SUPREME COURT NO. 98796-3
COURT OF APPEALS NO. 78801-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL S. AMADOR II,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Sean P. O'Donnell, Judge
The Honorable Theresa B. Doyle, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Daniel Amador, the appellant below, seeks review of the Court of Appeals decision in State v. Amador, noted at ___ Wn. App. 2d ___, 2020 WL 3267994, No. 78801-9-I (Jun. 15, 2020), following the contemporaneous denial of his motion for reconsideration.

B. ISSUES PRESENTED FOR REVIEW

1. One of the complainants, C.A, made allegations of abuse that resulted in CPS involvement through which C.A. was required to undergo counseling. The CPS investigation was determined to be unfounded. Years later, C.A.'s older sister, A.B., accused Amador of years of sexual abuse and then C.A. renewed her allegations of sexual abuse that had given rise to the CPS investigation. Amador sought discovery of C.A.'s 2013 counseling records or an in camera review, and the trial court denial an in camera review despite finding the records material. Did the trial court and Court of Appeals err in refusing to allow an in camera review of the records, conflicting with constitutional precedent of United States and Washington appellate courts?

2. The prosecutor asked three witnesses—A.B.'s mother, husband, and a close family friend—whether they supported A.B.'s decision to come forward and report her accusations of sexual abuse to

police; each witness answered yes. The prosecutor asked another witness who was close to both A.B. and Amador whether he maintained contact with either A.B. or Amador; he answered he maintained contact with A.B. but had not spoken to Amador since A.B.'s allegations. (A.) Was this testimony manifest constitutional error, necessitating reversal where it constituted obvious, impermissible opinions on the credibility of A.B. and the guilt of Amador, contrary to the Court of Appeals decision? (B.) Did the Court of Appeals apply the incorrect, nonconstituitonal error standard? (C.) Was repeatedly eliciting this improper opinion testimony flagrant and ill-intentioned prosecutorial misconduct, necessitating reversal? (D).Did defense counsel render constitutionally ineffective assistance of counsel in failing to object to the repeatedly improper opinion testimony and is the correct standard for reviewing such claims whether the deficient performance deprived Amador of a process—consideration of an issue on appeal—to which he otherwise had a right?

C. STATEMENT OF THE CASE

Amador respectfully directs the Washington Supreme Court to his full and detailed statement of the case in the Court of Appeals. Br. of Appellant, 4-16. For concision, he addresses the facts pertinent the arguments presented in this petition.

1. Denial of in camera review of counseling records

In 2013, C.A. told a cousin over Facebook that her father "pinned" her, a word the family used to describe Amador's restraint holds used to physical restrain his daughters. 3RP[1] 531, 541, 554, 558-59, 584-85, 589, 684; 4RP 28-29. Based on the pinnings, the cousin contacted Child Protective Services (CPS). 3RP 540-41, 591-93. CPS launched a full investigation of the Amador family, which ultimately was determined to be unfounded. C.A. denied being abused by Amador in any way; so did A.B. 3RP 596, 686.

Prior to trial, the defense sought counseling records of C.A. from a counselor in conjunction with the 2013 CPS investigation. CP 27-194; 1RP 5-10. The CPS investigation pertained to C.A.'s allegations that Amador had pinned her, an allegation similar to allegations A.B. also made. 3RP 584-85, 589, 684. The CPS investigation was determined to be unfounded, despite C.A.'s allegations and related counseling. CP 122-23. However, after A.B. made her accusations, C.A. renewed her own allegations of

[1] Amador refers to the verbatim reports of proceedings as follows:
1RP—consecutively paginated transcripts dated June 8 and September 1, 2017, and June 11, 13, and 18, July 13, and August 10, 2018;
2RP—consecutively paginated transcripts dated May 22, 23, and 24, 2018;
3RP—consecutively paginated transcripts dated May 29, 30, and 31, and June 4, 5, and 6, 2018;
4RP—transcript dated June 7, 2018.

pinning and asserted they also constituted sexual abuse, giving rise to the State's third degree molestation charge as to C.A. CP 3, 7-8.

