NO. 73699-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS LITTLE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TIMOTHY A. BRADSHAW

BRIEF OF RESPONDENT

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A. ISSUES

1. Evidence that someone else may have committed the crime is admissible only if the defendant can show a nexus between the other person and the crime. An initial report wrongly identified the perpetrator of the crimes as Little's father. The victims' maternal grandfather, "Papa," is roughly the same age as Little's father, but no evidence linked him to the offenses. Did the trial court properly exercise its discretion in refusing to admit "other suspect" evidence that "Papa" was the perpetrator?

2. Child hearsay statements are admissible if the Ryan factors are substantially met. The statements made by the victims to a CPS worker, police officer, forensic interviewer, and their mother did not result from leading questions; the girls had no apparent motive to lie; there was no evidence suggesting untrustworthy character; the statements were heard by multiple parties; and there were other indicia of reliability surrounding the statements. Did the trial court properly exercise its discretion in admitting the statements?

3. Hearsay statements made for the purpose of medical diagnosis and treatment are admissible. The child victims made statements about the crimes to a registered nurse who was conducting genital exams, the purposes of which were to determine whether any injuries had been

sustained and whether any diseases had been contracted through exposure to bodily fluids. Did the trial court properly exercise its discretion in admitting the statements?

4. Has Little failed to show that the prosecutor in rebuttal closing argument committed reversible misconduct by referring to a defense argument as "cagey"? Has Little also failed to prove that the prosecutor referred to Little's exercise of his right not to testify? And, if that reference occurred, was it harmless?

5. A defendant is entitled to an evidentiary hearing on whether his attorney prevented him from testifying if he presents substantial, specific, and credible evidence that his right to testify was violated. In the absence of such proof, it is presumed that a defendant elected not to take the stand on advice of counsel. Little personally assured the trial court that he understood he had an absolute right to testify, and a jail phone call shows that Little believed there was reasonable doubt in the case and that he made a strategic decision not to take the stand. Did Little fail in his burden to prove he was entitled to an evidentiary hearing?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Nicholas Little was charged with six counts of Child Molestation in the First Degree. CP 13-15. He was charged with two

counts relating to each of three children under 12 years old: A.M., J.M., and H.M. Id.

After an extensive pretrial hearing, the trial court granted the State's motion to admit several hearsay statements made by the three child victims, who are sisters, to a Child Protective Services social worker, a police officer, a forensic interviewer, and their mother. 7RP[1] 36-45. The trial court also admitted hearsay statements made for the purposes of medical diagnosis or treatment by the three girls to a sexual assault nurse. 11RP 154-55, 166-67. Also, the trial court granted the State's motion to exclude "other suspect" evidence. 5RP 110-12.

The jury found Little guilty of all six counts of Child Molestation in the First Degree. CP 71-76. The trial court sentenced Little to the high end of the standard range — 198 months. CP 408-20.

2. SUBSTANTIVE FACTS

Sherri Kidney is the mother of three daughters, A.M., who was ten years old at the time of the trial, and twins, H.M. and J.M, who were eight. 10RP 50-51. In 2010, Kidney was introduced to Nick Little by his sister, a college classmate and friend of Kidney's. 10RP 61. By early 2011,

[1] The verbatim report of trial court proceedings consists of 19 volumes, which will be referred to in this brief as follows: 1RP (9/22/14); 2RP (9/23/14); 3RP (9/24/14); 4RP (9/29/14); 5RP (9/30/14); 6RP (10/1/14); 7RP (10/2/14); 8RP (10/6/14); 9RP (10/7/14); 10RP (10/8/14); 11RP (10/9/14); 12RP (10/13/14); 13RP (10/14/14); 14RP (10/15/14); 15RP (10/16/14); 16RP (10/20/14); 17RP (10/21/14); 18RP (10/22/14); 19RP (10/23/14).

Little was spending four or five nights a week at the apartment Kidney shared with her girls. 10RP 66. In June, 2012, Kidney began a graduate program at the University of Washington. 10RP 69. Kidney and Little were discussing marriage, so in August they all moved into a three-bedroom duplex in West Seattle. 10RP 78-80. Kidney believed Little to be "a good, supportive father figure," and she could see that he loved the girls and they enjoyed being with him. 10RP 70-72. Kidney spent four to five days a week at the UW campus. 10RP 108-09, 127. Even while at home she would often isolate herself to do homework. 10RP 115-17. Whenever she was away, Little was "in charge" and had authority to discipline the girls. 10RP 140-41.

In the spring of 2013 her twins met and became "instant best friends" with a neighborhood girl, H.B. 10RP 138. The twins often played at H.B.'s house. 10RP 138. H.B. testified that while playing at her house the twins told her a secret and made her promise not to tell. 8RP 125, 130. The twins told her that Little would pull their pants down, pull his own pants down, and have them lie on his stomach with his penis sticking between their legs. 8RP 127. The twins also told her that Little made them put their mouths around his penis. 8RP 128. They also told her that he made them shake his penis until "bubbly white stuff came out." 8RP 128. Even though H.B. had promised not to tell, about four or five

days later she told her mother. 8RP 131. H.B's mother reported the matter to Child Protective Services. 8RP 75-76.

After receiving the report, CPS caseworker Ana Mejia went to the elementary school attended by all three sisters. 8RP 179. The twins, H.M. and J.M., both denied that they had been molested. 8RP 191, 204. However, A.M. told Mejia that Little had been touching her private parts. 9RP 39. Mejia called the police and later that day, April 29, 2013, Seattle Police Officer Willie Askew met and interviewed A.M. in the principal's office at her elementary school. 15RP 50-53. A.M. told Askew that Little had been touching her chest and vagina with her clothing off for about a year. 15RP 66-67, 70. She also told him, verbally and with motions, that Little had been having her masturbate him. 15RP 69-71.

Two days later, Carolyn Webster, a child forensic interview specialist, conducted videorecorded interviews of all three children. 12RP 103, 106. All three videos were played for the jury. Exhibits 16, 17, 18. H.M. told Webster that on more than one occasion Little had pulled down her pants and made her "cuddle in an inappropriate way." Ex. 18; 12RP 129-30. Little made her lie on top of him, "belly to belly," and shake. Ex. 18; 12RP 131-32. After the shaking, Little would tell her that it felt good, that he loved her, and would then let her go watch TV. Ex. 18; 12RP 137.

J.M. told Webster that more than once Little had pulled down his pants and put his penis between her legs. Ex. 17; 12RP 161-62. He told her not to tell anyone or she would be in a world of hurt. Ex. 17; 12RP 170. J.M. described Little ejaculating. 17RP 175-76.

A.M. told Webster that Little had been molesting her for more than a year. Ex. 16; 12RP 198. He made her touch his penis. Ex. 16; 12RP 199. He penetrated her anally with his penis. Ex. 16; 12RP 201, 205-11, 237. He had her masturbate him. Ex. 16; 12RP 202. On multiple occasions he tried to put his penis in her mouth. Ex. 16; 12RP 215-19.

Because of the disclosures all three children underwent genital examinations by a registered nurse. During the course of their examinations, A.M. and J.M. disclosed Little had molested them and they described him ejaculating. 11RP 154-55, 166-67. H.M. did not disclose any molestation to the nurse. 11RP 163.

All three of the children testified at the trial. H.M. testified that Little had touched her private parts with his hand, and that more than one time when they were on the couch Little touched her private part with his private part. 13RP 118, 120-21. She also testified that the same thing happened sometimes when they were in her mom's bed. 13RP 122-24.

J.M. testified that once on the couch Little had put his private part (that he "uses to go to the bathroom") between her legs, touching her

private part. 9RP 48-52. Neither of them had clothes on and Little was "moving fast" while J.M. was still. 9RP 52. She testified that the same thing happened more than once in her mother's bedroom. 9RP 59-60, 71. After Little touched her private part with his, J.M. saw something white coming out of his private part. 9RP 62.

A.M. testified that once on the couch Little touched her private parts. 13RP 170-71, 175. She had a great deal of difficulty answering questions about Little, frequently responding that it was too hard, or that she was scared. E.g., 13RP 173-76, 180-81, 184-85. She was able to say that once when alone with Little in the bedroom he asked her to touch his penis. 13RP 188.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXCLUDED "OTHER SUSPECT" EVIDENCE.

