.B., who was less than twelve years old, between on or about the 1st day of January, 2018, through on or about the 22nd day of December, 2018. CP 270-271.

Mr. Miyares' first trial ended in a hung jury. CP 159-160. At the conclusion of his second trial, the jury convicted Mr. Miyares on counts one and two, and acquitted on count three, and the trial court imposed an indeterminate sentence of 75 months to life. CP 3-18, 24-39. Mr. Miyares appealed and

the Court of Appeals affirmed the trial court. Attach. A. Mr. Miyares now respectfully requests that this Court grant discretionary review and reverse his convictions and sentence.

1. B.B.'s Background and Living Situation

B.B. has had a "chaotic" childhood. CP 224. B.B.'s biological parents both struggled with drug addiction, causing the state to intervene in her custody. Verbatim Report of Proceedings, Vol. I (I VRP)[1] 445:12-25, 448:1-3, 475:16-20; 3 VRP 108:5-7. B.B.'s father died when she was three years old, and her mother was absent for "huge parts" of B.B.'s life because she was in prison. I VRP 445:12-25; 448:1-3, 475:10-15.

Between the ages of three and four, B.B. was placed with her grandparents. I VRP 476:6-13. She then returned to her biological mother's care briefly, before being placed with

[1] Pretrial VRP volumes are designated by Arabic numerals, trial VRP volumes by Roman numerals.

her aunt, Kaylyn Tolliver, who ultimately adopted her. I VRP 389:8-13, 445:12-25; 448:1-3; II VRP 560:12-22.

In 2018, when she was seven years old, B.B. lived in a home in Mountlake Terrace with a constantly shifting arrangement of adults and children. I VRP 391:15-19. B.B. was upset around this time when one of the adults and her younger half-brother moved away, and received less attention when Ms. Tolliver gave birth to a son that year and Mr. Alazadi, Ms. Tolliver's boyfriend, was generally working outside of the home. I VRP 434:19-21; 446:19-447:25; 475:2-479:20; 501:9-13.

The adults in the home smoked from a hookah and B.B. was not permitted to be present when people were smoking from the hookah. II VRP 564:7-12. The prohibition on B.B. being present when the adults were smoking the hookah was "a big deal" for Ms. Tolliver. I VRP 482:10-25.

B.B. frequently sought attention from the adults but was often rebuffed. Mr. Miyares and Ms. Hoyt would "shoo" B.B. out of their room when she came down, particularly when they were smoking the hookah, but B.B. would try to remain in the room anyway. II VRP 803:5-17.

In the midst of her chaotic childhood, B.B. became a "technology savvy" child, "glued to" her tablet device. I VRP 480:23-481:5; II VRP 802:7-22. Her tablet had "unfettered" internet access and she watched whatever she wanted, including hip-hop music videos containing explicit content. II VRP 527:23-528:3, 741:5-12.

B.B. attended two or three different schools during 2018. II VRP 528:23-529:2. At one of these schools, B.B. had a best friend named Caytlyn. I VRP 493:23-494:9; II VRP 529:3-10. Caytlyn told B.B. that she was molested by an adult, and, at some point, B.B. told Caytlyn she had also been molested by an adult. I VRP 409:23-25, 493:23-494:9.

2. The Allegations

Mr. Miyares denies ever sexually assaulting or otherwise inappropriately touching B.B. II VRP 735:16-736:3; 778:17-779:5.

On December 22, 2018, Mr. Miyares was working at a butcher shop. II VRP 743:6-18. He got home around 7:30 in the evening and began smoking his hookah pipe to unwind, when B.B. entered the room. Id. Mr. Miyares left the door open, which is what he usually did. II VRP 744:2-7. Within 5 or 10 minutes, Ms. Tolliver entered the room, and they began having a conversation about Christmas gifts. I VRP 460:3-22; II VRP 743:6-18.

Ms. Tolliver testified that on that evening, she put her son to sleep and went downstairs to tell B.B. to get ready for bed. I VRP 457:4-458:1. When she got downstairs, she saw that the door to Mr. Miyares' room was cracked open and Mr. Miyares and B.B. were sitting on the bed, not "doing anything." I VRP 458:12-18. According to Ms. Tolliver's

testimony, when she opened the door, “they both just sat up very quickly off the bed like they were surprised that I was downstairs.” I VRP 458:25-459:4.

Ms. Tolliver smelled hookah smoke when she walked in the room but did not know if it was recent or from earlier in the day. I VRP 482:14-18. Ms. Tolliver did not notice anything unusual about B.B. when she asked her to leave Mr. Miyares alone, go upstairs, and get ready for bed. I VRP 483:17-25.

3. The Report and Investigation

On the morning of December 23rd, Ms. Tolliver testified that she asked B.B. “why did you guys like get up so fast” or “why did you guys act that way when I walked in the room.” I VRP 465:13-17. B.B. purportedly began crying and said, “Alex touches me” and clarified that this meant he touches her “peach” which is her word for “private parts.” I VRP 465:13-466:3. Mr. Alazadi then contacted law enforcement. I VRP 467:10-468:6.

4. B.B.'s Prior Statements

Extensive testimony from several witnesses was presented regarding B.B.'s prior out of court statements. B.B. denied ever discussing the issue with Mr. Alazadi. I VRP 433:17-19. However, Mr. Alazadi testified, over defense objection, that B.B. told him "Alex had touched her." I VRP 504:9-19. Mr. Alazadi emphasized this testimony on the next day of the trial, repeating his allegations that B.B. told him Mr. Miyares touched her "vagina area." II 529:20-25.

Shortly afterwards, Ms. Tolliver likewise repeated B.B.'s hearsay accusation, over defense objection. II VRP 541:23-542:1; 558:1-16.

Dr. Bensen, the examining physician, also repeated B.B.'s allegations, testifying "[f]rom the notes, the patient had told the mother that a male roommate had been touching her in her private area." II VRP 642:5-14. He added it had been occurring over three months "and the most recent episode was a week prior to presentation." Id.

Danielle Singson, the child forensic interviewer, testified to interviewing B.B., and the State played the interview video for the jury, which the jurors watched while viewing a transcript. II VRP 692:7-10, 694:17-695:22. B.B. described multiple incidents in the child forensic interview, which she did not recount to the other witnesses. II VRP 856:16-857:19.

V. ARGUMENT

A. THE COURT ERRED IN ADMITTING B.B.'S CHILD HEARSAY STATEMENTS UNDER RCW 9A.44.120.

The trial court's decision to admit B.B.'s child forensic interview and statements to Ms. Tolliver, Mr. Alazadi, and Ms. Singson exceeded what is permitted under RCW 9A.44.120, constituted impermissible vouching, and violated ER 403.

In rejecting this argument, the Court of Appeals declined to consider evidence of unreliability on the grounds that Mr. Miyares failed to renew his objection following introduction of this evidence. Attach. A at 5-9. The Court of Appeals similarly

concluded Mr. Miyares failed to raise and preserve ER 403 and vouching challenges to this testimony. Attach. A at 10.

The record reveals that the Court of Appeals was wrong. Mr. Miyares raised his objections to B.B.'s hearsay statements multiple times, including following introduction of new evidence of unreliability. With this evidence properly considered, the duplicative hearsay statements should have been excluded.

1. **Standard of Review**

A trial court's decision to admit child hearsay evidence under RCW 9A.44.120 is reviewed for abuse of discretion. *State v. Young*, 62 Wn. App. 895, 903, 802 P.2d 829 *as modified on reconsideration*, 817 P.2d 412 (1991).