Although the trial court found the counseling records to be material, it determined that C.A.'s privacy outweighed their materiality, denying Amador's discovery request for the records and denying to conduct an in camera review of such records. 1RP 17-18. The Court of Appeals approved this denial because, even though Amador had shown the records were plausibly material, he could not show the records (which he hasn't seen) would have impacted the outcome of trial. Slip op. 8-9.

2. Improper opinion testimony elicited by the prosecution

As each of these witnesses testified at trial, The State asked Melanie Amador, Sandra McLaughlin, and Nicolas B. whether they supported A.B.'s decision to report her allegations to law enforcement; all witnesses answered yes. 3RP 474, 503, 547. The State also asked Thomas McLaughlin, who was a very close friend with Amador for many years, whether he had had any contact with Amador since learning of A.B.'s allegations against him; he answered no. 3RP 773. Amador argued on appeal for the first time that these were improper opinions that constituted manifest constitutional erro,r flagrant and ill-intentioned misconduct, and, the extent the errors could not be reviewed for lack of objection, the result of ineffective assistance of

counsel. Br. of Appellant at 23-40. The Court of Appeals rejected these arguments. Slip op., 10-16.

D. ARGUMENT IN SUPPORT OF REVIEW

1. **The Court of Appeals decision conflicts with the controlling constitutional precedent of the United States and Washington Supreme Courts and Courts of Appeals governing in camera review of confidential records**

The Court of Appeals decision requires the impossible of the defense: the defense must show that records it cannot see contain information that would change the outcome of trial. The Court of Appeals decision is a misapplication of State v. Gregory, 158 Wn.2d 759, 793-94, 147 P.3d 1201 (2006), State v. Kalakosky, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993), State v. Cleppe, 96 Wn.2d 373, 382, 635 P.2d 435 (1981), State v. Diemel, 81 Wn. App. 464, 468 & n.7, 914 P.2d 779 (1996), State v. Uhthoff, 45 Wn. App. 261, 268, 724 P.2d 1103 (1986), and State v. Mines, 35 Wn. App. 932, 938-39, 671 P.2d 273 (1983). The lower courts' refusal to allow even an in camera review of one complainant's material counseling records in preparation for trial violated Amador's Sixth Amendment, Fourteenth Amendment, and article I, section 22 rights to prepare for trial, to have the effective assistance of counsel, and to the disclosure of all evidence that is favorable, that bears on credibility of a witness, or that is material to his guilt or punishment. See Pennsylvania v. Ritchie, 480 U.S. 38, 57, 107

S. Ct. 989, 94 L. Ed. 2d 40 (1987); Strickland v. Washington, 466 U.S. 668, 684, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Barker v. Wingo, 407 U.S. 514, 532, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 214 (1963); State v. Boyd, 160 Wn.2d 424, 434, 158 P.3d 54 (2007); State v. Gonzalez, 110 Wn.2d 738, 748, 757 P.2d 925 (1988); United States v. Strifler, 851 F.2d 1197, 1201-02 (9th Cir. 1988). RAP 13.4(b)(1), (2), and (3) review is therefore merited.

When there is a claim that particular records are privileged or confidential, the accused is entitled to an in camera review to determine whether the records contain exculpatory or impeaching information. Ritchie, 480 U.S. at 57-58; Mines, 35 Wn. App. at 938-39; CrR 4.7(h)(6); RCW 70.125.065. The accused establishes the need for in camera review where he or she establishes a nonspeculative basis to believe the records may have evidence relevant to innocence. Cleppe, 96 Wn.2d at 382; Uhthoff, 45 Wn. App. at 268. The defense must make "some plausible showing" that the records in question would likely contain evidence to support a particular defense theory or attack the credibility of the prosecution's witnesses. Rictchie, 480 U.S. at 58 & n.15; Gregory, 158 Wn.2d at 793-94; Diemel, 81 Wn. App. at 468 & n.7 (discussing "some plausible showing" standard). Stated slightly differently, the showing required of the defense must be supported by "specific fact-based allegations that the privileged records

contain information useful to the defendant in his case." Diemel, 81 Wn. App. at 468.

