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Division I
State of Washington
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Supreme Court No. 96291-0

No. 75716-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES ZESATI,

Petitioner.

PETITION FOR REVIEW

JAN TRASEN
Attorney for Petitioner
WSBA # 41177

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

James Zesati, appellant below, seeks review of the Court of Appeals decision designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Zesati appealed his King County Superior Court convictions for one count of rape in the third degree and three counts of rape of a child in the third degree. The Court of Appeals affirmed in an unpublished decision on August 6, 2018. Appendix. This motion is based upon RAP 13.3(e) and 13.5A.

C. ISSUES PRESENTED FOR REVIEW

1. The prosecution is obligated to inform an accused person of favorable evidence known to law enforcement that is either exculpatory or impeaching. Where the prosecution withheld exculpatory, material evidence, did this undermine confidence in the outcome of the case, and was the Court of Appeals decision therefore in conflict with decisions of this Court, requiring review? RAP 13.4(b)(1)?

2. Out-of-court statements are not admissible except under specific exceptions to the hearsay rule. Did the court erroneously admit statements of I.Z. as "excited utterances," as well as cumulative hearsay statements through other witnesses, and was the Court of Appeals

decision therefore in conflict with decisions of this Court, requiring review? RAP 13.4(b)(1)?

3. Mr. Zesati requests this Court review each of the issues raised in his pro se Statement of Additional Grounds, in order to determine whether the Court of Appeals decision was in conflict with decisions of this Court, requiring review of his issues in his S.A.G. RAP 13.4(b)(1).

D. STATEMENT OF THE CASE

1. Background of James Zesati

James Zesati and his wife, January Sinclair, lived with their family in Bellevue for many years. RP 428-30. Mr. Zesati was a skilled tradesman, running the family plumbing business. RP 427. Mr. Zesati and Ms. Sinclair lived together for 14 years and had two daughters of their own, ages 12 and 9 at the time of trial. RP 428-29. Mr. Zesati also raised Ms. Sinclair's daughter from her first marriage, I.Z., who was three when the couple met, and 17 at the time of trial. Id.

I.Z. and Mr. Zesati were very close, and I.Z. always considered Mr. Zesati her "Daddy," since I.Z.'s birth father was not part of her life and had been extremely abusive. RP 431, 672-73 (I.Z. changed her last name to Sinclair, her maternal grandfather's name, because of her birth father's abuse), RP 771-72.

2. Alan Sinclair case and defense interview

In September 2013, the family was torn apart when I.Z.'s grandfather, Alan Sinclair, inadvertently pocket-dialed his daughter, January Sinclair, and thus implicated himself in the molestation and rape of I.Z. RP 660-64; see State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016). The investigation revealed that Mr. Sinclair had been molesting and raping I.Z. since she was 11, and this abuse continued until Mr. Sinclair's arrest when I.Z. was 15. RP 660-61.

Mr. Sinclair was convicted of rape of a child in the second degree and related counts in June 2014; he received a lengthy sentence. Sinclair, 192 Wn. App. at 383. Mr. Zesati, I.Z.'s stepfather, was supportive and helpful to I.Z. and her mother during this ordeal, driving them to the police station to report Mr. Sinclair's crimes and spending countless hours in court during the Sinclair trial. RP 455-56, 450-53. Mr. Zesati also regularly drove I.Z. to the King County Sexual Assault Resource Center (KCSARC) for counseling. RP 456. I.Z. was so comfortable with Mr. Zesati that she changed her last name again – to shed Sinclair, the name of her abusive grandfather, and acquire Zesati, the name of her stepfather and sisters. RP 458-59, 563, 672-73.

During the course of preparation for the May 2014 trial of Mr. Sinclair, I.Z. was interviewed by Alan Sinclair's defense counsel on April

3, 2014, in the prosecutor's office. RP 1268. In this interview, I.Z. was specifically asked whether she had ever "had sexual experiences with anybody else." CP 51. I.Z. answered, "no." Id. I.Z. was also asked, "The sort of stuff that you did with your grandfather, you've never done with anybody else?" Id. I.Z. said, "I haven't." Id.

3. Allegation against Mr. Zesati in 2015

Almost ten months later, on January 20, 2015, I.Z.'s mother, Ms. Sinclair, came home from work early one evening. RP 463-64. Ms. Sinclair walked into her bedroom to find I.Z., then 16, naked and straddling Mr. Zesati, who was stretched out on his back, also unclothed. RP 486-87. Ms. Sinclair observed that a large mirror, usually positioned on a hutch in the room, had been moved to the floor near the foot of the bed where I.Z. and Mr. Zesati were perched, in order to reflect the bed. RP 491-93. Loud rap music was playing from a portable speaker connected to I.Z.'s own cell phone. RP 489-90. When Ms. Sinclair burst into the room, I.Z. said, "Mommy--" and pulled up a blanket to cover herself. RP 488. Ms. Sinclair immediately smacked her daughter twice, chasing I.Z. out of the master bedroom. RP 492.[1]

[1] Ms. Sinclair's 911 call requested assistance "because I just caught my boyfriend with my daughter." RP 510. When the 911 operator asked, "Was this consensual by your daughter type of thing,.." Ms. Sinclair replied, "Yep, yep." Id.