Little argues that the trial court erred by excluding evidence that Sherri Kidney's father Alan Kidney, known to the three child victims as "Papa," was another suspect in the molestation of the girls. But the facts and circumstances proffered by the defense in support of this "other suspect" evidence were insufficient to establish the required nexus between "Papa" and the crimes. Thus, the trial court properly exercised its discretion in excluding the evidence.

a. Relevant Facts.

The first disclosure of sexual abuse was made by the twins to their playmate H.B. At the pretrial child hearsay hearing, H.B. testified that the twins had told her the name of the person who had molested them, but that she could not remember whether they said it was "Nick" or "Doug." 3RP 183-85. She also testified that she could not remember when she told her mother whether she had said that it was Nick or Doug. 3RP 184-85. H.B. got the names of Nick and Doug mixed up because she really didn't know them at all. 3RP 185. Earlier, in a defense interview, H.B. had said that she told her mom that the twins had said "Doug," but that she might have been confused and the twins might have really said "Nick." Id.

The initial report from H.B.'s mother to CPS indicated that the twins lived with their mother and her boyfriend, and that the perpetrator was "the boyfriend's father." 5RP 80. H.B.'s mother also reported that the boyfriend's father "lives about one mile from the family." Id.

The twins' mother, Sherri Kidney, testified that her father, Alan Kidney, was known to her girls as "Papa." 5RP 104. For a two to three week period in 2013, "Papa" lived with Kidney, Little and the girls in their home in West Seattle. 5RP 104-05. He also had a trailer "a mile or two" from the residence. 5RP 105. Ms. Kidney testified that Little's father, Doug, lived "half a mile or a mile" away from their residence. 5RP 106.

The State moved in limine for an order excluding "other suspect" evidence, specifically, any suggestion that Ms. Kidney's father, "Papa," had molested the girls. CP 16-20. The trial court granted the State's motion, stating that "other suspect" evidence is not admissible unless there is "some combination of facts or circumstances that point to a nonspeculative link between the other suspect and the charged crime." 5RP 112. After assessing the evidence, the trial court stated:

> With that, what we have presently, we established earlier, would be Papa or grandfather's presence for two to three weeks in the family home, and then the disputed evidence about improper labeling and a person residing in Alki or the West Seattle area. With that record, there simply doesn't exist any chain of facts or circumstances. There is mere opportunity. There is not even motive. The State's motion is granted.

5RP 112. Thus, the trial court precluded the introduction of any evidence that Alan Kidney, the maternal grandfather known as "Papa," had committed the offenses.

b. There Was No Nexus Between "Papa" And The Molestations.

A criminal defendant has a right under both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution to present testimony in his own defense. The right is not absolute, however; a defendant has no right to have irrelevant

evidence admitted. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); State v. Maupin, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996).

Washington law on the admission of "other suspect" evidence is clear:

> While evidence tending to show that another party may have committed the crime may be admissible, before such testimony can be received there must be such proof of connection . . . or circumstances as tend clearly to point out someone besides the one charged as the guilty party.

State v. Russell, 125 Wn.2d 24, 75, 882 P.2d 747 (1994) (quoting State v. Kwan, 174 Wash. 528, 532-33, 25 P.2d 104 (1933)). In other words, the evidence must establish a *nexus* between the other suspect and the crime. State v. Mezquia, 129 Wn. App. 118, 124, 118 P.3d 378 (2005), review denied, 163 Wn.2d 1046 (2008).

Remote acts, disconnected and outside the crime itself, are not admissible for the purpose of showing that someone else committed the charged crime. State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932). "The '[m]ere evidence of motive in another party, or motive coupled with threats of such other person, is inadmissible, unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged.'" State v. Rafay, 168 Wn. App. 734, 801-02, 285 P.3d 83 (2012), review denied, 176 Wn.2d 1023 (2013) (quoting Kwan, 174 Wash. at 533).

In State v. Franklin, 180 Wn.2d 371, 379, 325 P.3d 159 (2014), our supreme court held that the Downs "train of facts or circumstances" standard remains good law. The Downs test requires that a "combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime." Franklin, 180 Wn.2d at 381. The defendant has the burden of showing that the "other suspect" evidence is admissible. Mezquia, 129 Wn. App. at 124. The admission or refusal of such evidence lies largely within the sound discretion of the trial court, and will be reviewed only for abuse of that discretion. Id.

Little argues that because his father, Doug, referred to in the appellant's brief as "a grandfather-like figure," was identified as the perpetrator in the original report to CPS, then Little should have been allowed to introduce evidence that the children's maternal grandfather, "Papa," committed the crimes. Aside from both men being "grandfather-like," Little points to the fact that "Papa" lived with the family for two to three weeks and lived about one mile away from the family's house.

The trial court, citing Franklin, correctly found a lack of nonspeculative evidence linking "Papa" to the crimes. The court pointed out that there was simply "mere opportunity" and not even motive. 5RP 112. There was no evidence or offer of proof by Little to show that "Papa" had ever exhibited a lustful disposition toward his granddaughters.

While the evidence from the pretrial hearing and trial never explained the initial CPS report's identification of "the boyfriend's father" as the perpetrator, there is no basis to conclude that the twins ever said that Papa had molested them. Miscommunication could have occurred in the twins' telling to their playmate, H.B., or in H.B.'s relating of the information to her mother. But, significantly, H.B.'s mother knew that her report was implicating Little's father and not the girls' maternal grandfather. H.B.'s mother had met and spoken to Little's father before making the report. 8RP 74-75. He had told her that he worked at the Safeway in West Seattle and had live in West Seattle for a long time. Id. Moreover, contrary to Little's assertion that the CPS report described where Papa lived rather than Little's father, Ms. Kidney testified that both men lived about a mile away from her family's house in West Seattle. 5RP 105-06.

The trial court did not err in precluding speculative evidence that "Papa" rather than Little had committed the charged crimes, but even considering the heightened harmless error standard, it is clear that admission of evidence relating to "Papa" would not have changed the outcome of the case. There was no evidence or offer of proof that Papa was anything other than a beloved grandfather to the girls, a man who had access to his granddaughters in a manner typical of that relationship. The very concept of "other suspect" evidence seems incongruous to multiple

offenses of child molestation covering charged time periods of 16 months. "Papa," for example, was not even present at the times and locations of some of the described incidents, such as the molestation of A.M. at the extended Little family's beach vacation at La Push and the molestation of A.M. on the trip to the Little family cabin near Crystal Mountain. Under these circumstances, the identity of the perpetrator was never truly the issue for the jury, but whether the charged perpetrator, Nicholas Little, had actually committed the offenses.

2. THE TRIAL COURT PROPERLY ADMITTED THE CHILD VICTIMS' HEARSAY STATEMENTS.

Little argues that the trial court improperly admitted hearsay statements the girls made to a child playmate, a police officer, a forensic interviewer, and their mother. Little's arguments are without merit. After an extensive pretrial hearing, the trial court assessed the Ryan[2] factors and found the statements supported by sufficient indicia of reliability. The court properly exercised its discretion by admitting the hearsay statements.

a. Relevant Facts.

The first disclosure of sexual abuse by any of the girls was made by the twins, H.M. and J.M., to their playmate, H.B. Eight-year-old H.B. testified at the pretrial child-hearsay hearing that she and the twins had

[2] State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984).

been in her bedroom playing a game of "telephone" when the twins nervously told her that they had a big secret to tell her. 3RP 150, 163-64. They made her promise not to tell anyone. 3RP 164-65. The twins told her that they would lie on their backs on top of Little with their legs scissored and with his penis between their legs. 3RP 162. They said his penis was sticking up and they would shake it until bubbly white stuff came out. 3RP 162. H.B. testified that J.M. was the one who started telling her, but that H.M. also then started telling her, and both girls told her parts of it. 3RP 173-74. During the conversation neither of the twins disagreed with the other as to what was being said. 3RP 175.