In Gregory, among the clearest analyses of the issue in Washington case law, Gregory claimed consent as a defense to rape and demanded an in camera review of the complainant's dependency files to determine whether they showed she was engaged in prostitution activity at the time of the alleged rape. 158 Wn.2d at 793. Not only would this have supported a theory that Gregory merely hired the complainant's consensual sexual encounter, it would also have provided important impeachment evidence, given the complainant denied engaging in any sex work in the two to three years before the alleged rape. Id. at 793-95. Gregory had no way of knowing for sure that the social work files would actually show the complainant was engaged in sex work at the time of the alleged rape, and the trial court even provided Gregory the remedy of interviewing the complainant about her activities, believing that this would suffice to honor Gregory's right to investigate and gather evidence in his defense. Id. at 794.

The trial court nonetheless abused its discretion when it denied in camera review. Id. at 795. Gregory had shown that if there was more recent prostitution activity, it would have been addressed in the dependency files and thus "could confirm or refute [a] claim that she did not engage in streetwalking after 1995." Id. Gregory did not have to show a change in the

outcome of his trial to obtain an in camera review. He had to show that, plausibly, the records in question contained information that would be relevant to his defense or to the credibility of one of the prosecution's witnesses, and he had made this showing. Id. Thus, the case was remanded for in camera review. Id.

The Court of Appeals decision states that, to obtain an in camera review, the evidence in question must be material and "[m]ateriality requires a reasonable probability that the evidence would impact the outcome of a trial," citing Gregory for this proposition. Slip op. at 8-9. But this was not Gregory's holding. The requirement to obtain an in camera review was satisfied in Gregory upon showing that records, if they contained pertinent information, were likely to aid defense theories or credibility attacks. Gregory, 158 Wn.2d at 794-95. Other cases have held that the showing must be based on specific facts, rather than just speculation. Cleppe, 96 Wn.2d at 382; Diemel, 81 Wn. App. at 468; Uhthoff, 45 Wn. App. at 268.

Amador has made the showing required by these cases. The Court of Appeals and the trial court acknowledged that the "records could have some material value." Slip op., 7; 1RP 17-18. This is all Amador needs to show to obtain an in camera review under the constitutional case law, contrary to the Court of Appeals decision in this case. RAP 13.4(b)(1)-(3).

Amador requested review of counseling records of C.A.'s counseling sessions, which were 2013 counseling sessions scheduled in conjunction with the 2013 CPS investigation of C.A.'s "pinning" allegations. CP 31-32, 144, 185-86. C.A. testified at trial that she told CPS Amador had *not* abused her; she likely stated the same to the counselor CPS referred her to. 3RP 596. Amador correctly argued, "Records created close in time to the incident in 2013 . . . are even more critical [than later counseling records] to the preparation of Mr. Amador's defense, in particular where [C.A.] has made an allegation, recanted it, and then resurrected the allegation three years after the fact." CP 36-37. Amador also asserted, "When [C.A.]'s depression was properly treated, her perception of the pinnings and Mr. Amador's intent changed to the point where governmental involvement was no longer necessary. It stands to reason that records with her counselor . . . would contain additional discussions about the pinnings and [C.A.]'s perception of them." CP 37. And, the counseling records almost certainly contained exculpatory information about the pinnings and whether they were sexual in nature: C.A. now says Amador did touch her sexually, which was an allegation she made initially and then recanted in 2013. As Amador pointed out, "It is likely that the counseling records contain further evidence of [C.A.]'s recantations, and likely with more detail." CP 37; 1RP 5-6, 9.

C.A. initially claimed Amador abused her in 2013, which led to the CPS investigation. C.A. underwent counseling as part of the CPS-ordered services. The trial court itself pointed out that the counselor was a mandatory reporter of child abuse and yet made no disclosures that were inculpatory to Amador. 1RP 13-14. The CPS investigation was closed based on no finding of abuse. 3RP 596, 68. Then, after A.B. disclosed her allegations of sexual abuse, C.A. made allegations that the pinnings Amador engaged in were sexual in nature. CP 7-8. The counseling records were reasonably plausibly material, as they tended to elucidate the contorted progression of C.A.'s initial allegations, recantations, and subsequent decision to renew and augment her initial allegations only after her sister came forward, likely leading to both impeachment and exculpatory evidence.