Once I.Z. was in her own room, Ms. Sinclair berated her daughter, screaming that Mr. Zesati was <u>hers</u> – "He's your daddy, not your man." RP 496, 743. A week later, Ms. Sinclair told I.Z. she could "kiss college good-bye," and that she should be sent to a "psych ward." RP 739. After Mr. Zesati was arrested, Ms. Sinclair told I.Z. that it was I.Z.'s own fault that her younger sisters didn't have a dad anymore, and that she assumed I.Z. probably just lay there, saying, "f___ me." RP 743. Comments such as these led detectives to make a CPS referral and to eventually place I.Z. with her grandmother for over a month. RP 543-44, 617, 744-46, 868-70.

I.Z. also suddenly claimed, for the very first time, that Mr. Zesati had been sexually abusing her for years. RP 394-95. I.Z. told a story she had apparently never related to anyone before – not to her grandmother, her sisters, her long-time sexual assault counselors at KCSARC, nor to a single prosecutor, victim advocate, detective, or SANE nurse on the <u>Sinclair</u> case – that Mr. Zesati had been molesting her during the same years as her grandfather. <u>Id</u>.; RP 779-83. In fact, during the <u>Sinclair</u> defense interview on April 3, 2014, I.Z. had specifically denied that anyone else had sexually abused her during this period. RP 1269; CP 51.

4. <u>Prosecution of Mr. Zesati</u>.

Mr. Zesati was charged with two counts of rape of a child in the third degree and one count of rape of a child in the second degree, due to

I.Z.'s age at the time of the allegations of the prior abuse. CP 1-2.[2] Despite several general and specific Brady requests for the contents of the Sinclair interview transcripts, the State failed to disclose these to Mr. Zesati following his January 20, 2015 arrest. RP 1268-70.

Upon the commencement of Mr. Zesati's trial, defense counsel again made a specific request for the interview transcripts during pre-trial motions on June 6, 2016. RP 60-61. Counsel was assured by the State, "You have them… correct." RP 61. This was incorrect, as the State eventually admitted. RP 1264. Two weeks later, just before closing arguments, the trial prosecutor conceded the State had failed to disclose the interview which contained the exculpatory statements made by I.Z. in April 2014. RP 1264.

Mr. Zesati moved to dismiss under CrR 8.3(b) and Brady, stating Mr. Zesati had suffered prejudice from the late disclosure of the interview, and that he would have addressed this exculpatory evidence in voir dire, opening statements, cross examination of I.Z., and even his defense

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[2] The State later filed an amended information, dismissing the second-degree count, when I.Z. stated the alleged abuse occurred when she was older than she had previously recalled. RP 40-42. One count of rape in the third degree was added before trial, as to the incident on January 20, 2015, when I.Z. was 16 and her mother interrupted the conduct. Id.

interview of I.Z. RP 125-76. The court denied the motion, as well as Mr. Zesati's request to re-examine I.Z. RP 1281-86.[3]

Following a jury trial, which contained additional error, Mr. Zesati was convicted as charged. CP 79-82, 90-102.

Mr. Zesati timely appealed. CP 108-21. On August 6, 2018, following oral argument, the Court of Appeals affirmed in an unpublished decision. Appendix.

Mr. Zesati seeks review in this Court. RAP 13.4(b)(1).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

THIS COURT SHOULD GRANT REVIEW, AS THE COURT OF APPEALS DECISION IS IN CONFLICT WITH DECISIONS OF THIS COURT. RAP 13.4(b)(1).

1. The State withheld a prior interview of I.Z. containing exculpatory statements, which constitutes a violation of Brady and undermines confidence in the verdict.

I.Z. explicitly denied any misconduct by Mr. Zesati until the moment she was caught having intercourse with him – and then stated for the first time that the "rapes" had been occurring for years. This inconsistency was a critical element to Mr. Zesati's defense of recent fabrication.

[3] A stipulation was ultimately given to the jury, regarding the April 2014 interview, after every other remedy Mr. Zesati requested was denied. CP 51.

I.Z. had been previously interviewed by the prosecutor and had made statements which exculpated Mr. Zesati, which was known to the State; however, the State failed to promptly disclose these statements or even to turn over this transcript when requested. RP 1264. The State's pre-trial failure to disclosure this material exculpatory evidence when requested constitutes unreasonable delay under the circumstances.

a. The prosecution must disclose material evidence, known to them, that is favorable to the accused, where it is exculpatory or impeaching.

"[O]ne essential element of fairness" in a criminal case "is the prosecution's obligation to turn over exculpatory evidence." Milke v. Ryan, 711 F.3d 998, 1002 (9th Cir. 2013); see Brady v. Maryland, 373 U.S 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). The requirement that the government disclose material favorable evidence to a criminal defendant is required by the due process clauses of the State and Federal Constitutions as well as the constitutional guarantee of meaningful opportunity to present a defense. California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994); U.S. Const. amends. 6, 14; Const. art. I, §§ 3, 21, 22.

The prosecution's duty to disclose evidence favorable to an accused arises even when there has been no request by the accused. In re

Pers. Restraint of Stenson, 174 Wn.2d 474, 486, 276 P.3d 286 (2012). The prosecution's duty "encompasses impeachment evidence as well as exculpatory evidence." Id. "The scope of the duty to disclose evidence includes the individual prosecutor's 'duty to learn of any favorable evidence known to others acting on the government's behalf.'" Id. (citing Strickler v. Greene, 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999); Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

There are three components of a Brady violation. The evidence must be favorable to the accused, either as exculpatory or impeachment evidence; the State must have failed to disclose the evidence, "either willfully or inadvertently;" and "prejudice must have ensued." Strickler, 527 U.S. at 281-82.