2. **B.B.'s hearsay statements lacked sufficient indicia of reliability.**

Under RCW 9A.44.120, if a child witness testifies at a criminal trial, the child's out-of-court statements are admissible if the court finds "the time, content, and circumstances of the statement provide sufficient indicia of reliability." RCW

9A.44.120; *State v. Ryan*, 103 Wn. 2d 165, 174, 691 P.2d 197 (1984).

In *Ryan,* the Court presented nine factors for consideration in evaluating admissibility under RCW 9A.44.120. *Ryan*, 103 Wn.2d at 175-76. No single factor, taken alone, is decisive. *State v. Kennealy*, 151 Wn. App. 861, 881, 214 P.3d 200 (2009). However, "the factors must be 'substantially met' before a statement is demonstrated to be reliable." *Id*.

i. B.B. had motive to lie

With respect to the "motive to lie" factor, Mr. Miyares testified he was smoking hookah on the evening in question, and Ms. Tolliver admitted smelling smoke when she entered his room. I VRP 482:14-18; II VRP 743:6-18. Ms. Tolliver also testified the rule prohibiting B.B.'s presence while the hookah was being smoked was a "big deal." I VRP 482:10-25. Ms. Hoyt testified they would try to "shoo" B.B. away when they were smoking, but sometimes she refused. II VRP 803:5-17.

Accordingly, B.B. had a motive to accuse Mr. Miyares of misconduct to evade responsibility for her own violation of house rules prohibiting her presence when the hookah was out.

The evidence also showed B.B. was starved for attention and had a motive to lie to receive attention from the adults in the home. 3 VRP 103:1-4, 114:8-115:5; I VRP 434:19-21; II VRP 803:5-17, 805:9-19. She further learned how to make such accusations from her best friend, Caytlyn, and may simply have been repeating what Caytlyn disclosed to her. 3 VRP 6-13.

The Court of Appeals declined to consider the foregoing evidence, holding that Mr. Miyares failed to renew his hearsay objections after this evidence was presented. Attach. A at 6, n. 2. This conclusion is contradicted by the record. I VRP 504:20-505:22; 541:23-551:15; II VRP 644:24-668:6.

During Mr. Alazadi's testimony, defense counsel objected to Mr. Alazadi's recitation of what B.B. told him regarding the alleged molestation. I VRP 504:20-505:22. It was

couched as a vouching objection, but it again challenged the admission of the child hearsay as duplicative. Id.

When Ms. Tolliver began testifying to B.B.'s out of court statements, defense counsel again objected, stating "the objection is the witness is about to vouch for the declarant, the credibility." I VRP 542:2-9. In evaluating the objection after excusing the jury, the court addressed and reaffirmed its initial child hearsay ruling:

> The statement made within the context of the child disclosing an alleged incident of sexual assault, sexual abuse, which is admissible under the child hearsay rules, which has been found admissible by previous rulings and factual findings that the Court has now adopted. The objection is overruled. The record is clear for any review on appeal.

I VRP 551:9-15.

When the State called Ms. Singson as a witness, defense counsel specifically re-asserted his objection to admission of the forensic interview and withdrew his prior agreement to allow admission of the interview. II VRP 644:24-668:6; 647:6-21. He went on to state that his objection was based on the

Ryan factors, and thus was an express renewal of his child hearsay objection. II VRP 660:1-14.

The State responded that it was moving to admit the interview based on the prior findings from the child hearsay hearing, in response to which defense counsel objected, stating:

> I object. And based upon the additional information that we have received since the last trial --this is not the last trial. This is this trial. And there was additional information.

II VRP 664:11-18.

In overruling Mr. Miyares' objection, the court again revisited the child hearsay ruling, stating "[s]o again, this [objection] as it relates to this evidence is based on two things. One, the child hearsay statute; and two, authentication." II VRP 667:22-24. The court then re-affirmed the previous child hearsay ruling and admitted the interview. II VRP 667:24-668:5.

Accordingly, contrary to the Court of Appeals' conclusions, the record is clear that defense counsel renewed his objections to child hearsay during the trial, and the trial

court revisited and re-affirmed the initial child hearsay ruling. Defense counsel expressly cited the additional facts in the trial record and expressly raised the *Ryan* factors, leaving no doubt that he renewed his child hearsay objections in reliance on new facts elicited at trial.

Under these circumstances, consideration of evidence introduced at trial to evaluate the decision to admit child hearsay is appropriate and necessary. *See Dickerson v. Chadwell, Inc*., 62 Wn. App. 426, 431, 814 P.2d 687 (1991) ("a trial judge may, on further reflection, reconsider his or her decision to admit certain evidence.")

It is apparent from the record that the trial court erred in failing to find that B.B. had a motive to lie, and the Court of Appeals erred in declining to consider this evidence.

ii. B.B.'s general character did not support admission of the statements.

With respect to the "general character" factor, the Court of Appeals found "[s]ubstantial evidence" supports the trial

court's conclusion that this factor "favors admissibility of statements." Attach. A at 6. This is incorrect. No evidence supports this conclusion.

Mr. Alazadi's statement that he was not aware of B.B. lying to him personally falls far short of establishing B.B.'s "reputation for telling the truth." *State v. Lopez*, 95 Wn. App. 842, 853, 980 P.2d 224 (1999). Mr. Alazadi was working two jobs, including late nights at a hookah bar, and was not often available at home to help. I VRP 479:11-20, 501:9-13. That someone who was rarely present was not aware of B.B. lying to him hardly establishes a "reputation for telling the truth." The Court of Appeals erred in concluding that this factor is anything more than neutral.

iii. B.B.'s disclosure was not spontaneous.

With respect to the spontaneity of B.B.'s accusations, the Court of Appeals concluded that "[n]one of the […] witnesses

posed leading or suggestive questions." Attach. A at 8. This conclusion is again contradicted by the record.

Ms. Tolliver specifically confronted B.B. about what she perceived to be suspicious behavior the evening before. 3 VRP 100:1-14. She testified: "I just asked her why she had acted, like, startled or, like, weird when I had walked into the bedroom." 3 VRP 100:7-9. Only when Ms. Tolliver added "What does that mean? What does that mean? Are you sure? Are you -- this is a very serious thing to say about somebody" did B.B. finally state that Mr. Miyares touched her "peach," which is what she called her vagina. 3 VRP 99:13-23.

By accusing B.B. of acting "startled" or "weird" and then adding that "this is a very serious thing to say about somebody" before B.B. had stated that Mr. Miyares touched her vagina, Ms. Tolliver engaged in suggestive questioning and elicited an incriminating statement. She testified that the sheriff told her to "stop asking her those kinds of questions," i.e., leading and

suggestive questions, to avoid "putting anything in her head…" I VRP 469:6-12.

Under these circumstances, B.B.'s statement was not "spontaneous," and this factor should have weighed against admission. *Lopez*, 95 Wn. App. at 853 (statements made by an alleged victim of sexual abuse are "spontaneous" if they are not the result of leading or suggestive questions).

iv. B.B.'s statements were not made to a neutral party.

The Court of Appeals concluded the "neutral party" factor weighed in favor of admission, stating "B.B. gave a detailed disclosure to Singson, a child forensic interviewer with whom she had no prior relationship, that was the same as her disclosure to Tolliver and Alazadi." Attach. A at 8.

However, B.B.'s disclosure to Ms. Singson was not the same as her prior accusations. II VRP 856:16-857:19. Moreover, once the accusation is made initially, repeating it to a neutral party days after having committed to the accusation adds far

less to the reliability of the accusation than if the initial disclosure was made to a neutral party. This factor should have been treated as weighing against admission.

v. B.B. had other means of learning about sexual conduct.