The allegations of abuse came to the attention of the authorities when H.B.'s mother called CPS and reported what her daughter had told her. The mother's report to CPS indicated that the perpetrator was "the mother's boyfriend's father." 4RP 42. It was in response to the report that on April 29, 2013, CPS social worker Anna Mejia went to the elementary school and interviewed the three children. 4RP 22-23. Mejia testified at the pretrial hearing that based on her training and experience she was mindful that children can be susceptible to leading questions and that her goal was to get accurate information by asking non-leading questions. 4RP 57-58. To Mejia, the twins denied that they had been molested. 4RP 35-36, 51. One twin, H.M., in response to a question by Mejia as to

whether there was anything she should know, said "my older sister [A.M.] thinks mom and Nick will be leaving us." 4RP 53. She said A.M. was always asking, "Mom, are you going to leave?" 4RP 53. The twins' older sister, A.M., after denying that Little's father Doug had touched her sexually, disclosed to Mejia that she had been sexually molested by Little. 4RP 62-63. Mejia testified that the disclosure came as follows:

> "Has anyone else touched your private parts?" [A.M.] nodded yes.
> "Who?" [A.M.] shrugged her shoulders.
> "Your mom?" [A.M.] nodded no.
> "Doug?" [A.M.] nodded no.
> "Nick?" [A.M.] nodded yes.
> "Tell me about this." [A.M.] stated, "We close the door and cuddle."

4RP 63. Mejia testified that she had said "tell me about this" rather than something like "tell me about Nick touching your private parts" because she didn't want to lead A.M. 4RP 65. A.M. then explained that sometimes the "cuddling" was without clothes on and that they touched each other's "private parts." 4RP 63-64. A.M. said that Nick had told her not to tell her mother or she would "flip out." Speaking of her mother, A.M. told Mejia, "I don't want her to be mad at me." 4RP 64. After A.M.'s disclosure, Mejia did not ask any follow-up questions because that is not the role of a CPS investigator. 4RP 69. After consulting with her supervisor, Mejia called police. 4RP 70.

Seattle Police Officer Willie Askew responded to the call and Mejia told him that A.M. had reported that she was being inappropriately touched at home by her mother's boyfriend. 1RP 90, 127. During some preliminary conversation with Askew, A.M.'s demeanor was pleasant, she was articulate, and she had no hesitation in speaking with the officer. 1RP 93-94. But when Askew asked her if she knew why the police were there, A.M. got teary-eyed and said yes. 1RP 127. Askew said something to the effect of, "I hear there is some unwanted touching that's going on in your family." 1RP 93-94. A.M. then paused, her face flushed, her eyes began to water, and she said "yes." Id.

Askew told A.M. that it was very important that she be as honest and truthful as she could. 1RP 96. A.M. then told the officer that for about a year Little had been touching her private areas (indicating both breasts and vaginal area) with her clothes off. 1RP 101-02, 110-11. In response to a question about what Little was having her do, A.M.'s eyes filled with tears and she made a motion that the officer described as her "jacking him off," which he clarified meant that A.M. indicated she masturbated Little. 1RP 105-06. CPS caseworker Mejia was present during the interview and also saw A.M. use her hand to mimic holding and masturbating a penis. 4RP 76-77. The officer stopped questioning A.M.

at that point because he believed probable cause had been established and he wanted sexual assault detectives to follow up. 1RP 107.

The girls' mother, Ms. Kidney, was then called to school because the children were going to be placed into the custody of CPS. 1RP 107-08. Officer Askew saw all three girls talking to their mother before they were taken. 1RP 108-09. A.M. was crying and repeatedly apologizing to her mother, saying it was her fault and that she was sorry. 1RP 109-10. The girls spent one night in temporary foster care and then were placed with Kidney's mother for the following night. 4RP 90-92.

On May 1, 2013, two days after the girls were taken from the school by CPS, Carolyn Webster, a forensic interviewer employed by the King County Prosecuting Attorney's Office, interviewed the three girls separately. 3RP 35-38. All of the interviews were videorecorded. The following are disclosures made by A.M. to Webster on the DVD admitted as State's Pretrial Exhibit 21:

- At La Push, in the cabin bedroom while others were at the fire having s'mores, Nick made her touch his "private part" and he pushed it "into my little thing where the poop comes out and it was really hurting." A.M. said she was whining and that Nick "spit on my butt" or "licked it" and "put a little slobber on it and made it more comfortable for me." He put his mouth on her butt and "it felt really weird." She had to dry her butt off with a towel so her mom wouldn't notice it was wet.
- Asked about Nick's private part, A.M. said: Sometimes it's squishy, but sometimes it's hard, and sometimes he makes me put

it in -- like, sometimes he, like, tries to put it in my mouth, but I say, "No."

- A.M. described being with Nick in the bedroom he shared with her mother. She would lie down naked on her back on top of him with her legs "trapping" his penis which was "sticking up." When she is in that position, "he pushes me up and down." Nick would say "I love you," and she would say, "I love you, too." Sometimes when this happened Nick would "pee." He would "pee" into a sock or towel so that her mom wouldn't find the bed wet.
- Webster asked, "What's going on when he pees?" A.M. responded: "It's like the last thing, like 'A-a-a-h.'"
- Sometimes Nick would touch her chest and say, "You're growing boobs."
- Coming back from sledding once while Nick was driving, he asked her to "touch it" and she masturbated his exposed penis (she indicates with a hand motion on the video). Then he had her get on his lap while he drove and she moved up and down and could feel his penis against her back. While this was happening the twins were in the backseat in their boosters.
- Sometimes Nick would put coconut oil on her back and rub his penis against it.
- Sometimes in her mother's bedroom Nick would have her stand up and bend over and he would put his penis against her "butt cheeks" on the outside of her butt. He rubbed his penis against her and would say "A-a-a-h."

The following are disclosures made by J.M. to Webster on the DVD admitted as State's Pretrial Exhibit 22:

- J.M. told Webster that when Nick does his "inappropriate cuddling" he pulls down his pants and takes his penis out and puts it between her legs. She said that he had done that more than one time. She said that she tries to get away, but he holds onto her and that he's strong.
- When asked to describe what it felt like when Nick had his penis between her legs, J.M. said, "Have you ever felt a rotten apple that's all bruised up but hasn't been eaten?"
- She said that white stuff "that he called sperm" came out of him, and that he used a sock around his penis.

- She said that all of the inappropriate cuddling occurred in Nick and her mom's bedroom except two times were on the couch.

The following are disclosures made by H.M. to Webster on the DVD admitted as State's Pretrial Exhibit 23:

- H.M. told Webster that Nick made her cuddle inappropriately, which she said involved climbing on top of him and shaking. When this happened she had no pants on and his were pulled down. He told her that it made him feel really good.
- It sometimes happened in the bedroom and sometimes on the living room couch under a blanket.
- H.M. told Webster that after the shaking Nick would say: "Thank you. I love you. That felt really good."

The girls' mother testified at the pretrial hearing that before CPS got involved she had no idea that her girls had been molested. 2RP 139-40. Regarding Little's relationship with the girls, Kidney testified that he seemed to genuinely care for all of the girls. 2RP 56. He was loving toward them, and the love was reciprocated by the girls. 2RP 56. Kidney had heard her daughters tell Little that they loved him. 2RP 56-57.

Kidney testified that she had been instructed by at least three people (a CPS worker, a police detective, and her own lawyer) not to question the girls about the sexual molestations. 2RP 94-95. She was instructed that if the children said anything to her she should just listen and tell them that she was sorry that it had happened and that they were safe now. Id. She testified that she had followed that advice. 2RP 95.

Once, after the disclosures to CPS and law enforcement, while playing a board game with her mom, A.M. said that at the cabin in La Push Nick had put his penis inside her "butthole" and that it had hurt really bad. 2RP 93. Kidney also kept a journal where she noted disclosures the girls made to her. One entry recorded: "[H.M.] and [J.M.] say he did it sometimes in our bed, but mostly on the couch in the living room if I was studying in the bedroom or gone or in the shower. The white stuff is icky and he would use a sock or a t-shirt to keep it off of the bed or couch." 2RP 106. Another time, H.M. told Kidney that "he made us do it until the white stuff came out." 2RP 113.

At the hearing, Kidney also described a conversation she had with all three girls in the car driving back from A.M.'s counseling session. 2RP 126-27. H.M. said that sometimes Nick would "make her put her mouth on it," and that it happened before school more than once. 2RP 127. And J.M. said that it had happened to her before school, too. 2RP 127.