Material evidence includes information that opens up new avenues for impeachment. See Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); see e.g., United States v. Blanco, 392 F.3d 382, 387 (9th Cir. 2004) ("Brady/ Giglio information includes 'material ... that bears on the credibility of a significant witness in the case.' "). The State does not dispute that the I.Z. interview here was favorable to Mr. Zesati. Appendix at 5.

Likewise, the Court of Appeals seemed to agree that the interview would have benefited Mr. Zesati's defense. Id. The Court found, however, that no suppression, and thus, no Brady violation occurred. Id. The Court's finding should be reviewed. RAP 13.4(b)(1).

b. The Court of Appeals findings that no suppression occurred and that the evidence was not material were erroneous and should be reviewed by this Court.

In April 2014, I.Z. was interviewed by defense counsel for Alan Sinclair, in preparation for his trial on several counts of rape of a child and related counts. RP 1268. At the time of this interview at the prosecutor's office, I.Z. stated several times that she had never had sexual contact with anyone other than Mr. Sinclair. CP 51. Approximately six months later, when I.Z. was caught having sex with Mr. Zesati, I.Z. claimed for the first time that Mr. Zesati had been sexually abusing her for years. RP 394-95. Although the time period indicated by I.Z. in these allegations was exactly the same as the time period during which she clamed to have had no other sexual contact in the Sinclair interview, the State did not disclose the interview to Mr. Zesati's defense at any point during discovery. RP 1264.

During pre-trial motions in limine, Mr. Zesati specifically requested the Sinclair interviews, stating he had never received them. RP 60-61. The prosecutor assured Mr. Zesati, "he knows precisely what [I.Z.] testified to in that trial." When Mr. Zesati clarified that he was entitled to

the defense interviews, in addition to the trial transcript, the prosecutor stated, "You have them." Mr. Zesati's defense counsel inquired whether the prosecutor was referring to the defense interviews, and the prosecutor replied, "Correct." Id.

The prosecutor admitted two weeks later, after persistent reminding, that her earlier statement was incorrect, and the Sinclair interview had never been disclosed to Mr. Zesati. RP 1264 (STATE: "We're reasonably certain that [I.Z.]'s defense interview was not sent to Mr. Cohen as part of the original Alan Sinclair discovery"). Although the prosecutor claimed to later send an email containing the interview as an attachment to Mr. Zesati's counsel shortly before I.Z. testified, Mr. Zesati's counsel stated he did not receive the email. RP 1273-74.

Mr. Zesati was unaware of the contents of this exculpatory statement before conducting his own defense interviews, as well as conducting voir dire, opening statement, and cross examinations, particularly of I.Z. The remedies requested by Mr. Zesati, including dismissal under CrR 8.3(b), as well as the opportunity to recall I.Z. for further examination or further interview, in light of the newly disclosed evidence, were denied by the trial court. RP 1275-76, 1279-81.

Whether the prosecution's failure to disclose the evidence prejudiced Mr. Zesati is reviewed de novo. Stenson, 174 Wn.2d at 491.

Sufficient prejudice exists where there is a reasonable probability of a different result. Kyles, 514 U.S. at 434. A "reasonable probability" of a different result is shown when the government's failure to disclose favorable impeachment evidence "undermines confidence in the outcome of the trial." Id. (quoting Bagley, 473 U.S. at 678).

> In cases in which the witness is central to the prosecution's case, the defendant's conviction indicates that in all likelihood the impeachment evidence introduced at trial was insufficient to persuade a jury that the witness lacked credibility. Therefore, the suppressed impeachment evidence, assuming it meets the test for disclosure, takes on an even greater importance.

Benn, 283 F.3d at 1055.

If "there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment" of the evidence presented at trial, the outcome would have been different and the Brady violation requires a new trial. Price, 566 F.3d at 914.

In Gregory, for example, the defense objected to the court's refusal to provide impeachment evidence contained in a witness's sealed file from a dependency proceeding. State v. Gregory, 158 Wn.2d 759, 798, 147 P.3d 1201 (2006), overruled on other grounds. The file included inconsistent statements from the witness regarding her use of drugs and whether she was court-ordered to attend drug treatment. Id. The

prosecution argued that the defense had numerous other available means to attack the complainant's credibility. Id.

In evaluating the materiality of evidence relevant to the credibility of a witness, this Court noted that the question was not whether there were other means of challenging the witnesses' credibility, but rather, whether all of the impeachment material, taken together, would have affected the jury's assessment of the case. Id. at 800. If so, the nondisclosure is prejudicial and material.

c. *Because the State's unreasonable delay in disclosing the interview foreclosed Mr. Zesati's defense, the Court of Appeals decision requires review by this Court.*

The State possessed exculpatory statements made by I.Z., while she was interviewed in the prosecutor's own office in April 2014. RP 1268. Yet the State failed to turn over the contents of this interview when Mr. Zesati was charged in January 2015, and the State continued to withhold the interview as Mr. Zesati sat in jail awaiting trial. RP 1276.