The Court of Appeals agreed that B.B. had multiple other means of learning about sexual conduct. Attach. A at 9. However, it declined to consider this evidence in its analysis because "none of this evidence was before the court at the time it ruled on the admissibility of the child hearsay and Miyares never asked the court to reconsider its ruling based on this new evidence." Attach. A at 9. This conclusion is again contradicted by the record.

The evidence at trial showed B.B. had her own tablet device with unfettered internet access and no parental restrictions. I VRP 480:23-481:5; II VRP 527:23-528:3, 741:5-12, 802:7-22. Her best friend Caytlyn told her about being sexually abused. 3 VRP 6-13; I VRP 409:23-25, 493:23-494:9.

And she lived in a chaotic household where her parents struggled with drug addiction and was ultimately removed from the home. 3 VRP 93:8-12, 105-106:12, 108:5-7, 146:16-19.

Mr. Miyares renewed his objections after this evidence was introduced. I VRP 504:20-505:22; 541:23-551:15; II VRP 644:24-668:6. This evidence should have been considered and treated as weighing against admission.

Because no factors supported admission, and numerous factors weighed against admission, the court's decision to admit B.B.'s hearsay statements under RCW 9A.44.120 constituted an abuse of discretion.

3. ADMISSION OF THE CHILD HEARSAY STATEMENTS VIOLATED ER 403 AND CONSTITUTED IMPERMISSIBLE VOUCHING.

Even if admission of child hearsay evidence were proper under RCW 9A.44.120, it nonetheless should have been excluded based on Mr. Miyares' vouching objections under ER

403. I VRP 504:20-505:22; II VRP 558:1-16. In rejecting this argument, the Court of Appeals concluded:

> [a]t no point during trial did Miyares argue that admitting testimony about B.B.'s disclosures from several different witnesses amounted to impermissible vouching or that it was needlessly cumulative.

Attach. A at 10. This conclusion is contradicted by the record.

Mr. Miyares in fact objected to child hearsay on vouching grounds multiple times throughout trial. I VRP 504:9-505:5; II VRP 541:23-551:16. When Mr. Alazadi began testifying about his conversation with B.B., defense counsel objected as follows:

> MR. ROBBINS: Your Honor, I'm going to object. This is touching on Motion in Limine Number 5 regarding vouching.
>
> MS. LAWRENCE: Judge, this has been previously ruled on by Judge Appel.
>
> THE COURT: I'm going to overrule the objection just based on the testimony before me right now. Just so I can be clear, was the objection that this is regarding Motion in Limine Number 5 and regarding vouching?

> MR. ROBBINS: Yes.
>
> THE COURT: Okay. The objection is overruled. You can proceed, please.

I VRP 504:9-505:5. Mr. Alazadi then proceeded to repeat B.B.'s accusations in detail. I VRP 505:6-22.

Likewise, when Ms. Tolliver began testifying to what B.B. told her, defense counsel again objected:

> MR. ROBBINS: Your Honor, I'm going to object.
>
> THE COURT: What's the objection?
>
> MR. ROBBINS: Your Honor, the objection is the witness is about to vouch for the declarant, the credibility.
>
> MS. LAWRENCE: Judge, this is just a recitation of a conversation that has been deemed admissible. Counsel can cross-examine and make appropriate argument.
>
> MR. ROBBINS: That is not true, Your Honor.

II VRP 541:23-542:11. After the judge overruled the objection, Ms. Tolliver proceeded to detail B.B.'s accusations. II VRP 557:20-558:16.

The Court of Appeals holding that this issue was not preserved is erroneous. Moreover, "vouching" or bolstering objections are governed by ER 403 and constitute ER 403 objections for purposes of preservation. *See State v. Ish*, 170 Wn. 2d 189, 197, 241 P.3d 389 (2010) (evaluating a vouching objection under ER 403); *State v. Beadle,* 173 Wn. 2d 97, 121, 265 P.3d 863 (2011) (analyzing admissibility of testimony that "amounted to impermissible bolstering" under ER 403). Mr. Miyares thus properly preserved the issue of whether the trial court erred in denying his vouching objections, in violation of ER 403.

Moreover, it was error to overrule these objections. Though evidence may be admissible under the child hearsay statute, the inquiry does not stop there. *State v. Bedker*, 74 Wn. App. 87, 94, 871 P.2d 673 (1994). These statements, like any other evidence, are subject to analysis under ER 403. *Id.*

The prejudicial impact of B.B.'s hearsay statements, namely, the impermissible bolstering and vouching and cumulative effect of four witnesses repeating B.B.'s accusations, substantially outweighed the minimal probative value. The probative value of this evidence was, at most, *de minimus*, as B.B. had already presented her account of events with live testimony in a coherent and articulate manner. To the extent her trial testimony required elaboration from her prior statements, the child forensic interview alone would have fulfilled that purpose, and the testimony of three additional witnesses served only to cause unfair prejudice.

By having several witnesses repeat B.B.' s prior statements alleging sexual contact, the trial court allowed her testimony to unfairly take on greater importance. *See State v. Lynch*, 176 Wn. 349, 351, 29 P.2d 393 (1934) ("A witness may not fortify his testimony or magnify its weight by showing that he has previously told the same story on another occasion out of court"); *see also State v. Perez,* 137 Wn. App. 97, 107, 151

P.3d 249 (2007) (Prior consistent statements have negligible probative value and are generally inadmissible because repetition does not make something true.). The *Lynch* court explained, "[i]f a witness were permitted to [repeat another witness' hearsay statements], then garrulity would supply veracity." *Lynch*, 176 Wn. at 351-52.

This analysis applies with particular weight in a case such as this, where the child was over ten years old at the time of trial, was described as "quite a smart young child" and an "old soul," and had no difficulty relating her story to the jury. II VRP 560:6-11.

Even assuming, *arguendo*, that some of B.B.'s out-of-court statements were admissible as child hearsay, the repetition of her statements by four different witnesses, Ms. Tolliver, Mr. Alazadi, Dr. Bensen, and Ms. Singson, caused a prejudicial bolstering and vouching effect that far outweighed any minimal

probative value, and the Court of Appeals erred in declining to consider this argument on preservation grounds.

B. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO DR. BENSEN'S REPETITION OF B.B.'S HEARSAY STATEMENTS UNDER THE MEDICAL TREATMENT EXCEPTION.

Mr. Miyares was denied his constitutional right to effective assistance of counsel due to counsel's failure to object to Dr. Bensen's repetition of B.B.'s out-of-court statements. The Court of Appeals rejected this argument because (1) a hearsay proponent need not present evidence of intent to seek medical treatment to qualify under the medical treatment exception, and, alternatively, (2) "B.B. made statements to Dr. Bensen for purposes of obtaining medical treatment." Attach. A at 15. However, controlling law is clear that statements made for the purpose of pursuing criminal prosecution are not admissible under the medical treatment exception, and the record makes clear that B.B.'s statements were made solely for the purpose of criminal prosecution.

A defendant claiming ineffective assistance based on counsel's failure to object must show (1) an absence of legitimate tactical reasons for failing to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

The key issue in this case was B.B.'s credibility. There can be no legitimate tactical reason for not objecting to Dr. Bensen's hearsay testimony, which served only to bolster B.B.'s credibility.