Regarding her daughters' personalities and truthfulness, Kidney said A.M. was sweet and empathetic, but acknowledged that she had some separation anxiety and fear that her mother would leave her. 2RP 133-36. She said that if A.M. tries to boss her twin sisters around they are defiant. 2RP 182. Kidney said that all of the girls had lied, but only about simple things like whether they had cleaned their room or brushed their teeth, or

whether they were fighting with their sisters and who started it. 2RP 183-84. When this happened she would explain the importance of telling the truth. 2RP 184. Kidney could think of no instances when the girls had lied about anything important. 2RP 184.

After completion of the pretrial testimony, the trial court examined the Ryan factors in an extensive oral ruling. 7RP 36-46. The court admitted the statements the twins made to their playmate, H.B., and the statements the girls made to Mejia, Officer Askew, and Webster. 7RP 45. The court admitted some of the statements made by the girls to their mother, but excluded the statements made by the girls during the drive home from a counseling session because the court had questions as to the spontaneity of those statements. 7RP 41-42, 45.

b. The Trial Court Did Not Abuse Its Discretion By Finding That The Ryan Factors Supported The Admission Of The Child Hearsay Statements.

RCW 9A.44.120 governs the admissibility of a child sex abuse victim's hearsay statements. It states, in relevant part:

> A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13

> RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:
>
> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
>
> (2) The child either:
>
> (a) Testifies at the proceedings; or
>
> (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120.

The statute was enacted "to give trial courts greater discretion in determining the trustworthiness of a child victim's out of court statement," in recognition of the fact that the typical lack of witnesses other than the victim and perpetrator makes the sexual abuse of children one of the most difficult crimes to detect and prosecute. State v. C.J., 148 Wn.2d 672, 680-81, 63 P.3d 765 (2003).

In evaluating a Confrontation Clause challenge to RCW 9A.44.120 in a case where the child victim did not testify, the supreme court in State v. Ryan identified nine factors that it felt were useful in evaluating the reliability of a hearsay statement. 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). Since then, this Court has recognized that only the first five of those factors are truly helpful in evaluating the admissibility of a child's hearsay statements about sexual abuse. State v. Borland, 57 Wn. App. 7,

20, 786 P.2d 810 (1990), abrogated on other grounds by State v. Rohrich, 132 Wn.2d 472, 939 P.2d 697 (1997).

The first five Ryan factors are: (1) whether the declarant, at the time of making the statement, had an apparent motive to lie; (2) whether the declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) the spontaneity of the statement; and (5) whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness. C.J., 148 Wn.2d at 683-84; Ryan, 103 Wn.2d at 175-76. Not every Ryan factor need be satisfied in order for a child victim's hearsay statement to be admissible under RCW 9A.44.120. State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990). However, the Ryan factors must be "substantially met" in order for a statement to be demonstrated as reliable. State v. Kennealy, 151 Wn. App. 861, 881, 214 P.3d 200 (2009).

A trial court's ruling on the admissibility of child hearsay statements under RCW 9A.44.120 will not be overturned absent an abuse of discretion. Swan, 114 Wn.2d at 665. A trial court abuses its discretion only when no reasonable judge would have reached the same conclusion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012).

Here, Little challenges the trial court's admission of the twins' statements to their playmate, H.B., outside the context of the Ryan factors,

arguing only that the child hearsay statute should not have been applied because it was "impossible to determine whether the statements made by the twins were reliable because it is unclear which twin made which statement." Brief of Appellant (BOA) at 17. The trial court properly rejected that argument based on H.B.'s testimony. The court held:

> The Court is mindful of the arguments and the situation we have with [H.B.]; that is, her ability or inability to segregate statements between the twins. So I've looked at the record again on this and did my best to think this through, and the record reflects that most of these statements attributed to the twins by [H.B.], or her inference, at least, was that they were in unison, if not simultaneous, and quickly presented to her as adopted admissions.
>
> Moreover, [H.B.] well articulated the personality differences that she knows between the twins. She thinks they're dissimilar and can tell the difference, and she recalls [J.M.] encouraging [H.M.] to disclose. The disclosure was in the other's presence, in other words.
>
> Importantly, the Court has confirmed that it is sufficiently clear that each of the twins alleged molestation. The ambiguousness rests in the proportion and the details, not that only one was abused; and mindful of the other statements made to Ms. Webster, those present as subsequent consistent statements that underscore and support [H.B.]'s inference.

7RP 44-45. It was clear to the court that each of the twins had alleged molestation to H.B., to some extent in unison, and to some degree through adoptive admissions. As the court pointed out, a short time later the twins, consistently, both alleged molestation to Carolyn Webster, the forensic interviewer. The fact that there was some ambiguity as to details of H.B.'s

testimony goes to weight, not admissibility, and H.B. testified before the jury and was subject to cross examination. The trial court did not abuse its discretion in admitting the twins' statements through H.B. It cannot be said that no reasonable judge would have reached the same conclusion.

Little addresses a few of the Ryan factors in challenging the trial court's admission of child hearsay through three witnesses: Officer Askew, Carolyn Webster, and Sherri Kidney. Little is critical of CPS worker Ana Mejia's interview of A.M., claiming that she used leading questions that "contaminated" subsequent statements by the children, but, to be clear, Little does not appeal the trial court's admission of Mejia's testimony relating the hearsay statements of the children.[3] Regarding the three challenged witnesses, Little addresses the following Ryan factors: apparent motive to lie, spontaneity of the statements, the timing of the statement and the relationship between the declarant and the witness, and the surrounding circumstances.

Regarding the first of the Ryan factors, an "apparent motive to lie," Little argues that by telling the twins to tell the truth after they had denied to her that they had been molested, Mejia "signaled" the twins that they needed to change their stories. He also argues that by telling A.M., who

[3] At oral argument on the pretrial motion, Little conceded the admissibility of not just the twins' statements to CPS worker Ana Mejia, but also the admissibility of A.M.'s statement to Mejia. 5RP 130, 132-33, 140.

had disclosed abuse to Mejia, to tell the truth, Mejia somehow convinced her that she must continue to lie in order to be returned home to her mother. BOA at 18-19. These arguments are speculative and illogical and should be rejected. Mejia testified that after she had conducted the three interviews and the police officer had placed the girls in her protective custody, while driving the girls to her office she told them all that they would be interviewed again and it was important to tell the truth. 4RP 162. Then, when she saw them two days later at Carolyn Webster's interviews, Mejia again told the girls to tell the truth. 4RP 163.

There is no basis in the evidence to conclude that by simply being told to tell the truth each of these three children made up tales of abuse by Little when speaking to Officer Askew, Webster and their mother. Logically, Little's argument ignores the fact that the twins had already alleged abuse in the initial disclosures to H.B., and that A.M. had disclosed to Askew before Mejia told the children to all tell the truth in subsequent interviews. Fundamentally, these children had no motive to falsely incriminate Little, their mother's boyfriend and a father-figure to them to whom they each said "I love you." A.M. asked Mejia not to tell her mother because she didn't want her mother to be mad at her. When the girls were taken from the school in front of their mother they all sobbed and A.M., in particular, repeatedly apologized to her mother.

Little does not address the second Ryan factor, "whether the declarant's general character suggests trustworthiness." Here, there was no evidence that any of these three girls had ever lied about anything more significant than whether they had brushed their teeth. The trial court properly found this factor weighed in favor of reliability. 7RP 38-39.

Little also does not address the third Ryan factor, "whether more than one person heard the statements." Since the girls each made multiple statements to different witnesses, this factor clearly weighs in favor of reliability, as the trial court correctly found. 7RP 39; State v. Lopez, 95 Wn. App. 842, 853, 980 P.2d 224 (1999).

Little addresses the fourth Ryan factor, "spontaneity of the statements," in a very limited manner. This Court has held that "Ryan compels a less narrow definition of 'spontaneous'" than is used in other contexts, "one that considers the entire context in which the child makes the statement." State v. Henderson, 48 Wn. App. 543, 550, 740 P.2d 329 (1987). A child's response to a question that is neither leading nor suggestive qualifies as "spontaneous" in the context of the Ryan factors. Henderson, 48 Wn. App. at 550; Borland, 57 Wn. App. at 15.