Even upon a specific request for this interview transcript, the prosecutor erroneously assured Mr. Zesati's counsel on the record that this specific transcript had been turned over. RP 61; See State v. Mullen, 171 Wn.2d 881, 895, 259 P.3d 158 (2011) (suppression of Brady material may be willful or inadvertent). This statement was false, and the State failed to turn this transcript over until the trial was nearly finished. RP 1264-65.

The Court of Appeals finding that the stipulation to I.Z.'s interview was equivalent to the introduction of I.Z.'s prior statements through further cross-examination is erroneous. Appendix at 6. Mr. Zesati was unaware of I.Z.'s exculpatory interview statements before conducting his own defense interviews – of I.Z. or any other witness – or before conducting voir dire, opening statement, and cross examination of I.Z. There is a reasonable probability of a different result from the remedies requested by Mr. Zesati – including dismissal under CrR 8.3(b), as well as recall of I.Z. for further cross-examination or further interview – which were denied by the trial court, before Mr. Zesati agreed to the only remaining remedy, the stipulation. RP 1275-76, 1279-81.

Likewise erroneous is the Court's finding that I.Z.'s 2014 interview at the prosecutor's office was cumulative to her trial testimony. Id. I.Z.'s testimony at trial that she had never told anyone about being molested by her father was categorically different from the statements that she made in the 2014 interview in the prosecutor's office – a specific and dishonest lie about a specific time period. RP 1268.

The delayed disclosure of I.Z.'s interview crippled Mr. Zesati's defense during the trial, deprived the jury of a reasonable basis to question the State's case, and undermined confidence in the outcome of the trial.

Because the Court of Appeals decision is in conflict with this Court's decisions, this Court should grant review. RAP 13.4(b)(1).

2. This Court should review the evidentiary errors below.

a. Hearsay is not admissible at trial except as specifically provided by the rules of evidence, court rules, or statute.

For hearsay[4] to be admissible, it must be admitted under a specific exception to the evidentiary rule. State v. Chapin, 118 Wn.2d 681, 685, 826 P.2d 194 (1992) (excited utterance); ER 802.

An out-of-court statement is admissible at trial as an exception to the hearsay rule if it qualifies as an "excited utterance." ER 803(a)(2). An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Id.

b. The Court of Appeals erroneously upheld the trial court's admission of hearsay statements; therefore, this Court should grant review.

The trial court erroneously admitted statements I.Z. made to Officer Jones regarding the situation with Mr. Zesati. I.Z. offered to answer the officer's questions and was not crying or blurting out an "utterance." RP 390, 408-09.

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[4] "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c).

These statements fail to meet the criteria as excited utterances, because no startling event or condition had occurred. Chapin, 118 Wn.2d at 686. I.Z. had just been interrupted while in the middle of a sexual encounter which was apparently consensual. RP 487-91, 516 ("it appeared that way"). When Officers Lee and Jones arrived at the Zesati house, the officers did not describe I.Z. as being in an upset or excited state. RP 390-94, 1098-99. In fact, Officer Lee described the family as "stoic." RP 1098. When Officer Jones entered I.Z.'s bedroom to speak with her shortly after the 911 call, I.Z. was not crying and was willing to answer Jones's questions. RP 390-94. In fact, Officer Jones described the scene in I.Z.'s room as an "interview" situation. RP 408-09.

Officer Jones then asked I.Z. several questions about what had transpired with Mr. Zesati, preceding the abrupt entry of I.Z.'s mother into the room. Id. I.Z. described an allegedly non-consensual sexual encounter with Mr. Zesati, over defense objection. Id. I.Z. then proceeded to discuss incidents of sexual misconduct with Mr. Zesati from the past two years, in response to questioning by Officer Jones. Id.

The key to the excited utterance exception is spontaneity. Chapin, 118 Wn.2d at 687. Because I.Z.'s out-of-court statements were in response to police questioning, this factor "raises doubts as to whether the statement was truly a spontaneous and trustworthy response." Id.

Even if the entry of Ms. Sinclair into the bedroom was, indeed startling, the sexual act was likely not, if I.Z. is to be believed, and if the alleged misconduct had actually been ongoing. In addition, Officer Jones conceded that I.Z.'s statements were not spontaneous, but the product of his interview. RP 390-94, RP 408-09 (Jones refers to their conversation as an "interview"). I.Z.'s statements were part of a conversation, which contraindicates the second element, since the statement was a product of questioning, rather than a spontaneous utterance. Chapin, 118 Wn.2d at 687-88.

Lastly, the trial court erroneously admitted additional hearsay statements, although the statements were not admitted pursuant to any exception to the hearsay rule. For example, Dr. Samira Farah, the physician who examined I.Z. at Children's Hospital, testified that she spoke with I.Z. about the intercourse with Mr. Zesati that occurred on January 20, 2015 (third degree rape count). RP 922-24. However, the court also admitted statements of Dr. Farah related to I.Z.'s allegations of past abuse by Mr. Zesati. Id.

No hearsay exception applies to statements of past abuse, including ER 803(4) (statements for the purpose of medical treatment). State v. Woods, 143 Wn.2d 561, 602, 23 P.3d 1046 (2001). Mr. Zesati likewise objected to the admission of hearsay statements made by Jade Bartoletti,

the SANE nurse at Children's Hospital. RP 970. Mr. Zesati objected to the admission of this cumulative evidence, in which the jury heard I.Z.'s allegations repeated through the testimony of several different witnesses. Id. An error in admitting hearsay evidence is prejudicial and requires a new trial if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

Accordingly, because the Court of Appeals opinion affirming the trial court's admission of I.Z.'s statements, as well as the medical hearsay evidence, is in conflict with decisions of this Court, review should be granted under RAP 13.4(b)(1).