In addition, "pinning" allegations were made by both A.B. and C.A. 3RP 584-85, 589, 684. C.A.'s descriptions of the pinnings and whether they were of a sexual nature were material not only to her own allegations and credibility, but also A.B.'s and their mother's. And evidence of the pinnings was important to the state's case to illustrate Amador's supposed sexual grooming behavior for both daughters under a res gestae theory. CP 390. The Court of Appeals decision claims that "C.A. was unaware that the pinnings A.[B]. experienced were sexual in nature or that Amador had sexually assaulted A.[B]. in any manner until years after the counseling

sessions." Slip op., 10. But C.A. was not unaware of A.B.'s accusations when C.A. decided to renew her claim that the pinnings she experienced were also sexual in nature; the temporal progression of C.A.'s contradictory claims was extremely probative of her credibility and provided exculpatory evidence for Amador's case. All plausibly available information about the pinnings should have been disclosed to the defense before trial. Because the records plausibly could have contained relevant, exculpatory, and/or impeaching material for the defense, the Court of Appeals and the trial court erred in refusing to permit in camera review.

The central problem with the Court of Appeals decision is that it conflates the question of obtaining in camera review and the question of the impact on the outcome of trial. Slip op., 8-9. The Court of Appeals fails to recognize that, when the defense makes the plausible showing under the case, the impact-on-trial question can occur only after the in camera review does. Once the required showing is made for in camera review, the appellate court does not move on to consider prejudice, it remands for an in camera review, obviously to learn what information is in the records. Gregory, 158 Wn.2d at 795 (citing Ritchie, 480 U.S. at 58). "If the information in the files [upon in camera review] would probably have changed the outcome of trial, then the defendant is entitled to a new trial. But if nondisclosure was

harmless beyond a reasonable doubt, then the convictions can be reinstated." Id.

Contrary to the Court of Appeals decision, the question of prejudice by nondisclosure of the records occurs *after* the in camera review occurs, and after the trial court makes findings and conclusions pertaining to its review of the records. See id. at 795-97 (reviewing the trial court's findings pertaining to its in camera review of the dependency files). The defense does not need to demonstrate a likely change in the outcome of trial to get an in camera review in the first place. Because the Court of Appeals applies the law incorrectly and in conflict with other Washington Supreme Court and Court of Appeals decisions on a constitutional question, review should be granted pursuant to RAP 13.4(b)(1), (2), and (3).

The Court of Appeals decision is also erroneous in its suggestion that Amador's possession of C.A.'s CPS interview was a good enough substitute for the counseling records for his defense overall. Not only this based on an incorrect legal standard, as discussed, it conflicts with Gregory directly. The Gregory court soundly rejected the contention that the remedy should be limited to just interviews of the complainant; merely interviewing the complainant about her activities was no substitute for third-party records plausibly kept about such activities, given the clear impeachment value of such records. 158 Wn.2d at 794-95. Under Gregory, the fact that defense

might have other helpful evidence does not somehow negate its entitlement to all potentially helpful evidence. Because Amador has made a plausible showing that C.A.'s counseling records contemporaneous to the CPS investigation were material to several aspects of his defense, the law requires remand for an in camera review to occur.

Finally, Amador moved for reconsideration, pointing out the Court of Appeals' misapplication of Gregory, yet no revision occurred. The Court of Appeals decision just refuses to read what Gregory actually says. Unfortunately, this type of refusal to acknowledge a rule of law or holding is not uncommon at the Court of Appeals, which increasingly appears oriented to the result of a particular case rather than the law that applies to it. Not only is review necessary due to the constitutional nature of the issue and conflicts in case law Amador has identified, but also as a matter of substantial public importance to ensure the integrity of the appellate court system. All RAP 13.4(b) criteria are satisfied and support review.

2. **The Court of Appeals decision conflicts with several cases pertaining to the prosecution's elicitation of improper opinion evidence and the unconstitutional usurpation of the jury's role that results**

a. The Court of Appeals misapplied the manifest constitutional error standard

The Court of Appeals decision claims that the prosecution's elicitation of the testimony of four witnesses expressing support for A.B.

coming forward publicly to accuse Amador was not manifest constitutional error because it related only indirectly to A.B.'s credibility. Slip op., 13. Because it conflicts with the manifest constitutional error standard articulated by the appellate courts on a constitutional issue, review is warranted under RAP 13.4(b)(1), (2), and (3).