Here, Little does not allege that either Webster or Kidney asked any leading questions; rather, he argues that a single leading question by Mejia to A.M. and one by Officer Askew should somehow result in this

Court holding that all the statements by all the children should have been excluded as unreliable by the trial court. BOA at 21.

First, the State does not concede that the questioning of A.M. by either Mejia or Askew was leading. The passage that Little alleges contaminated not just all of A.M.'s following statements, but somehow all the subsequent statements of the twins as well, occurred when A.M. first disclosed abuse to Mejia:

> "Has anyone else touched your private parts?" [A.M.] nodded yes.
> "Who?" [A.M.] shrugged her shoulders.
> "Your mom?" [A.M.] nodded no.
> "Doug?" [A.M.] nodded no.
> "Nick?" [A.M.] nodded yes.

4RP 63. In this context, when a reluctant child has indicated that she has been abused but shown an inability to verbally identify the perpetrator, Mejia's use of a list of persons who had access to the child did not suggest a desired response. This is demonstrated by the fact that A.M. did not respond affirmatively until the third person named by Mejia. When A.M. nodded that Little had touched her private parts, Mejia followed up with "tell me about this," specifically to avoid leading questions. 4RP 65.

Little also argues that Officer Askew improperly led A.M. His citation and argument is not an accurate characterization of the record. ("Officer Askew began his questioning of A.M. by asking what Mr. Little

had asked her to do. 1RP 122." BOA at 21.) In fact, Askew, who spoke to A.M. right after Mejia had spoken to her, engaged A.M. in preliminary conversation, during which the child was pleasant and articulate. Then the officer asked A.M. if she knew why the police were there, at which point the child began weeping. Askew, who had been briefed by Mejia, then said something to the effect of, "I hear there is some unwanted touching that's going on in your family." 1RP 93-94. This was nothing more than orienting the child, at which point she began to talk about Little having been touching her breasts and vaginal area. A.M. was already talking about what Little had been doing to her before Askew asked what Little had asked her to do. It was in response to that question that A.M. made the motion depicting masturbation, at which time Askew ended the interview because he knew he had probable cause to arrest.

There is no logical basis to conclude that even if there were any improper questions in the Mejia or Askew interviews of A.M., that fatal contamination spread to all of A.M.'s subsequent statements, and certainly not to the statements by the twins. Both Mejia and Askew took purposely limited statements before deferring to other professionals for follow-up — Mejia only to determine whether the children were in a harmful environment and Askew only to establish probable cause. A.M.'s statement to Carolyn Webster was consistent in that A.M. identified Little

as her abuser, but was far more thorough and detailed in descriptions of molestations than in her two earlier statements.

Regarding the fifth Ryan factor, "the timing of the declaration and the relationship between the declarant and the witness," Little argues that A.M.'s statements to Mejia and Askew were unreliable because A.M. did not have a trusting relationship with them. BOA at 22. Illogically, Little points to the fact that CPS and the police removed the girls from their home *after* A.M.'s statements to argue that A.M. couldn't trust the witnesses to whom she had disclosed. Of course, at issue is the nature of the relationship at the time the statements were made. That Mejia and Askew were both trained professionals actually enhanced the reliability of A.M.'s statements. Lopez, 95 Wn. App. at 853 (presence of professionals investigating child abuse enhances the reliability of the statements for purposes of determining admissibility under child hearsay rule).

Little cites Swan for the proposition that a CPS worker is not in a position of trust with a child declarant. Contrary to Little's assertion, Swan did not state that a CPS worker cannot be in a position of trust with a child, but rather that in that case the reliability of the child's statement to the CPS worker was enhanced because of the presence of the child's daycare teacher, with whom there was an obvious relationship of trust. Swan, 114 Wn.2d at 650. Other courts, assessing the fifth Ryan factor,

have found specifically that the presence of a CPS caseworker enhances reliability. State v. Young, 62 Wn. App. 895, 901, 802 P.2d 829 (1991).

Little also argues that the timing of the twins' statements to Carolyn Webster, coming two days after they had denied being abused when interviewed by Mejia, makes them unreliable. But Little is asking this Court to assume, with absolutely no supporting evidence, that in the intervening days the twins were persuaded to falsely accuse Little. In State v. Carlson, 61 Wn. App. 865, 872-73, 812 P.2d 536 (1991), the court held that a trial judge may find a child's hearsay statements to be unreliable on the ground that there had been a lapse of time and intervening counseling between the alleged abuse and the statements at issue only when there is evidence demonstrating that the lapse or counseling somehow affected the child's statements. Little's argument, in addition to being unsupported by evidence, also ignores the fact that the twins had already disclosed the abuse to their playmate, H.B. Their statements to Webster, after denying abuse to Mejia, were consistent with the earlier disclosures to H.B.

Finally, Little argues Ryan's ninth factor, the circumstances surrounding the statements, indicate unreliability. Little's assertion that "The twins initially denied that anyone had ever touched them" (BOA at 24), again ignores the fact that the twins originally disclosed the

molestations to their playmate. Little then reiterates his suggestion, without evidence, that the twins had falsely accused Little after being persuaded during the brief time-lapse before the Webster interviews.

In fact, the circumstances surrounding the children's statements support the reliability of the accusations. Swan, while discussing the reliability of child hearsay statements, cited other courts approvingly in stating that "the child victim's explicit descriptions of abuse made the possibility of fabrication unlikely. A young child is unlikely to fabricate a graphic account of sexual activity because such activity is beyond the realm of [her] experience." Swan, at 648-49 (citations omitted). Swan also found reliability in a child's use of age-appropriate language and responses when describing those acts. Id. at 649. Here, all three children displayed a precocious knowledge of sexual activity and used age-appropriate language to describe the acts. To their playmate, the six-year-old twins said that they would lie on top of Little and "shake" until "white bubbly stuff" came out of his penis. Mejia, Askew, and Webster all saw A.M. demonstrate with her hands that she had masturbated Little. To Webster, A.M. said that Little had tried to put his "private part" "into my little thing where the poop comes out." She said that he "spit on my butt" and "put a little slobber on it" to make it more comfortable for her. A.M. told Webster that Little would "pee" into a sock and say "A-h-h-h." These

are just a few examples of the children displaying an unusual knowledge of sexual activity and using childlike words to describe it. None of the circumstances surrounding the girls' statements suggest unreliability. These are nice, normal children who liked to please their mother and who loved the man with whom she was trying to build a home.

The trial court, after an extensive pretrial hearing, carefully exercised its discretion by excluding some of the proffered hearsay statements while admitting the majority of the statements because the Ryan factors were substantially met. There was no error by the trial court.

3. THE VICTIMS' STATEMENTS TO THE SEXUAL ASSAULT NURSES WERE PROPERLY ADMITTED UNDER THE HEARSAY EXCEPTION FOR STATEMENTS MADE FOR THE PURPOSE OF MEDICAL DIAGNOSIS OR TREATMENT.

Each of the three child victims was initially taken for a physical examination at a hospital emergency room. None of the girls was able to complete the genital examination at the emergency room because of anxiety, so they were referred to a different, more child-friendly location to complete that portion of the exam. At trial, Little argued only that the statements made by the girls during the follow-up examination should be excluded. Now, on appeal, he doesn't specify which statements should have been excluded, and seems to argue that the trial court erred by allowing any testimony by the nurse examiners.

Because Little failed to object to admission of statements made by the children during their initial examinations he is precluded from raising the issue for the first time on appeal. Regarding the follow-up portions of the examinations, the trial court did not abuse its discretion in admitting the hearsay because the information communicated by the children to the nurse was for the purpose of medical diagnosis and treatment.

a. Relevant Facts.

Lori Moore is a nurse who works for Providence Intervention Center for Assault and Abuse. 14RP 134. Her organization has contracts with numerous hospitals to respond to emergency rooms to perform sexual assault examinations. 14RP 135. The examinations are conducted "to provide a plan of care for the patient and make sure that we have a good safety plan and a plan of care set up upon discharge." 14RP 140. Her work involves speaking to a child about why the child is there, and then conducting a "head-to-toe" physical examination. 14RP 141.