3. Mr. Zesati requests this Court review each issue raised in his Statement of Additional Grounds.

Mr. Zesati requests that this Court review each and every issue raised in his pro se Statement of Additional Grounds. Mr. Zesati preserves for review and does not abandon any of the issues to which he has assigned error in his Statement of Additional Grounds.

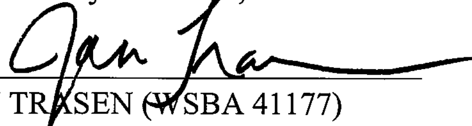
These issues include, but are not limited to: prosecutorial misconduct; Brady; and failure to preserve and disclose evidence under CrR 4.7 and related claims.

F. CONCLUSION

For the above reasons, the Court of Appeals decision should be reviewed, as it is in conflict with decisions of this Court. RAP 13.4(b)(1).

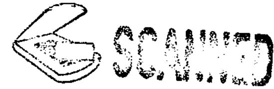
DATED this 4th day of September, 2018.

Respectfully submitted,



JAN TRASEN (WSBA 41177)
Washington Appellate Project
Attorneys for Petitioner

APPENDIX



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
Respondent,	)	No. 75716-4-I
v.	)	DIVISION ONE
JAMES JOEL ZESATI,	)	UNPUBLISHED OPINION
Appellant.	)	FILED: August 6, 2018

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2018 AUG -6 AM 8:46

LEACH, J. — James Zesati appeals his convictions for one count of rape in the third degree and three counts of rape of a child in the third degree. He alleges a Brady[1] violation, asserts that insufficient evidence supports his convictions for rape of a child in the third degree, and challenges the trial court's admission of hearsay evidence. Because Zesati does not show that the State suppressed evidence, his Brady claim fails. The victim's detailed testimony about specific incidents of child rape provides sufficient evidence to support the three counts the State charged. Lastly, the trial court did not abuse its considerable discretion by admitting the challenged hearsay statements, which also were cumulative of the declarant's testimony. For these reasons, we affirm.

[1] Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

FACTS

Zesati began dating I.Z's mother, January Sinclair, when I.Z. was three years old. Zesati and January have two daughters together.[2] Zesati helped raise I.Z., and she thought of him as her father.

When I.Z. was 11 years old, her maternal grandfather, Alan Sinclair, began sexually abusing her.[3] Independently of Sinclair, Zesati began sexually abusing I.Z. when she was 14 years old.

January discovered Sinclair's abuse in September 2013 when he inadvertently "pocket-dialed" January and left a message with an explicit conversation between him and I.Z.[4] She was 15 years old at the time.[5] Sinclair was arrested, prosecuted, and convicted of rape of a child and other related offenses.[6]

On the discovery of Sinclair's abuse, Zesati stopped raping I.Z. He began raping her again a month or two after Sinclair went to prison in June 2014.

On January 20, 2015, January discovered Zesati's abuse. She was working late, and Zesati sent I.Z.'s sisters to bed early. I.Z. testified that Zesati

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[2] To avoid confusing January Sinclair with her father, Alan Sinclair, we use January's first name.

[3] State v. Sinclair, 192 Wn. App. 380, 383, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016).

[4] Sinclair, 192 Wn. App. at 383.

[5] Sinclair, 192 Wn. App. at 383.

[6] Sinclair, 192 Wn. App. at 383.

was folding laundry in his bedroom when she came in to get her laundry. Zesati came up behind her while she was getting her laundry together. He pulled her pants and underwear off while she tried to kick and push him away. Zesati forced his penis into her vagina and then lifted her up onto the bed and managed to take her shirt off, leaving her naked.

January came home unexpectedly early from work and walked in to the bedroom. There, she saw Zesati raping I.Z. January pushed I.Z. out of the room and told her to go to her bedroom. January prevented Zesati from taking a shower and took his keys so he could not leave the house.

January called 911. Officer Benjamin Jones of the Bellevue Police Department responded to the call. Officer Jones found I.Z. in her bedroom. She looked like she had been crying. I.Z. told Officer Jones that Zesati raped her that night and that he had been raping her for several years.

The next day, I.Z. went to the hospital for a sexual assault examination. Sexual assault nurse examiners saw lacerations and redness in I.Z.'s vagina. A DNA (deoxyribonucleic acid) analysis of swabs collected from I.Z. showed the presence of DNA matching Zesati's DNA profile.

The State charged Zesati with one count of rape in the third degree and three counts of rape of a child in the third degree. A jury found Zesati guilty as charged. Zesati appeals.

ANALYSIS

Brady Violation

First, Zesati contends that the State committed a Brady violation by failing to disclose an interview I.Z. gave in connection with the Sinclair prosecution.

In spring 2014, Sinclair's attorney interviewed I.Z. in preparation for Sinclair's trial. The attorney asked the following questions during the interview:

> Q: But have you had sexual experiences with anybody else?
>
> I.Z.: No.
>
> Q: The sort of stuff that you did with your grandfather you've never done with anybody else?
>
> I.Z.: I haven't.