The role of the jury is "inviolate" under the Washington Constitution. CONST. art. I, §§ 21, 22. The right to have factual questions decided by the jury is crucial to the jury trial right. U.S. CONST. amend. VI; CONST. art. I, §§ 21, 22; Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989). "To the jury is consigned under the constitution 'the ultimate power to weigh the evidence and determine the facts.'" State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008) (quoting James v. Robeck, 79 Wn.2d 864, 869, 490 P.2d 878 (1971)). It is exclusively "the function of the jury to assess the credibility of a witness and the reasonableness of the witness's responses." State v. Demery, 144 Wn.2d 753, 762, 30 P.3d 1278 (2001) (plurality op.).

The error is clearly constitutional but, contrary to the Court of Appeals' conclusion, the error is also manifest. "[M]anifestness 'requires a showing of actual prejudice.'" Kalebaugh, 183 Wn.2d at 584 (quoting State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). "To demonstrate actual prejudice, there must be a 'plausible showing by the

[appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" Id. (alteration in original) (quoting O'Hara, 167 Wn.2d at 99) (quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007))). '"[T]o determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at the time, the court could have corrected the error." In the improper opinion context, the question is whether there is an "explicit or almost explicit witness statement on an ultimate issue of fact." Kirkman, 159 Wn.2d at 936.

Amador's former wife, his son-in-law, and two close family friends gave their opinion that A.B.'s accusations were credible and that Amador was guilty when they stated they supported her decision to make formal accusations to law enforcement or, in Thomas McFarland's case, stated he maintained contact with A.B. but had not had contact with Amador since the accusations. These statements constituted explicit or near explicit statements that the witnesses believed A.B.'s accusations and therefore Amador was guilty as charged. That was their only probative value, as the Court of Appeals acknowledged. Slip op., 13 ("Although a juror could infer from their testimony that the witnesses believed A.[B].'s allegations credible and worthy of reporting to law enforcement . . . ."). The Court of Appeals concluded that the opinions were related "'only indirectly to a victim's

credibility'" and so the errors were not manifest. Slip op., 13 (quoting Kirkman, 159 Wn.2d at 922).

Opinions cannot at once create an inference supporting the complainant's credibility and yet only indirectly support the complainant's credibility, as the Court of Appeals claims. In State v. Johnson, 152 Wn. App. 924, 934, 219 P.3d 958 (2009), it was manifest constitutional error to admit Johnson's wife's testimony that she believed the complainant's allegations. Here, four witnesses close to Amador, including his ex-wife gave their explicit opinions—they supported A.B.'s decision to come forward because they obviously deemed her allegations credible—on A.B.'s credibility and Amador's guilt. The Court of Appeals misapplication of the RAP 2.5(a)(3) standard merits review under RAP 13.4(b)(1), (2), and (3).

b. The Court of Appeals decision fails to hold the prosecution to its burden of proving harmlessness beyond a reasonable doubt

In two sentences, the Court of Appeals addressed the harmless of the constitutional error raised by Amador, "even if the testimony amounted to nearly explicit opinions on credibility and guilt." Slip op., 14. The decision states that any error was "not so prejudicial as to create practical and identifiable consequences in the outcome of trial. The State presented overwhelming evidence that Amador sexually abused A.[B]. over many years." Slip op., 14.

Constitutional error is presumed prejudicial and the state bears the burden of establishing harmlessness beyond a reasonable doubt. State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466 (1983); State v. Olmedo, 112 Wn. App. 525, 533, 49 P.3d 960 (2002). The Court of Appeals does not even attempt to apply the correct constitutional standard, which merits RAP 13.4(b)(1), (2), and (3) review, and likely RAP 13.4(b)(4) review as stated in Part D.1 above.

c. The Court of Appeals decision conflicts with prosecutorial misconduct cases addressing improper opinion testimony

A prosecutor commits misconduct by asking clearly objectionable questions that seek to elicit inadmissible testimony from a witness. State v. Jerrels, 83 Wn. App. 503, 507-08, 925 P.2d 209 (1996). "Such questioning invades the jury's province and is unfair and misleading." Id. at 507. There is a due process right to a trial by a fair prosecution, free of prejudicial misconduct. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

Jerrels was accused of raping and molesting his daughter and two stepchildren. Jerrels, 83 Wn. App. at 504. During trial, the prosecutor asked Jerrels's wife if she believed the children were telling the truth about Jerrels's actions and she said she did. Id. at 506-07. The prosecutor's questions were "clearly improper because the prosecutor inquired whether she believed the children were telling the truth; thus, misconduct occurred."