On April 29, 2013, Moore was called to Swedish Mill Creek Hospital's Emergency Department to conduct examinations of the girls. 14RP 144-45. During the course of the examinations, A.M. told Moore that Little touched her over her clothes on her breasts and vaginal area, and that it had been occurring for about one year. 14RP 154-55. H.M. did not disclose any sexual assault to Moore. 14RP 163. J.M. told Moore

only that "Nick was cuddling us inappropriately," but she didn't want to talk and said that she couldn't remember anything else. 14RP 167-68.

Children often have difficulty completing the genital exam in a hospital emergency room, and when that occurs the child is referred to the Providence Intervention Center office in Everett, which is "much more child-friendly," to complete the process. 14RP 142. In this case, none of the three girls was able to complete the genital examination, so they were referred to complete the examinations at a later date. 14RP 159, 165, 169.

The girls were taken to Providence Intervention Center on May 15, 2013. 11RP 146. The examination rooms there are set up to be very child-friendly, with toys and televisions for playing videos for children during the exams. 11RP 134. The examinations were conducted by Paula Newman-Skomski, a registered nurse practitioner and forensic nurse with specialized training in medical evaluation of interpersonal trauma and violence. 11RP 130-32, 146. Newman-Skomski testified that the reason for her examination of the girls was that "the exam in the emergency room was not complete." 11RP 147. Newman-Skomski testified that when the initial exam at the emergency room is not completed it is important that the exam is finished so that "any injuries that may be present are treated effectively" and "to make sure that complete treatment for any exposure to possible STDs is completed." 11RP 169. The reason for the exam of each

of the girls, stated on the report generated from each exam, was "to complete the GU[4] portion of the exam." Pretrial Exs. 2, 4, 6.

Newman-Skomski testified that a standardized approach is taken for the examinations because "we want to look for any injuries related to any kind of trauma." 11RP 138. She testified regarding the purpose for her obtaining information from the children she examines:

> The history that I obtain from kids is gained so that I can help make good decisions about medical care for them, so that I can find out whether or not they've been exposed to any body fluids or diseases and make sure that that gets treated appropriately.

11RP 146.

Newman-Skomski testified that during her examination of A.M., the girl said that her "mom's ex-boyfriend Nick" had touched the private areas of her body both over and under her clothes; that he had made her touch his private areas; that she had seen something come out of his private area; and that he tried to put his private part in her "butt hole" while they were in La Push and that it had "really hurt." 11RP 154-55. Although A.M. demonstrated anxiety, Ms. Newman-Skomski was able to complete the genital examination. 11RP 157. The exam was "nonspecific," meaning there were no physical findings of injuries or trauma. 11RP 158.

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[4] In this context, a "GU exam" likely refers to a genitourinary exam.

During Newman-Skomski's examination of H.M., the twin denied that anyone had ever touched her private parts. 11RP 163. Otherwise talkative during the examination, H.M. resorted to body language when she was asked questions about the private areas of her body. 11RP 163. Newman-Skomski completed the genital exam of H.M., which was nonspecific. 11RP 164.

During Newman-Skomski's examination of J.M., the child told her that Nick had been pulling down her pants and touching her with his private part, and that it hurt, and she had seen something come out of his private part. 11RP 166-67. J.M.'s genital exam was also nonspecific. 11RP 169.

Newman-Skomski testified that the reason she asks the question "Did you see anything come out of his private part?" is to determine whether a child is exposed to bodily fluids because of the risk of sexually transmitted diseases. 11RP 167-68. In addition to the genital examinations, urine specimens were collected from each of the girls for laboratory assessment for STDs. Pretrial Exs. 2, 4, 6.

b. The Trial Court Did Not Abuse Its Discretion By Admitting The Hearsay Statements Of The Children To The Sexual Assault Nurses.

An out-of-court statement offered to prove the truth of the matter asserted is admissible at trial if it is a statement "made for purposes of

medical diagnosis or treatment." ER 803(a)(4). The medical treatment exception applies to statements reasonably pertinent to diagnosis or treatment. State v. Woods, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001). A trial court's admission of testimony pursuant to this exception is reviewed under an abuse of discretion standard. Id.

At trial, Little did not contest that the statements made by the girls to the nurse at the initial emergency room examinations met the hearsay exception for medical diagnosis and treatment, he argued only that the follow-up examinations were in fact second exams that were conducted not for medical purposes but to gather evidence. 1RP 20-22. To the extent that Little is now attempting to raise an issue with the trial court's admission of the children's statements to initial nurse examiner Moore at the emergency room, this Court should not allow it. RAP 2.5; State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (appellate courts generally will not consider issue raised for the first time on appeal.).

Regarding the statements the children made to Newman-Skomski at Providence Intervention Center, the trial court found that those statements were made as part of a bifurcated medical examination and were admissible under the exception. 11RP 106. Little's argument that "the children were referred to the second nurse not to address any unresolved medical issues but purely to gather evidence for the State," is

factually unsupported. BOA at 26. The record establishes that none of the girls had been able to complete the genital examination at the emergency room and, therefore, were referred to Providence Intervention Center to complete that key aspect of the medical examination. The purpose of the exams was to determine whether any of the girls had sustained injury or been infected with sexually transmitted diseases.

Authorities that support the trial court's admission of the hearsay evidence are numerous, including several involving statements made by child victims of sexual assault. In State v. Bishop, 63 Wn. App. 15, 24, 816 P.2d 738 (1991), this Court, in a case involving the rape of a nine-year-old, upheld the admission of the victim's statements about penetration to a physician. In State v. Fitzgerald, 39 Wn. App. 652, 658, 694 P.2d 1117 (1985), a prosecution for statutory rape, this Court held that the State's expert witness, a physician, had properly been allowed to testify as to what the child had told her about the incident. Other courts have reached the same conclusion, upholding the admission of the testimony in In re Penelope B., 104 Wn.2d 643, 655-56, 709 P.2d 1185 (1985) (child's statements made to child psychiatrist as to alleged acts of sexual contact between the child and her father admissible under ER 803(a)(4)); and in State v. Butler, 53 Wn. App. 214, 766 P.2d 505, review denied, 112 Wn.2d 1014 (1989) (child's statements made to medical

personnel describing father's abusive acts were pertinent to physician's treatment for child's physical and emotional injuries and therefore admissible under ER 803(a)(4)).

Little also argues that the children's statements should have been ruled inadmissible because "the State failed to establish the children had an incentive to be truthful in order to obtain appropriate medical care," since the children had not sought medical assistance and "the children reported no complaints upon their initial examination and resisted the physical exam." BOA at 26. This argument is also without merit. The record establishes that the children were taken for the genital examinations for the purposes of diagnosing potential injuries or possible exposure to sexually transmitted diseases. Whether the children subjectively believed they needed medical assistance is immaterial. In State v. Williams, 137 Wn. App. 736, 746, 154 P.3d 322 (2007), the admission of statements made by an 18-year-old rape victim to a nurse was upheld even though the victim testified that when she was taken to the emergency room it was for the purpose of evidence collection and that she didn't believe she needed any specific medical treatment. The statements were admissible because the victim underwent the medical examination for "a combination of purposes — medical as well as forensic." Id.

The trial court did not abuse its discretion by admitting the children's statements to the nurses who conducted their examinations.

4. THE STATE DID NOT COMMIT REVERSIBLE PROSECUTORIAL MISCONDUCT IN ITS REBUTTAL CLOSING ARGUMENT.

Little claims that the prosecutor twice committed misconduct in closing argument. But both instances occurred in the rebuttal closing and the prosecutor, who has leeway in responding to defense arguments, did not overstep his bounds. If any misconduct occurred, it was harmless under the circumstances of the case.

a. The Prosecutor Did Not Impugn The Integrity Of Defense Counsel By Using The Word "Cagey" When Rebutting A Defense Argument.