In preparation for Zesati's trial, the defense requested material related to Sinclair's defense. The State turned over material related to the Sinclair case, but the material did not include the transcript of the interview with I.Z. On June 11, the Saturday before opening statements on Monday, defense counsel e-mailed the prosecutor to tell her that he could not find the interview transcript. On June 14, the prosecutor's paralegal e-mailed the interview transcript to defense counsel. Three minutes later, the paralegal received an e-mail confirming that the defense counsel had read the e-mail. I.Z. testified on June 16. On June 21, defense counsel first raised the issue of the missing interview

transcript with the court. Defense counsel told the court that he never received the e-mail from the State and sought dismissal under CrR 8.3(b). The trial court denied this request. The parties stipulated to the contents of the interview, and the court read it to the jury.

Zesati claims the State improperly suppressed evidence of the interview and that suppression constitutes a Brady violation. "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[7] To establish a Brady violation, the defendant must show (1) the evidence is favorable to him or her because it is either exculpatory or impeaching, (2) the evidence was willfully or inadvertently suppressed by the State, and (3) the evidence is material.[8]

The State does not dispute that the evidence is favorable to Zesati. It contends, however, that it did not suppress the evidence. The trial court made a finding that the prosecution e-mailed the transcript to the defense before I.Z. testified. Zesati does not challenge this finding. So no suppression and thus no Brady violation occurred.

Also, Zesati does not show that the evidence was material under Brady. Evidence is material only if reasonable probability exists that with the

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[7] Brady, 373 U.S. at 87.

[8] State v. Davila, 184 Wn.2d 55, 69, 357 P.3d 636 (2015).

prosecution's disclosure of the evidence to the defense, the proceeding would have had a different result.[9] "A 'reasonable probability' is shown if the suppression of the nondisclosed evidence 'undermines confidence in the outcome of the trial.'"[10]

Courts apply a different test when the prosecution unreasonably delays disclosing evidence. The defendant must show that but for the delayed disclosure, he would have been able to present a plausible strategic option that was foreclosed by the delay.[11] Zesati does not do this. Zesati was able to introduce the evidence about I.Z.'s prior interview through the stipulation. Also, I.Z. testified at trial that she never disclosed Zesati's abuse to anyone before her mother walked in on them. Thus, the interview transcript merely repeated what I.Z. had already testified about. Zesati was able to cross-examine I.Z. about her previous failure to disclose. Zesati does not show that the State's delayed disclosure foreclosed any strategic defense. So his Brady claim and his delayed disclosure claims fail.

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[9] State v. Thomas, 150 Wn.2d 821, 850, 83 P.3d 970 (2004).

[10] State v. Mullen, 171 Wn.2d 881, 897, 259 P.3d 158 (2011) (internal quotation marks omitted) (quoting Kyles v. Whitley, 514 U.S. 419, 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

[11] United States v. Bender, 304 F.3d 161, 164-65 (1st Cir. 2002); see also United States v. Burke, 571 F.3d 1048, 1054 (10th Cir. 2009).

Sufficiency of Evidence

Zesati also contends that the State presented insufficient evidence at trial for the jury to convict him unanimously on three separate counts of rape of a child in the third degree. When reviewing a sufficiency challenge, we view the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt.[12] An insufficiency claim admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.[13]

The constitutional right to a jury trial requires that the jury be unanimous about the specific acts the defendant committed for each crime.[14] To ensure jury unanimity in multiple acts cases, either (1) the State must elect the particular criminal act upon which it will rely for conviction or (2) the trial court must instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt.[15] "In sexual abuse cases where multiple counts are alleged to have occurred within the same charging period, the State need not elect particular acts associated with each count so long as the evidence

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[12] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
[13] Salinas, 119 Wn.2d at 201.
[14] State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).
[15] State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988) (citing Petrich, 101 Wn.2d at 572).

'clearly delineate[s] specific and distinct incidents of sexual abuse' during the charging periods."[16]

The State charged Zesati with three counts of rape of a child in the third degree. "A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim."[17] Thus, the charging period for these offenses was between July 9, 2012, and July 8, 2014, when I.Z. was 14 and 15 years old.

Zesati claims that the testimony is insufficient for the jury to have found specific and distinct acts occurred during this charging period. He points to I.Z.'s testimony that Zesati forced her to have sexual intercourse many times, three times a month or once a week. He contends that this testimony describes only a generic act of sexual assault without providing specific details, like dates or descriptions. But I.Z. gave detailed descriptions of specific incidents when Zesati raped her.

I.Z. described the first incident, which occurred when she was 14. She testified that Zesati came into her bedroom when he had only a towel on and

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[16] State v. Hayes, 81 Wn. App. 425, 431, 914 P.2d 788 (1996) (alteration in original) (quoting State v. Newman, 63 Wn. App. 841, 851, 822 P.2d 308 (1992)).

[17] RCW 9A.44.079(1).

started taking off her clothes. She testified that she tried to push him away but that he was really strong and he took off his towel and forced his penis into her vagina.

I.Z. testified about another time a couple of weeks later when Zesati raped her. She was in the living room watching television on the couch. Zesati lay down on the couch next to her. I.Z. tried to kick him off while he pulled her pants down. Zesati removed his penis through the zipper of his jeans and forced his penis inside of her.