Additionally, an objection should have been sustained. Statements made for the purpose of medical diagnosis or treatment are admissible as an exception to the hearsay rule under ER 803(a)(4). However, accusatory statements from a child are only admissible under the medical treatment exception if the declarant's motive was consistent with promoting

treatment and the provider reasonably relied on the statements. *State v. Carol M.D.*, 89 Wn. App. 77, 85, 948 P.2d 837 (1997), *rev'd and remanded for reconsideration on other grounds sub nom, State v. Doggett*, l36 Wn.2d 1019, 967 P.2d 548 (1998). In *Carol M.D.*, the Court held that because the child did not desire medical assistance, the requisite motivation to seek medical treatment could not be presumed. *Id*. at 86-87.

The Court of Appeals noted that the *Carol M.D.* holding has been relaxed, stating it is "'not per se a requirement that the child victim understand that his or her statement was needed for treatment if the statement has other indicia of reliability.'" Attach. A at 14 (quoting *in re Personal Rest. of Grasso*, 151 Wn.2d 1, 20-21, 84 P.3d 859 (2004); *State v. Ashcraft*, 71 Wn. App. 444, 457, 859 P.2d 60 (1993)). However, the Court of Appeals took this a step further and held that the medical treatment exception could be applied even in the absence of any need for medical treatment.

In *Grasso*, the Court held the exception could apply if "it appears unlikely that the child would have fabricated the cause of *the injury*" even in the absence of evidence that the child made the statement for the purpose of medical treatment. 151 Wn.2d at 1, 20-21 (emphasis added). Thus, while the rule in *Carol M.D.* may have been relaxed, there must still be an injury for which treatment is sought.

In this case, Dr. Bensen testified that there was "no evidence of any trauma to the genital area." II VRP 642:5-643:2. II VRP 642:5-14. To apply the medical treatment exception to situations in which a child with no injury is taken to a physician at the behest of law enforcement expands the exception beyond reasonable bounds.

Moreover, the Court of Appeals' additional conclusion that B.B. nonetheless "made the statements to Dr. Bensen for purposes of obtaining medical treatment" cannot be reconciled with the facts that (1) B.B. did not complain of any injury, (2)

B.B. was taken to the hospital a week after the incident, and (3) B.B. was only taken to the hospital at the behest of law enforcement. I VRP 467:25-468:21; II VRP 642:5-643:2. II VRP 642:5-14. For the Court of Appeals to infer on these basic facts that B.B. was seeking medical treatment is manifestly unreasonable.

Because there is insufficient evidence of a motivation consistent with seeking medical diagnosis or treatment, and no evidence of an injury, B.B.'s statements to Dr. Bensen should not have been admitted under the medical treatment exception, and defense counsel was ineffective for failing to raise this objection.

C. THE ERRONEOUS ADMISSION OF B.B.'S OUT-OF-COURT STATEMENTS WAS NOT HARMLESS AND WAS PREJUDICIAL.

The foregoing errors were not harmless and were prejudicial. The State did not challenge the element of prejudice in the appellate proceedings, instead relying solely on its

assertion that no errors occurred. Because the trial and appellate courts erred, reversal is necessary.

"'The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.'" *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004) (quoting *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). Additionally, a defendant is harmed by counsel's failure to object 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 Wn.2d 647, 672-73, 101 P.3d 1 (2004).

In this case, the improper admission of four hearsay statements was not minor – it represented the crux of the State's case. The evidence against Mr. Miyares consisted solely of B.B.'s accusation. There was no physical or other corroborating evidence. Given that the admission of these statements allowed

B.B.'s allegations to be reiterated and bolstered throughout the trial, rather than heard just once during her trial testimony, there is a reasonable probability the outcome of the trial would have been different if not for the error, and reversal is required. This conclusion is supported by the fact that the first trial ended in a hung jury. CP 159-160.

D. THE CUMULATIVE ERRORS DEPRIVED MR. MIYARES OF HIS RIGHT TO A FAIR TRIAL.

"Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless." *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

In this case, the errors described above would each, individually, warrant reversal of Mr. Miyares' convictions. Even if the Court concludes otherwise, Mr. Miyares was denied his right to a fair trial by the cumulative errors in this case, necessitating reversal of his convictions and remand for a new trial.

VI. CONCLUSION

For the foregoing reasons, Mr. Miyares respectfully requests that this Court grant discretionary review of the Court of Appeals' decision pursuant to RAP 13.4 and reverse Mr. Miyares' convictions and sentence.

This document contains 4,945 words excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 21st day of December, 2022.

/s/ John Henry Browne
John Henry Browne, WSBA #4677
Attorney for Appellant

ATTACHMENT A

FILED
10/24/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ALEX MIYARES, Appellant	)	No. 83408-8-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, C.J. — Alex Miyares appeals his convictions for first degree child molestation, arguing the trial court erred in admitting hearsay statements made by the child victim, that he received ineffective assistance of counsel, and that he was denied the right to present a defense. We disagree and affirm his conviction.

FACTS

In 2018, seven-year-old B.B. lived with her adoptive mother and biological aunt, Kaylyn Tolliver,[1] Tolliver's partner, Taki Alazadi, their infant son, and two other adults, Tolliver's childhood friend, Ashlee Hoyt, and her boyfriend, Miyares. After Hoyt moved out of the home, Miyares continued to live in a bedroom on the lower level of Tolliver's home.

[1] B.B.'s biological mother, Tolliver's sister, struggled with drug addiction and B.B.'s biological father passed away years before.

B.B., who had a very close relationship with Hoyt, had developed a good relationship with Miyares. Miyares watched B.B. while Tolliver and Alazadi were working and helped out by picking her up from school. Miyares took B.B. on outings to play golf or to visit his mother. And B.B. often watched movies with Miyares in his bedroom, sitting with him on his bed with the door closed.

On the evening of December 22, 2018, B.B. and Miyares were sitting on his bed watching television. When Tolliver went to Miyares' room to tell B.B. it was time for bed, she saw Miyares and B.B. both sit up "very quickly off the bed like they were surprised." Initially, Tolliver thought they reacted this way because Miyares was smoking hookah and B.B. was not allowed to be around him when he smoked. After a brief conversation, Tolliver and B.B. went upstairs and went to bed.

The next morning, feeling uneasy, Tolliver asked B.B. why she and Miyares were startled and jumped up so fast when she walked into the room. B.B. began to cry and told Tolliver "Alex touches me." When Tolliver asked what that meant, B.B. explained "like my private parts." Tolliver confirmed that B.B. understood the seriousness of her accusation. Tolliver testified that B.B. was very upset, crying, and unwilling to disclose any details.

Tolliver shared these allegations with Alazadi, who asked B.B. to explain to him what had happened. According to Alazadi, B.B. told him that Miyares had touched her inappropriately. Like Tolliver, Alazadi confronted B.B. about the severity of her allegations and asked her repeatedly if she was sure. She

responded that she was. She also told Alazadi that Miyares told her not to tell anyone.

After reporting the incident to the police, and at the police suggestion, Tolliver took B.B. to a hospital where Dr. Randal Bensen examined her. During this examination, B.B. told Dr. Bensen that the most recent episode of inappropriate touching had occurred the prior week. The examination revealed no evidence of any physical trauma to B.B. Child Forensic Interviewer Danielle Singson also interviewed B.B. In that interview, B.B. again disclosed that Miyares had touched her inappropriately.

The State charged Miyares with three counts of child molestation in the first degree. Prior to trial, the State sought to admit out-of-court statements B.B. made to Tolliver, Alazadi, and Singson under RCW 9A.44.120. Following an evidentiary hearing, the trial court concluded that the criteria set forth in *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984) weighed in favor of admissibility and admitted these statements.

Miyares' first trial in October 2020 ended in deadlock. The State retried Miyares in September 2021. The trial court adopted the court's prior ruling regarding the child hearsay and admitted the same testimony.