The United States and Washington Constitutions guarantee every defendant a fair trial. U.S. CONST. amend. V, VI; WA CONST. art. I, § 3. A defendant who claims on appeal that prosecutorial error or misconduct deprived him of a fair trial bears the burden of establishing that the conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). In the context of closing arguments, the prosecuting attorney has "wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence." Id. Appellate courts evaluate allegedly improper comments "within the context of the prosecutor's entire argument, the issues in the

case, the evidence discussed in the argument, and the jury instructions." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Here, Little alleges that the prosecutor committed misconduct by using the word "cagey" in describing a defense argument. During his rebuttal the prosecutor argued:

> And the same principles about human memory and about feeling comfortable when you're talking to people and the content and the circumstances when you're being asked questions, all attribute to changing memories, little details here and there. That's human nature.
>
> The Defense, make no mistake about it, is *cagey* with the words, but they're trying to essentially assassinate --
>
> MR. COHEN: Objection, Your Honor.
>
> MR. GAUEN: -- [A.M.]'s character.
>
> JUDGE BRADSHAW: The objection is overruled, but the jurors are reminded to be the determiners of evidence in accordance with the Court's instructions on the law. Please continue.
>
> MR. GAUEN: Just because she's chatty or had emotional problems, because she's been to therapy or what-have-you, I don't know that she would make this stuff up.

18RP 100 (emphasis added).

Little argues that the use of "cagey" impugned the role of defense counsel, and likens the situation to State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 43 (2011). The comparison is not appropriate. In Thorgerson, the prosecutor "impugned defense counsel's integrity, particularly in referring to the presentation of his case as 'bogus' and involving 'sleight of hand.'" Id. at 451-52. Because the "sleight of hand" argument was

planned in advance, the Thorgerson court concluded it was flagrant and ill-intentioned conduct. Id. at 452. Here we have a prosecutor's single use of a word that is far less inflammatory than the two phrases used in Thorgerson, and no evidence that the prosecutor planned the usage in advance. Whereas both "bogus" and "sleight of hand" inarguably suggest fraud, sham, and trickery, a single use of "cagey" is far less derogatory. "Cagey" is defined as: (1) Hesitant about committing oneself, (2)(a) wary of being trapped or deceived: shrewd, and (2)(b) marked by cleverness. Merriam-Webster.com, Merriam-Webster, n.d. Web. 19 May 2016.

Moreover, the prosecutor's use of "cagey" occurred in rebuttal closing in response to a defense argument. Our supreme court has upheld the use of far more pejorative words in response to defense closing arguments. In State v. Brown, 132 Wn.2d 529, 567, 940 P.2d 546 (1997), the supreme court held that a prosecutor in a murder case had not committed misconduct in rebuttal closing argument by referring to a defense theory as "ludicrous." The prosecutor was responding to a defense argument that the victim had been asleep and not aware of the defendant's plan to eliminate witnesses. Id. The supreme court held:

> The prosecutor's characterization of the defense theory as "ludicrous" was reasonable in light of the evidence. Appellant admitted raping and torturing Ms. Washa over a prolonged period of time. It was the prosecution's contention that, under those circumstances, she was not

> likely asleep while Appellant was anywhere nearby. The use of the word "ludicrous" was simply editorial comment by the prosecuting attorney which was a strong, but fair, response to the argument made by the defense.

Id.

Here, the prosecutor was rebutting a defense closing argument in which Little's attorney repeatedly stated that he was not saying that the children were lying. For example, he argued:

> Now, nobody is saying that the children were lying. That's not it. They're lovely children. [A.M.] maybe a little less so, or maybe different. Maybe we use the word "different." [A.M.] has challenges.

18RP 84-85. And: "What I said is that this is not a situation where someone is saying, 'Oh, the children are lying.'" 18RP 87. Little's attorney went on to focus on A.M., who had received therapy for anxiety:

> [A.M.] is a handful. [A.M.] is -- whether she's looking for attention, she certainly enjoys or has enjoyed – there's something about the limelight. There's something that's going on with [A.M.], and it becomes a little troubling sometimes.

18RP 85.

In the context of rebuttal closing argument, the prosecutor's spontaneous use of the word "cagey" in response to the defense closing argument was not misconduct. Defense counsel sought to explain away the testimony of three child victims, while somehow assuring the jury that he wasn't accusing the children of lying, by focusing on the fact that one

of the girls had received therapy. Here, the prosecutor's use of "cagey" was consistent with the definition "noncommittal and shrewd," which does not disparage the defense in the manner of "bogus" and "sleight of hand."

b. The Prosecutor Did Not Refer To The Defendant's Right Not To Testify, But If He Did The Reference Was Indirect And Was Harmless Error.

Little's second assertion of prosecutorial misconduct involves what he characterizes as the prosecutor's comment on Little's exercise of his right not to testify. The Fifth Amendment bars the prosecution from commenting on a defendant's failure to testify. Griffin v. California, 380 U.S. 609, 609-15, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). In order to assess whether a prosecutor's statement impermissibly comments on the defendant's silence, this Court must consider "whether the prosecutor manifestly intended the remarks to be a comment" on the defendant's exercise of his right not to testify and whether the jury would "naturally and necessarily" interpret the statement as such. State v. Barry, 183 Wn.2d 297, 306-07, 352 P.3d 161 (2015) (internal quotations and citations omitted); State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). The prosecutor's remark must be considered "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." Brown, 132 Wn.2d at 561.

In his closing argument, Little's attorney focused on Little's alleged molestation of A.M. in the bedroom of the rented cabin in La Push. The defense had called witnesses who were present that weekend, including Little's mother, sister, and cousin, who testified that they had been in and out of the cabin several times during the approximate timeframe of the alleged molestation. 18RP 83-84. Little's attorney argued that it made no sense that Little would have molested a child in the cabin with so many people coming and going. Id.

In rebuttal, the prosecutor responded to the argument:

> By no means were these family members and friends and such lying about the timing of events in La Push. They simply had no way of remembering whether [A.M.] left that fire for a short slice of time. We're talking about ten to twenty minutes, folks. The reality is that only the Defendant and [A.M.] knew what happened behind that closed bedroom door --
>
> MR. COHEN: Objection, Your Honor.
>
> JUDGE BRADSHAW: Overruled.
>
> MR. GAUEN: -- when [A.M.] walked up the path to go use the restroom.

18RP 94. In the context of the argument by the defense and the State's rebuttal, it cannot be said that the prosecutor "manifestly intended" his remark to be a comment on the defendant's exercise of his right not to testify, or that the jury would "naturally and necessarily" interpret the statement as such. The thrust of the prosecutor's argument was that it was impossible for Little's witnesses, who were in and out of the common area

of the cabin, to know what happened in the locked bedroom. It is likely that the jury viewed the remark in that way.

State v. Scott, 93 Wn.2d 7, 13, 604 P.2d 943 (1980), is illustrative. In that case, a trial of three codefendants, the supreme court held that it was not prosecutorial misconduct as alleged by the two non-testifying codefendants for the prosecutor to have said in closing argument: "The only defendant we heard from was Mr. Benson, Mr. Baker's client." The court held that in the context of addressing a defense argument based on defendant Benson's testimony, "the words used were not intended as a comment on the failure of Scott and Sample to testify, and could not reasonably be so understood by the jury." Id.

Even assuming the remark was improper, reversal is unwarranted. Although Little contends that the remark was a presumptively prejudicial "constitutional error" that the State must prove harmless beyond a reasonable doubt, he is mistaken. Only when the prosecutor directly comments on a defendant's failure to testify does it violate the Fifth Amendment and becomes subject to the stricter standard of constitutional harmless error. Emery, 174 Wn.2d at 757 (citing State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996)). Here, the prosecutor's fleeting reference to the defendant's failure to testify, if it occurred at all, was indirect, and the more forgiving harmless error standard should be applied.

But under either standard, reversal is unwarranted. The issue being argued when the prosecutor made the reference was whether the State had proven Little committed a molestation of A.M. in La Push, Washington, which was not the basis for any of the charged offenses. Evidence of that incident, since it occurred outside King County[5], was admitted pursuant to ER 404(b) without objection from Little. 5RP 57-61. The remark had no impact on the jury's determination of guilt on any of the charged offenses, all of which were supported by substantial evidence, including the children's statements to Carolyn Webster, the nurses, and their mother, as well as their own testimony.

5. THE TRIAL COURT PROPERLY DENIED LITTLE A FULL EVIDENTIARY HEARING ON HIS CLAIM THAT HE WAS DENIED THE RIGHT TO TESTIFY.