I.Z. described a third incident when Zesati raped her in his bedroom. Zesati took her homework into his room and told I.Z. to work on it in there. She was working on her homework on the floor when Zesati tried to take her pants down. She tried to twist his nipple to make him stop, but he put her on the bed, took her pants down, and forced his penis inside her.

I.Z. described another time when she was lying on the couch when Zesati pulled down her pants and put his mouth on her vagina before she kicked him away.

I.Z. described another incident of rape that occurred when she and Zesati took a trip to Sequim, Washington, and stayed in a hotel on the Olympic peninsula. Zesati tried to force her to put on white fishnet tights. Zesati then forced his penis into I.Z.'s vagina. The next day Zesati and I.Z. drove to Lake

Chelan to join I.Z.'s mother and sisters. I.Z. testified that because she drove, she thought she might have been 16 at the time. But she later testified that she began driving at 15 when she got her learner's permit. And January testified that the Sequim trip occurred on Labor Day weekend of 2013. I.Z. turned 15 in July 2013, so she would have been 15 at the time.

Although I.Z. did not testify to the specific dates of these rapes, her testimony indicated that he raped her on different occasions and in different locations while she was 14 or 15 years old. I.Z.'s descriptions of these incidents contain sufficient specific details to support three separate convictions for child rape.

Hearsay

Next, Zesati challenges several hearsay statements. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[18] Hearsay evidence is inadmissible unless an exception applies.[19] We review a trial court's decision on the admissibility of statements under the hearsay rules for abuse of discretion.[20] We will not disturb the trial court's ruling unless we believe that no reasonable judge would have made the same ruling.[21]

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[18] ER 801(c).
[19] ER 802.
[20] State v. Woods, 143 Wn.2d 561, 595, 23 P.3d 1046 (2001).
[21] Woods, 143 Wn.2d at 595-96.

Excited Utterance

First, Zesati challenges the trial court's admission of statements I.Z. made to Officer Jones under the excited utterance exception to the hearsay rule. "An excited utterance is made an exception to the rule excluding hearsay on the theory that the declarant, being under the stress of excitement caused by the startling event, is much less likely to consciously fabricate."[22] A court may admit a hearsay statement as an excited utterance if (1) a startling event or condition occurred, (2) the statement was made while the declarant was still under the stress of the startling event, and (3) the statement was related to the startling event.[23] Spontaneity, the passage of time, and the declarant's state of mind are factors courts consider to determine whether a statement is a product of reflex or instinct rather than a deliberate assertion.[24]

Here, application of these factors supports the trial court's decision. The court ruled that when Officer Jones was interviewing her, I.Z. was still under the stress of the startling event: "I would say that she must be under the stress of some startling event. It's not only the fact that she was having sex, but also that the mother found out."

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[22] State v. Dixon, 37 Wn. App. 867, 872, 684 P.2d 725 (1984).
[23] State v. Hardy, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997); ER 803(a)(2).
[24] State v. Palomo, 113 Wn.2d 789, 791, 783 P.2d 575 (1989).

Zesati challenges the trial court's decision to admit the statement on the basis that I.Z. did not appear distressed. He relies on police statements that I.Z. was not crying and was able to answer the officer's questions.[25] But according to Officer Jones, I.Z. was visibly upset. He said she looked like she had been crying and that at times she was trying not to cry. Thus, the record supports a finding that I.Z. was under the stress of the startling event.

The relatively short time between the event and the statement supports admission here, as well. The passage of time, although relevant, is not dispositive in determining whether a statement is an excited utterance.[26] In sexual abuse cases, courts have admitted hearsay statements under this exception made several hours after the startling event, depending on the circumstances.[27] January came home and discovered Zesati raping I.Z. sometime after 8:00 p.m. She called 911 shortly after she walked in on I.Z. and Zesati. Officer Jones was dispatched at around 9:00 p.m. and arrived at the scene about 5 minutes later. There, he talked to January for 15 to 20 minutes before he talked to I.Z. The record is not clear about how much time exactly

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[25] Zesati attempts to make a point out of the sex appearing consensual to January. But what January believed when she saw I.Z. and Zesati having sex is not relevant to I.Z.'s state of mind and would be inappropriate for the court to consider.

[26] Thomas, 150 Wn.2d at 854.

[27] See State v. Thomas, 46 Wn. App. 280, 284, 730 P.2d 117 (1986), aff'd, 110 Wn.2d 859, 757 P.3d 512 (1988).

passed between the event and the statements. But less time passed than in some cases where the excited utterance exception applied when many hours had passed after the startling event.[28]

Zesati also asserts that I.Z.'s statements lack spontaneity because she was responding to police questions. But responses to questions may be admissible under this exception.[29] "The crucial question in all cases is whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment."[30] Considering that relatively little time had passed since the startling event and I.Z. appeared to be under the stress of the event when Officer Jones interviewed her, her statements are not inadmissible because they were made in response to police questioning.

Zesati also asserts that the hearsay statements did not relate to the startling event. But the test for relatedness is flexible. "For purposes of ER 803(a)(2), an utterance may 'relate to' the startling event even though it does not

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[28] State v. Guizzotti, 60 Wn. App. 289, 803 P.2d 808 (1991); State v. Fleming, 27 Wn. App. 952, 621 P.2d 779 (1980). C.f. State v. Ramerez-Estevez, 164 Wn. App. 284, 292, 263 P.3d 1257 (2011) (declining to extend the excited utterance exception to a case where the victim was recounting rapes more than two years later).