Miyares testified at the first, but not the second, trial and denied ever touching B.B. The State read this testimony to the jury at the second trial. The jury convicted Miyares of two counts of first-degree child molestation and acquitted him of the third charge. He was sentenced to 75 months to life.

Miyares appeals.

ANALYSIS

1. Child Hearsay

Miyares argues the trial court erred in admitting statements that B.B. made to Tolliver, Alazadi, and Singson under RCW 9A.44.120 because those statements lacked sufficient indicia of reliability. We disagree.

RCW 9A.44.120 allows a trial court to admit child hearsay if it is made by a child under the age of ten and describes any act of sexual contact performed or attempted with or on the child by another, if the trial court concludes, after a hearing, "that the time, content, and circumstances of the statement provide sufficient indicia of reliability," and the child testifies at the proceedings.

In determining the reliability of child hearsay statements, the trial court considers the following nine *Ryan* factors:

> (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statement; (4) the spontaneity of the statements; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statement contained express assertions of past fact; (7) whether the declarant's lack of knowledge could be established through cross-examination; (8) the remoteness of the possibility of the declarant's recollection being faulty; and (9) whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement.

State v. Kennealy, 151 Wn. App. 861, 880, 214 P.3d 200 (2009) (footnote omitted) (citing *Ryan*, 103 Wn.2d at 175-76). No single factor is dispositive, but a statement is not considered reliable unless the factors are "substantially met." *Id.* at 881.

We review a trial court's decision to admit child hearsay for abuse of discretion. *State v. Woods*, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005). We review the trial court's findings of fact for substantial evidence. *State v. A.X.K.*, 12

Wn. App. 2d 287, 298, 457 P.3d 1222 (2020). Miyares challenges the court's findings for the first, second, fourth, fifth, and ninth factors.

Motive to Lie

Miyares contends the trial court erred in finding that B.B. had no apparent motive to lie about the molestation. We disagree. The evidence presented to the court supports the trial court's finding. Tolliver and Alazadi both testified that B.B. and Miyares were close, often spent time together, and had a good relationship. B.B. never expressed any anger or resentment toward Miyares. This evidence supports the trial court's finding that "[n]o evidence tends to indicate there is any apparent motive for [B.B.] to lie."

Miyares nonetheless asserts that B.B. had three potential motives to lie. First, he contends that B.B. had a motive to accuse Miyares of misconduct in order to evade responsibility for violating Tolliver's rule prohibiting her presence while the adults were smoking. While the adults in the house occasionally smoked hookah, Tolliver prohibited B.B. from being present while hookah was out. Despite this rule, on the night Tolliver found B.B. in Miyares' room, Miyares had his hookah pipe out while B.B. was present.

Second, Miyares contends that B.B. had a motive to lie so she could copy her friend, Caytlyn, who had told B.B. she had experienced similar but unrelated sexual misconduct.

The problem with these arguments is that neither party presented any evidence during the child hearsay hearing that Miyares was smoking in B.B.'s presence or that B.B. was violating a rule by being in his room while Miyares

smoked, or that Caytlyn had told B.B. about being sexually molested. The court could not have considered this evidence in conducting its *Ryan* analysis because the evidence was not before it.

Third, Miyares argues that B.B. had a motive to lie simply to attract attention from adults. The evidence does support a conclusion that B.B. had what Tolliver described as a "chaotic" upbringing, due to a mother addicted to drugs and B.B. being removed her from her mother's custody on two occasions. But there is nothing in the record to suggest that these life experiences led B.B. to act out to get attention.[2] The trial court correctly found that "[n]o motive was developed or brought to light in either direct or cross examination."

Because the evidence supports the trial court's finding that B.B. had no apparent motive to lie, the court did not abuse its discretion in concluding the first *Ryan* factor weighed in favor of admitting B.B.'s out-of-court statements.

B.B.'s General Character

Next, Miyares argues nothing in the record establishes B.B.'s reputation for telling the truth and that the record establishes that B.B. was raised in a "chaotic" environment that "would necessarily inhibit a child's ability to distinguish between fact and fiction." The record does not support this argument.

The trial court found that "[B.B.'s] general character favors admissibility of statements. No evidence suggests any reputation for not telling the truth." Substantial evidence in the record supports this finding. B.B. testified that she

[2] Miyares contends we should consider evidence that came out at trial in evaluating the trial court's *Ryan* findings. But we find no indication that Miyares asked the trial court to reconsider the child hearsay ruling after the first, and before the second trial, based on evidence that came out at the first trial. Nor do we find any indication he did so at any point during the second trial.

understood the difference between a truth and a lie, described each for the court, and explained that it is very bad not to tell the truth. Tolliver testified that B.B. was "a very outgoing child," "helpful" and "very mature for her age," who understood the difference between a truth and a lie. Alazadi, who had known B.B. since she was three years old, testified that B.B. was not known to lie and that, to his knowledge, she had not lied to him or to anyone else.

Miyares does not explain how the trauma B.B. experienced in her childhood impacted her ability to tell the truth or led her to develop a reputation for being dishonest. There is certainly no evidence to suggest either was the case. The trial court did not abuse its discretion in finding that this factor weighed in favor of reliability.

Spontaneity of the Statements

Miyares next argues that B.B.'s disclosure was not spontaneous because she first made the accusation in response to Tolliver's questions. But for purposes of this factor, statements made by a child victim of sexual assault are considered spontaneous if they are not the result of leading or suggestive questions. *State v. Lopez*, 95 Wn. App. 842, 853, 980 P.2d 224 (1999) (quoting *In re Dependency of S.S.*, 61 Wn. App. 488, 497, 814 P.2d 204 (1991)).

The trial court found that B.B.'s disclosures were the product of "open-ended questions that did not infer any inappropriate conduct had occurred." It also found that none of the questions posed to B.B. "carried any information as if to suggest answers" to her.

There is substantial evidence to support these findings. B.B. first disclosed that Miyares had touched her after Tolliver questioned B.B. about her behavior the night before. Tolliver testified that she did not ask B.B. anything specific, but asked only "What was—why did you act that way when I walked into the room?" When B.B. disclosed that "Alex touches me," Tolliver then asked "what does that mean?" Similarly, Alazadi testified that B.B. made the same disclosure to him after he asked her what had happened. Singson testified that she used open-ended questions to interview B.B. in order to avoid influencing B.B.'s disclosure. None of these witnesses posed leading or suggestive questions to B.B. The trial court did not err in finding that B.B.'s statements were spontaneous.

Relationship Between B.B. and the Witnesses

Miyares next argues that B.B. did not make her disclosures to a neutral party, a fact weighing against admission. The trial court, however, found that Tolliver, Alazadi, and Singson would testify that they heard the same statements describing allegations of sexual contact. While Tolliver and Alazadi are arguably not neutral parties, they were not the only people to whom B.B. made disclosures. B.B. gave a detailed disclosure to Singson, a child forensic interviewer with whom she had no prior relationship, that was the same as her disclosure to Tolliver and Alazadi. The record does not suggest that B.B.'s relationship with Tolliver or Alazadi impacted the reliability of her out-of-court statements under these circumstances.

Circumstances of Disclosure

Finally, Miyares contends that the circumstances of the disclosures suggest that B.B. may have misrepresented Miyares' involvement because there was evidence indicating that B.B. was exposed to other sexual matters, which may have influenced her disclosure.

The trial court found that there was no evidence in the record to suggest B.B. misrepresented Miyares' identity, had a motive to get him into trouble, or wanted to divert attention from herself. It also found that while B.B. had a chaotic upbringing before the age of 6, "there is nothing to explain why a 9 year old would understand sexual matters. There is no evidence to indicate she was exposed to any sexual matters." These findings are also supported by the evidence at the child hearsay hearing.