Little argues that he was wrongly denied a full evidentiary hearing on his claim that he had been denied his right to testify. But at trial not only did Little's attorney assure the court that Little understood his absolute right to testify, Little himself, personally made the same assurances. In deciding Little's post-trial motion, the trial court considered several affidavits and other evidence, including jail phone calls from Little during which he admitted that he had not testified for strategic reasons and because he and his attorney believed there was reasonable

[5] This Court can take judicial notice that La Push is in Clallam County. ER 201.

doubt in the State's case. The court determined that Little's claim that he had been denied the right to testify lacked credibility. The trial court did not err by denying a full evidentiary hearing.

a. Relevant Facts.

The defense rested without the defendant testifying. 17RP 80. When one of the prosecutors expressed concern for a potential appellate issue when "a defendant comes back and says. 'Oh, I wanted to testify but my attorney wouldn't let me,'" the trial court engaged in a colloquy with both defense counsel and Little personally. 17RP 83. Little's attorney said his client understood that he had "an absolute right to testify and an absolute right to not testify." 17RP 83-84. Moments later the court addressed Little:

> THE COURT: First, Mr. Little, do you have any questions of me, any questions of the Court regarding what your attorney addressed earlier; that is, your right to testify absolutely and your right not to testify?
>
> THE DEFENDANT: Not at all, Your Honor.

17RP 88.

Two weeks after the guilty verdicts, Little's trial attorney filed a motion for new trial. CP 77. The motion cited no legal authority but was accompanied by a declaration of counsel that alleged that because the defendant had smelled of alcohol and behaved erratically there was "a

serious question as to whether the defendant was in a position of making a competent decision whether to testify in his own defense." CP 78-79. At the same time, Little's attorney moved to withdraw. CP 80. Subsequently, the State filed a number of responsive declarations and transcripts of jail calls made by Little.[6] Little's trial counsel was allowed to withdraw and substitute counsel was appointed.

Little's dismissed trial counsel, Jeffrey Cohen, later filed a supplemental declaration in which he stated that he had told Little he had a right to testify, but that Cohen was concerned about Little's demeanor and whether the jury would smell alcohol. CP 212. Cohen did not discuss with Little the possibility of requesting a continuance so that he might testify without the risk of the jury smelling alcohol on his person. CP 213. Cohen also stated that he told Little, "I don't see how I can put you on," in the context of Little's lack of preparation to testify, despite Cohen's numerous attempts to prepare him. CP 213. Cohen further declared that when he made the statement to Little, he believed that "Mr. Little understood it to mean that because we had not prepared, it would harm his case for him to testify." CP 213.

[6] Declaration of Carolyn Webster (CP 81); two declarations of deputy prosecutor Celia Lee (CP 82-84, 190-92); declaration of prosecutor Ben Gauen (CP 85-87; transcripts of four jail calls (CP 104-61)).

Represented by new counsel, Little filed a declaration in which he stated that on the date of his decision on whether to testify, "I did not feel that I was intoxicated, but I was definitely feeling the physical effects of having consumed a great deal of alcohol the night before." CP 188. Little stated that Cohen and the prosecutor smelled alcohol on him, and that Cohen warned him that the jury might smell the alcohol and that if the Court smelled it on him he might be held in contempt or have his bond revoked. CP 188. Little claimed that he told his attorney that "I wished to testify." CP 188. Finally, Little declared that fear of getting in trouble with the court or the jury smelling alcohol was a "substantial part of my decision not to object when Mr. Cohen told the Court that I would not be testifying," and that "had I known it would have been possible to testify at some later time when I did not appear hung over or smell of alcohol, I would have demanded that Mr. Cohen pursue that option." CP 188.

After considering the declarations and transcripts of jail calls, the trial court determined that Little had not met his burden to show that a full evidentiary hearing was warranted on the issue of whether his attorney had wrongly prevented him from testifying. CP 439.

b. The Trial Court Did Not Err By Determining That Little Failed To Meet His Burden Of Proof To Warrant A Full Evidentiary Hearing.

A criminal defendant has a constitutional right to testify on his or her own behalf. Rock v. Arkansas, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). In Washington, a criminal defendant's right to testify is explicitly protected under our state constitution. This right is fundamental, and cannot be abrogated by defense counsel or by the court. State v. Robinson, 138 Wn.2d 753, 758, 982 P.3d 590 (1999). Only the defendant has the authority to decide whether or not to testify. Id.

A defendant who remains silent at trial may be entitled to an evidentiary hearing if he alleges that his attorney actually prevented him from testifying. Robinson, at 760. Regarding what constitutes wrongly preventing a defendant from testifying, our supreme court held:

> We therefore conclude that in order to prove that an attorney actually prevented the defendant from testifying, the defendant must prove that the attorney refused to allow him to testify in the face of the defendant's unequivocal demands that he be allowed to do so. In the absence of such demands by the defendant, however, we will presume that the defendant elected not to take the stand upon the advice of counsel.

Id. at 764. The burden of proof is on the defendant by a preponderance of the evidence. Id.

To obtain an evidentiary hearing on the issue of whether he was actually prevented from testifying, "The defendant must ... produce more than a bare assertion that the right [to testify] was violated; the defendant must present substantial, factual evidence in order to merit an evidentiary hearing or other action." Id. at 760 (quoting State v. Thomas, 128 Wn.2d 553, 557, 910 P.2d 475 (1996)). Mere allegations by a defendant that his attorney prevented him from testifying are insufficient to justify reconsideration of the defendant's waiver of the right to testify. Id. Defendants must show some "particularity" to give their claims sufficient credibility to warrant further investigation. Id. (citing Underwood v. Clark, 939 F.2d 473, 476 (7th Cir. 1991). "The defendant must allege specific facts and must be able to demonstrate, from the record, that those specific factual allegations would be credible." Id. (citations omitted).

Little's evidence falls far short of establishing that his attorney refused to allow him to testify in the face of his unequivocal demands to do so. Nothing was put forward to defeat the presumption that Little simply followed the advice of counsel by declining to testify. Although Little, in his declaration, asserts that on the day in question, "I told my attorney, Mr. Cohen, that I wished to testify" (CP 188), Cohen does not support the suggestion that he refused an unequivocal demand to put his client on the stand. Cohen does not state that Little ever made a clear

demand to testify. Rather, Cohen asserts that he told Little, "I don't see how I can put you on," in the context of Little being unprepared to testify, and that Little understood that to be the case. The fact that Little personally assured the court that he understood he had an absolute right to testify is consistent with this interpretation.

Attorneys have an ethical obligation to provide legal advice to their clients on the exercise of their right to testify, and courts must take care to distinguish cases where a defendant is wrongfully prevented from testifying from cases in which the defendant merely follows the advice of counsel. Robinson, at 763-64. Here, there is Little's mere allegation, unsupported by specific, substantial, and credible facts, that his attorney prevented him from testifying. In addition to Little's words of assurance to the court that he understood it was entirely his decision not to testify, Little's own words in a phone conversation show that his decision not to testify was strategic. On November 1, 2014, two days before the motion for new trial was filed, Little spoke to his father from jail and said that he had believed there was reasonable doubt in the case and had simply taken his lawyer's advice by not testifying. CP 104-17. After discussing that Little's attorney (referred to as "Jeff") would be filing a motion for a new trial, Little said:

> I would be okay with a mistrial and retrial for sure this time knowing that the pros, or the judge, or the jury's gonna most likely convict I will definitely get on the stand. I thought maybe that there would be reasonable doubt in this case and Jeff advised me not to get on the stand so didn't. But had I known that there would have been this, if this was gonna be, if I'd a, if I'd a known this was gonna be the outcome or had even the slightest inclination that this was gonna be the outcome I for sure would have been put on the stand. I would have been like yes I wanna go on the stand you know.

CP 108.

In blunt terms, Little's words show that his motion for new trial was utterly contrived. The trial court did not err by finding that Little had not met his burden of proving that his attorney actually prevented him from testifying. Little's request that the case be remanded for a full evidentiary hearing on the issue should be rejected.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Little's judgment and sentence.

DATED this 16 day of June, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Kathleen A. Shea, containing a copy of the Brief of Respondent, in STATE V. NICHOLAS LITTLE, Cause No. 73699-0-I, in the Court of Appeals, Division I, for the State of Washington.

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

Date : June 16, 2016

Done in Seattle, Washington