[29] State v. Hieb, 39 Wn. App. 273, 278, 693 P.2d 145 (1984).

[30] Hieb, 39 Wn. App. at 278 (alteration in original) (quoting Johnston v. Ohls, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)).

explain, elucidate, or in any way characterize the event."[31] Here, statements about the rape relate to the shock of being discovered by the mother. And statements about the prior abuse relate to the January 20 rape. In light of the broad discretion granted to the trial court in ruling on admissibility of excited utterances, the court did not err in permitting Officer Jones to testify about I.Z.'s statements.

Medical Treatment

Zesati also challenges testimony about I.Z.'s statements by two medical professionals. The trial court permitted Dr. Samira Farah and Sexual Assault Nurse Examiner Jade Bartolleti to testify about I.Z.'s description of the January 20 incident under ER 803(a)(4). This rule allows hearsay statements made for purposes of medical diagnosis or treatment.

Zesati challenges testimony by Dr. Farah about I.Z.'s allegations of past abuse. Dr. Farah testified that I.Z. told her that Zesati had forced her to have sex with him multiple times in the past. Zesati contends that ER 803(a)(4) does not encompass these statements of past abuse. The State contends that Zesati waived this objection because he did not object to these statements or make this argument to the trial court. Indeed, Zesati raises this issue for the first time in the appeal. He provides no reason this court should consider the argument despite

[31] State v. Chapin, 118 Wn.2d 681, 688, 826 P.2d 194 (1992).

the general rule that the appellate court may refuse to consider a claim of error not raised in the trial court.[32] A party may raise a claim of manifest error affecting a constitutional right for the first time on appeal. But Zesati does not provide any argument to justify consideration here.

Zesati also objects to hearsay statements by Bartolleti. The trial court allowed Bartolleti to testify about I.Z.'s description of the January 20 incident under ER 803(a)(4). Zesati claims the trial court improperly permitted Bartolleti to testify about prior abuse. But the only statements by I.Z. that Bartolleti testified about were about the events of January 20. She said nothing about I.Z.'s statements about prior abuse. Zesati provides no argument to challenge the hearsay statements that Bartolleti did make. At trial, Zesati objected to the testimony as cumulative of other evidence. The court decided that the testimony was not cumulative because Bartolleti was only the second medical witness to testify about it. Zesati does not argue on appeal that this ruling was incorrect.

Because Zesati does not provide appropriate arguments about the medical treatment exception to the hearsay rule, he fails to show that the trial court abused its discretion in admitting this testimony.

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[32] RAP 2.5(a).

Statement of Additional Grounds for Review

Zesati filed a pro se statement of additional grounds for review, but his claims lack coherence and lack merit. His arguments primarily relate to the weight of the evidence and are thus not reviewable by this court.[33]

For example, Zesati first asserts a claim of prosecutorial misconduct. In support of this claim he merely points out inconsistencies and uncertainties about the testimony about forensic testing of I.Z.'s underwear and the dates that the detective collected the underwear from the crime scene. These arguments about the weight of the evidence and the credibility of the witnesses do not raise a claim for our review.

Further, the testimony Zesati cites does not show prosecutorial misconduct. Prosecutorial misconduct is grounds for reversal when the conduct is both improper and prejudicial.[34] When the defendant does not object to the claimed misconduct at trial, to obtain appellate relief the defendant must show that the prosecutor's conduct was so flagrant and ill intentioned that any prejudice could not have been neutralized by a curative jury instruction.[35] The

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[33] State v. Smith, 31 Wn. App. 226, 228, 640 P.2d 25 (1982) ("Judgment as to the credibility of witnesses and the weight of the evidence is the exclusive function of the jury.").

[34] State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011).

[35] Monday, 171 Wn.2d at 679 (quoting State v. Warren, 165 Wn.2d 17, 43, 195 P.3d 940 (2008)).

testimony that Zesati cites shows no improper conduct by the prosecutor. Thus, his prosecutorial misconduct claim fails.

Zesati also asserts that the State failed to disclose evidence under Brady and CrR 4.7.[36] He appears to contend that the State improperly withheld a cutting of I.Z.'s underwear. But Zesati does not show that the State suppressed this evidence. State witnesses testified about the underwear. Moreover, much of Zesati's argument refers to facts outside the record, so we are unable effectively to consider it.

To the extent Zesati raises other claims, he has not adequately explained them to permit us to review the issues. "[T]he appellate court will not consider a defendant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors."[37]

CONCLUSION

Zesati does not establish a Brady violation, show the evidence was insufficient to support his convictions, or show that the trial court abused its

[36] Zesati cites Fed. R. Crim. P. 16 requiring the government to disclose evidence. CrR 4.7 provides the relevant Washington disclosure rules.
[37] RAP 10.10(c).

discretion in admitting hearsay testimony. Nor does he identify any other claim entitling him to relief in his statement of additional grounds. We affirm.

Leach, J.

WE CONCUR:

Dwyer, J. Schindler, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 75716-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Stephanie Guthrie, DPA
[PAOAppellateUnitMail@kingcounty.gov]
[stephanie.guthrie@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

NINA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: September 4, 2018

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