At trial, Alazadi testified that B.B. had unrestricted access to the internet and Miyares testified that he sometimes caught her watching "explicit content, as in, like, hip-hop music videos." Tolliver testified that B.B.'s friend, Caytlyn, had confided in B.B. that she had also been the victim of an inappropriate touching. But none of this evidence was before the court at the time it ruled on the admissibility of the child hearsay and Miyares never asked the court to reconsider its ruling based on this new evidence.

The State presented sufficient evidence to meet the *Ryan* factors to establish the reliability of the child hearsay statements. The trial court did not abuse its discretion in admitting this evidence at trial.[3]

[3] Miyares also argues that, even if the statements were admissible child hearsay, they were nonetheless inadmissible under ER 403 because the repeated recitation of B.B.'s allegations

2. Ineffective Assistance of Counsel

Next, Miyares contends that he received ineffective assistance of counsel due to his counsel's failure to object to Dr. Bensen's repetition of B.B.'s out-of-court statements. We reject this argument.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant's right to effective assistance of counsel. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). To prevail on this claim, Miyares must establish that counsel's performance was deficient and resulted in prejudice. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We strongly presume that counsel's representation was effective. *Grier*, 171 Wn.2d at 33. To rebut this presumption, "the defendant bears the burden of establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance.'" *Id.* at 42

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amounted to impermissible vouching. Miyares, however, did not preserve this evidentiary objection and we will not address it. It is the general rule that appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Miyares did not raise the issue at the child hearsay hearing and he made only two vouching objections during trial. Both of the objections were made in response to witness testimony that they had asked B.B. if she was sure of what had happened and being honest about it. These objections are unrelated to the argument Miyares now advances on appeal. At no point during trial did Miyares argue that admitting testimony about B.B.'s disclosures from several different witnesses amounted to impermissible vouching or that it was needlessly cumulative. Thus, Miyares did not preserve this argument under ER 403. *See State v. Powell*, 166 Wn.2d 73, 83, 206 P.3d 321 (2009) (failure to object to testimony at trial under ER 403 constitutes failure to preserve evidentiary issue for appeal).

(emphasis omitted) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). Where the appellant claims ineffective assistance based on his trial counsel's failure to object, he must show that such an objection, if made, would have been successful in order to establish deficient performance. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 394 (1998). The decision regarding whether and when to object to trial testimony is a "classic example[ ] of trial tactics." *State v. Crow*, 8 Wn. App. 2d 480, 508, 438 P.3d 541 (2019).

Miyares contends that his counsel was deficient in failing to object to Dr. Bensen's testimony relaying B.B.'s disclosure because the statements contained inadmissible hearsay. We reject this argument because the challenged testimony was admissible under ER 803(a)(4) and it is unlikely the trial court would have sustained the objection.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Hearsay is inadmissible unless an exception or exclusion applies. ER 802. ER 803(a)(4) provides a hearsay exception for "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

"[T]he test for statements made for medical diagnosis or treatments considers the subjective purposes of both the declarant and the medical professional." *State v. Burke*, 196 Wn.2d 712, 740, 478 P.3d 1096, cert. denied, 142 S. Ct. 182, 211 L. Ed. 2d 74 (2021). A statement is reasonably pertinent to

diagnosis or treatment when "(1) the declarant's motive in making the statement is to promote treatment, and (2) the medical professional reasonably relied on the statement for purposes of treatment." *State v. Williams*, 137 Wn. App. 736, 746, 154 P.3d 322 (2007). Statements of fault are generally inadmissible, but depend on the context in which the statements are made. *Id*. Statements attributing fault to a member of the victim's household, however, may be pertinent to treatment if relevant to prevent recurrence of injury. *State v. Ackerman*, 90 Wn. App. 477, 482, 953 P.2d 816 (1998); *see also State v. Ashcraft*, 71 Wn. App. 444, 456, 859 P.2d 60 (1993) ("[I]n abuse cases, it is important for the child to identify the abuser in seeking treatment because the child may have possible psychological injuries and also may be in further danger, due to the continued presence of the abuser in the child's home.").

Dr. Bensen testified that, prior to examining B.B. in the emergency department, he had a conversation with her about what had occurred. He explained that this history "directs me into what areas I'm going to specifically concentrate on" during the examination. Dr. Bensen testified that, during this pre-examination conversation he learned that B.B. had told Tolliver "that a male roommate had been touching her in her private area," the most recent episode of which was the week prior to examination. He also testified that these statements assisted him in diagnosing and treating B.B.

Dr. Bensen confirmed that B.B. was not complaining of any pain or injury to her genital areas. He testified that B.B.'s vital signs were normal and he observed no trauma to the genital area. He also testified that he collected no evidence during

his examination of B.B. because his exam was intended to "make sure there is nothing emergent that needs to be addressed." Only after completing his medical examination did he refer B.B. to a sexual assault nurse examiner for a forensic examination.

Miyares argues that the trial court would have sustained a hearsay objection to this testimony because the State failed to show that B.B.'s motive in making the statements was to promote treatment rather than a criminal prosecution.[4] He relies on *State v. Carol M.D.*, 89 Wn. App. 77, 948 P.2d 837 (1997), *remanded sub nom. State v. Doggett*, 136 Wn.2d 1019, 967 P.2d 548 (1998), for the proposition that the State must present affirmative evidence that B.B. understood her statements would further diagnosis and treatment.

In that case, the defendants were charged with multiple sex offenses involving their four children, including nine-year-old M.D. *Carol M.D.*, 89 Wn. App. at 83. Relying on ER 803(a)(4), the court admitted the testimony of M.D.'s counselor, Cindy Andrews. *Id.* at 84. M.D. testified that she knew Andrews was her therapist, but did not know what Andrews was supposed to do. *Id.* at 86. The defendants argued on appeal that the State had failed to demonstrate that M.D. understood that her statements to Andrews were for medical treatment purposes. *Id.* at 84.

Division Three agreed, ruling that where a child declarant has not sought medical treatment, but makes statements to a counselor procured for her by a state social agency, the "record must *affirmatively demonstrate* the child made the

[4] Miyares does not contest that Dr. Bensen's testimony establishes that B.B.'s statements were reasonably relied on for treatment purposes.

statements understanding that they would further the diagnosis and possible treatment of the child's conditions." *Id.* at 86.

Miyares' reliance on *Carol M.D.* is misplaced. First, Washington courts have since recognized that it is "'not per se a requirement that the child victim understand that his or her statement was needed for treatment if the statement has other indicia of reliability.'" *In re Personal Rest. of Grasso*, 151 Wn.2d 1, 20-21, 84 P.3d 859 (2004) (quoting *Ashcraft*, 71 Wn. App. at 457). If there are other indicia of reliability or indirect evidence of corroboration, a finding that the child made statements for the purpose of receiving treatment is not necessary.

Here, the trial court found that B.B.'s statements to her aunt, her aunt's boyfriend, her grandmother, and the forensic interviewer were reliable because B.B. lacked an evident motive to lie, made her disclosures spontaneously, and had a positive relationship with Miyares. In addition to these findings, there was evidence that B.B. was extremely emotional while describing the incident to her aunt and wanted to leave the home she shared with Miyares because she had become afraid of him. Such behavioral changes constitute indirect corroboration of disclosures that support admissibility under ER 803(a)(4). *See State v. Swan,* 114 Wn.2d 613, 623, 790 P.2d 610 (1990) (child's behavior and emotional response deemed corroborative); *State v. Swanson*, 62 Wn. App. 186, 195, 813 P.2d 614 (1991) (behavioral changes and fear of defendant constitute indirect corroborative evidence).

Second, we can infer B.B.'s motive in speaking to the doctor was to obtain medical treatment. In *State v. Kilgore,* Division Two held:

> When the party is offering hearsay testimony through the medical diagnosis exception, *when the declarant has stated he or she does not know what the medical personnel to whom the statement was made does . . . the party offering the statement must affirmatively establish the declarant had a treatment motive.* Otherwise, as long as the declarant is not a very young child, courts may infer the declarant had such a motive.

107 Wn. App. 160, 184, 26 P.3d 308 (2001) (emphasis added). Our Supreme Court has affirmed that we may infer a victim's motive from testimony and the context in which an examination occurs. *Burke*, 196 Wn.2d at 741 ("[m]edical professionals often ask patients how their injuries are caused" and it is reasonable to believe that the victim understood the question "Can you tell me what happened?" as the starting point for a medical exam). Here, B.B. met with a medical doctor for a physical examination, not for the collection of forensic evidence. This context leads to only one reasonable inference—B.B. made statements to Dr. Bensen for purposes of obtaining medical treatment.

Miyares suggests that we must infer B.B.'s motives were purely forensic because Tolliver testified that "the sheriff we had talked to after everything said that we needed to take her to go get checked out." But unless a declarant's statements show that they spoke with medical professionals purely for a forensic purpose, a court may infer that the statements were made for a combination of purposes, including both medical and forensic purposes. *Williams*, 137 Wn. App. at 746-47. Here, even if B.B. had mixed motives in seeking medical treatment, the statement would still have been admissible under ER 803(a)(4). Because the trial court would likely have overruled any objection to Dr. Bensen's testimony, counsel's decision not to object was reasonable.

Even if the failure to object to Dr. Bensen's testimony constituted deficient performance, Miyares cannot establish prejudice. Prejudice exists if "'but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Estes*, 188 Wn.2d at 458 (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)).

Dr. Bensen testified that B.B. told Tolliver that a male roommate had inappropriately touched her "private areas." This single statement did not prejudice Miyares because the fact that B.B. reported the misconduct to Tolliver was undisputed at trial. Miyares cannot demonstrate that the outcome of the trial would have been different had this single sentence been excluded at trial. Because he cannot demonstrate either deficient performance or prejudice, Miyares has failed to demonstrate that he received ineffective assistance of counsel.

3. Right to Present a Defense

Miyares next argues that he was denied his right to present a defense when the court excluded evidence of (1) a similar sexual assault disclosure made to B.B. by her friend, Caytlyn; (2) B.B.'s chaotic upbringing; and (3) Miyares' temperament.

The United States Constitution and the Washington State Constitution guarantee defendants the right to present a defense. U.S. CONST., amend. VI, XIV; WASH. CONST., art. I, § 3; *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994). To determine whether the exclusion of evidence violates a defendant's constitutional right to present a defense, we engage in a two-part analysis. *State v. Arndt*, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019); *State v. Clark*, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017). First, we review a trial court's

evidentiary rulings for an abuse of discretion. *State v. Jennings*, 199 Wn.2d 53, 58, 502 P.3d 1255 (2022). A trial court abuses its discretion if no reasonable person would take the view adopted by the trial court. *Id.* at 59. Second, we determine whether such rulings violated a defendant's rights under the Sixth Amendment de novo. *Clark*, 187 Wn.2d at 648-49.

Caytlyn's Disclosure

Miyares first contends he was prevented from presenting his defense when the court precluded him from questioning B.B. about the details of a similar sexual assault disclosure made to her by her friend Caytlyn. We disagree.

The issue of Caytlyn's disclosure arose twice at trial, once during the cross examination of B.B. and again during the cross examination of Tolliver. B.B. testified that the first person she had told about Miyares touching her was her friend Caytlyn. Counsel for Miyares then asked if "prior to you telling her, had she told you that she had been touched by somebody?" to which the prosecutor objected on hearsay grounds. Miyares argued that this question was permissible to elicit "hue and cry" evidence. The court sustained the State's objection.

The trial court did not abuse its discretion in rejecting the "hue and cry" argument. That doctrine allows a *prosecutor* to introduce evidence that a victim of sexual assault made a timely report of the assault in order "to negate any inference that because the victim had failed to tell anyone she had been sexually assaulted, her later claim could not be believed." *State v. Martinez*, 196 Wn.2d 605, 610, 476 P.3d 189 (2020). The "hue and cry" doctrine would not have allowed Miyares to

elicit testimony from B.B. as to what Caytlyn had told her because Caytlyn's credibility was not at issue in this trial.

What Miyares probably intended was that he was not offering the evidence for the truth of the matter asserted but for the non-hearsay purpose of establishing B.B.'s state of mind at the time she made her disclosure to Tolliver. This became clear the second time the issue arose at trial, when Miyares was cross-examining Tolliver. Miyares asked if Tolliver was aware of Caytlyn's disclosure to B.B. and if she knew whether Caytlyn's allegations were similar to what B.B. had reported. The State objected on the grounds that what Caytlyn had told B.B. was irrelevant and constituted hearsay. During a short voir dire, Tolliver testified that she learned about Caytlyn's disclosure from the police, who told her it was similar to B.B.'s version of events. Tolliver testified, however, that B.B. had not shared any details about Caytlyn's experience with her.

The court ruled that the fact of the disclosure was admissible, because it was not being offered for the truth of the matter asserted but rather to show B.B.'s state of mind at the time of her own disclosure. The court also ruled that the details of Caytlyn's experience were inadmissible through Tolliver because, to the extent that Tolliver had any details, those details had come from the police and did in fact constitute hearsay. Miyares did not challenge this ruling and twice assured the court that he did not intend to offer the details of what had happened to Caytlyn. Miyares then elicited testimony from Tolliver, in front of the jury, that Caytlyn had disclosed to B.B. that she had been touched sexually as well.

We assume B.B., unlike Tolliver, had personal knowledge of the details of Caytlyn's disclosure. She, unlike Tolliver, would have been the proper witness to ask about those details. Had Miyares articulated the proper basis for admitting this evidence and made an offer of proof, the evidence may have been admissible if those details were in fact identical or substantially similar to B.B.'s disclosure. That information would have supported Miyares' argument that B.B. lied about her own experience and instead simply adopted Caytlyn's experience as her own.

But if Miyares had evidence that the two girls' experiences were similar, he made no offer of proof to that effect. We do not know what the "details" are that Miyares now claims he should have been allowed to elicit. ER 103(a)(2) provides that an evidentiary error may not be predicated on a ruling that excludes evidence unless "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." An offer of proof should (1) inform the court of the legal theory under which the offered evidence is admissible; (2) inform the trial court of the specific nature of the offered evidence so the court can judge its admissibility; and (3) create an adequate record for appellate review. *State v. Burnam*, 4 Wn. App. 2d 368, 377, 421 P.3d 977 (2018).

In this case, Miyares did not inform the court of the correct legal theory under which he sought to admit evidence from B.B., did not inform the trial court of the specific nature of the anticipated evidence, and did not create an adequate record for appellate review. Under these circumstances, we cannot conclude the trial court abused its discretion in sustaining the State's objection.

Next, we must assess whether the exclusion of the details of Caytlyn's disclosure violated Miyares' Sixth Amendment rights. *Clark*, 187 Wn.2d at 648-49. In assessing a constitutional challenge to a trial court's evidentiary decision, we must first determine if the evidence is at least minimally relevant. *State v. Orn*, 197 Wn.2d 343, 353, 482 P.3d 913 (2021). "If the evidence is relevant, the reviewing court must weigh the defendant's right to produce relevant evidence against the State's interest in limiting the prejudicial effects of that evidence to determine if excluding the evidence violates the defendant's constitutional rights." *Jennings*, 199 Wn.2d at 63.

Miyares argues that "a detailed description of Caytlyn's disclosure to B.B." was relevant to demonstrate "B.B.'s alternative means of acquiring age-inappropriate knowledge" and would have allowed the jury to "better assess B.B.'s credibility, which was the dispositive issue in the case." But without an offer of proof as to what "detailed description" B.B. would have provided, we cannot say that Caytlyn's experience was similar to what B.B. described or that Caytlyn provided B.B. with age-inappropriate sexual information. While the fact of disclosure was minimally relevant, Miyares fails to demonstrate that the details of Caytlyn's disclosure were minimally relevant. Without this showing, there is no need to reach the balancing test set out in *Jennings*.

Miyares relies on *State v. Carver*, 37 Wn. App. 122, 678 P.2d 842 (1984) to support his argument that exclusion of B.B.'s testimony violated his right to present a "logical explanation" for her statements. *Carver*, however, is distinguishable. In that case, the defendant, who was on trial for sexually assaulting his

stepdaughters, sought to introduce evidence that his stepdaughters had been sexually abused by their grandfather and a friend. *Id.* at 123. The trial court concluded that the rape shield statute, RCW 9A.44.020, applied and excluded the evidence. *Id.* at 123-24.

On appeal, this court reversed, concluding the rape shield statute did not apply because the defendant had not offered the evidence to attack the victims' character but to "to rebut the inference they would not know about such sexual acts unless they had experienced them with the defendant." 37 Wn. App. at 124. The court concluded that excluding this evidence "unfairly curtailed defendant's ability to present a logical explanation for the victims' testimony." *Id.* at 125.

Here, Miyares was able to present a logical explanation for B.B.'s testimony. The court permitted Miyares to present evidence that Caytlyn disclosed to B.B. that she had been the victim of sexual touching by permitting Tolliver to testify to this fact. And he was able to use that testimony to argue to the jury that B.B. was just trying to "copycat" what she heard from Caytlyn. Unlike *Carver*, the court's ruling limiting Miyares' cross examination of B.B. did not prevent Miyares from presenting his theory of the case because he was able to elicit the evidence he sought to introduce through Tolliver.

B.B.'s "Chaotic" Upbringing

Next, Miyares argues the trial court erred in preventing him from presenting evidence of B.B.'s upbringing, which he contends would have provided an alternative explanation of B.B.'s sexual knowledge.

At the pre-trial child hearsay hearing, Tolliver testified that both of B.B.'s parents struggled with drug addiction, B.B.'s father died of an asthma attack when she was three years old and, at the time of trial, B.B.'s mother was in prison. Tolliver also stated that the State had removed B.B. from her mother twice, resulting in a changing and "traumatic living situation." Tolliver testified that she "knew the circumstances [B.B.] was in and what she was going through" but did not know B.B.'s day-to-day life.

Tolliver repeated this testimony at trial. She explained that, beyond the general circumstances of B.B.'s living situation, she did not know details about B.B.'s daily life while living with her parents. Miyares then asked "I think it's safe to assume that [B.B.] saw a lot of things that maybe young children shouldn't see; is that correct?" The trial court sustained the State's objection to this question as calling for speculation.

The trial court did not abuse its discretion in sustaining this evidentiary objection. Pursuant to ER 602, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." The only evidence before the trial court demonstrated that Tolliver was unaware of B.B.'s daily activities when she lived with her biological parents. Therefore, any testimony that B.B. may have been exposed to things "young children should not see" would have been speculation. It is similarly speculative to suggest that B.B.'s parents exposed her to inappropriate *sexual* information. While there was evidence they had drug addictions, Miyares made

no offer of proof that the parents engaged in sexual conduct in front of B.B. or exposed her to age-inappropriate sexual information.

Nor did the trial court infringe Miyares' right to present a defense in excluding this testimony. Speculative testimony is not relevant. *State v. Dixon*, 159 Wn.2d 65, 79, 147 P.3d 991 (2006). Defendants have no constitutional right to present irrelevant evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Because information from a witness who lacks personal knowledge is not relevant, the court did not infringe Miyares' right to present a defense by sustaining the State's objection to this line of questioning of Tolliver.

Miyares' Temperament

Finally, Miyares argues the trial court erred in preventing Hoyt from testifying about Miyares' temperament—evidence he contends was admissible under ER 404(a)(1) and ER 405. We again disagree.

Under ER 404(a), "[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." ER 404(a)(1) provides an exception to this rule for "[e]vidence of a pertinent trait of character offered by an accused." Admissible character evidence may be presented through "testimony as to reputation." ER 405(a). To offer reputation evidence, the defendant must be able to lay a foundation showing that the evidence is "based on perceptions in the community," rather than the witness's personal opinion. *State v. Thach*, 126 Wn. App. 297, 315, 106 P.3d 782 (2005), *overruled on other grounds by State v. Case*, 13 Wn. App. 2d 657, 466 P.3d 799 (2020). "To establish a valid community, the party seeking to admit the

reputation evidence must show that the community is both neutral and general." *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993).

At trial, Miyares asked Hoyt, his former girlfriend, to describe his temperament for the jury. In responding to the State's ER 404 objection, Miyares clarified that he was seeking "[a] description of the defendant as a person. It is not offered for a defense in the case. . . . What I'm trying to do is create the response in the witness concerning his deportment, his demeanor, what type of person he is." The trial court sustained the objection, concluding

> It is character evidence. This witness cannot testify generally to this defendant's general character. . . .
>
> It's just a general testimony about his general character, which is not by way of reputation, because this witness by herself does not rise to the level of a community for which reputation testimony would be admissible.

This was not an abuse of discretion.

Miyares failed to present any argument that Hoyt was a member of neutral or generalized community and presented no evidence suggesting that Hoyt had knowledge of Miyares' reputation in that community. Hoyt's testimony regarding Miyares' temperament was inadmissible because it did not establish Miyares' reputation as required by the rules of evidence. The trial court did not err in sustaining the State's objection to this evidence.

Nor did the exclusion of this evidence infringe Miyares' right to present a defense. Evidence of a defendant's general character is irrelevant, as it does not make his guilt of child molestation any more or less probable. *See State v. Perez-Valdez*, 172 Wn.2d 808, 820, 265 P.3d 853 (2011) (noting that the State "correctly

argued that a general reputation for good character is not pertinent under ER 404(a)(1) to a specific element of . . . rape of a child."); *State v. Griswold*, 98 Wn. App. 817, 829, 991 P.2d 657 (2000), *abrogated on other grounds by State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003) (general moral character is not specifically pertinent to a child molestation charge). One person's opinion about Miyares' temperament is irrelevant to whether he molested a seven-year-old girl.

Because testimony by Hoyt concerning Miyares's general character was not admissible, Miyares was not denied his right to present a defense.

4. Cumulative Error

Finally, Miyares argues that the cumulative effect of the challenged errors deprived him of his right to a fair trial. The cumulative error doctrine requires reversal when the combined effect of several errors denies the defendant a fair trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). "The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial." *Id.* Because Miyares cannot show that multiple errors deprived him his right to fair trial, his cumulative error claim fails.

We affirm.

Andrus, C.J.

WE CONCUR:

Birk, J.

Bowman, J.

LAW OFFICES OF JOHN HENRY BROWNE, P.S.

December 21, 2022 - 12:29 PM

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