Id. at 508. The court pointed to another case where it reversed when a pediatrician testified that, based on the child's statements, she believed the child had been abused. Id. (citing State v. Carlson, 80 Wn. App. 116, 122, 129, 906 P.2d 999 (1995)). The Jerrels court made clearly that it is prosecutorial misconduct to "seek to compel a witness' opinion as to whether another witness is telling the truth." Id. at 507. "Such misconduct violates a defendant's due process right to a fair trial." Id. at 508.

Not only did the prosecutor here ask A.B.'s mother if she supported the allegations, she asked three other witnesses close to the Amador family. The Court of Appeals decision does not even acknowledge Jerrels and conflicts with Jerrels. Review should therefore be granted under RAP 13.4(b)(2) and (3).

d. The prejudice Amador shows due to counsel's failure to object is the deprivation of review on appeal, which the Court of Appeals fails to acknowledge

Both the Washington and United States Constitutions guarantee effective assistance of counsel to the accused. U.S. CONST. amend. VI; CONST. art. I, § 22; Strickland, 466 U.S. at 686-87; State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). The "defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim." Estes, 188 Wn.2d at 457-58.

The Court of Appeals asserts Amador cannot show prejudice because he cannot show a reasonable outcome that the result of the proceeding would be different, referring to the trial level proceedings. Slip op., 16. But the prejudice of not objecting has now infected his appellate proceedings: the Court of Appeals refuses to address his assignment of error because of the failure to object below. The prejudice is the deprivation of Amador's appellate proceedings to which he had a right, not solely whether he can demonstrate a reasonable probability that the outcome of trial would have differed. See State v. Hernandez, 172 Wn. App. 537, 290 P.3d 1052 (2012) ("As an initial matter, Hernandez, Rivera, and Delacruz stipulated to their offender scores; thus, this court might conclude that they have failed to preserve this issue for appeal. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002) (defendant waives challenge to same criminal conduct where alleged error involves an agreement to facts). Nonetheless, because Hernandez, Rivera, and Delacruz raise the issue in the context of a claim of ineffective assistance from counsel, we will consider these claims on their merits to determine if trial counsel gave deficient assistance."); State v. Goins, 113 Wn. App. 723, 54 P.3d 723 (2002) ("We turn now to Goins's claim that his trial counsel was ineffective for failing to preserve his right to appeal the inconsistent verdicts"); accord Roe v. Flores Ortega, 528 U.S. 470, 483, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)

(correct IAC question is whether prejudice is shown by the "denial of the entire judicial proceeding . . . to which [the accused] had a right").

The Court of Appeals decision conflicts with these constitutional decisions pertaining to ineffective assistance of counsel, meriting review under RAP 13.4(b)(2) and (3).

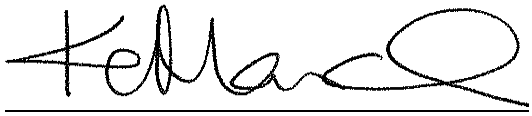
E. CONCLUSION

Because he satisfies all RAP 13.4(b) review criteria, Amador asks that this petition for review be granted.

DATED this 15th day of July, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON, Respondent, v. DANIEL S. AMADOR, II, Appellant.	)))))))))	No. 78801-9-I UNPUBLISHED OPINION

BOWMAN, J. — Daniel S. Amador II appeals his conviction for multiple charges stemming from long-term sexual assault of his daughter A.A. Amador seeks reversal, arguing the trial court erred when it refused in camera review of counseling records. He also argues that the State elicited improper opinion testimony from several witnesses that resulted in a due process violation, prosecutorial misconduct, and ineffective assistance of counsel and that the court allowed irrelevant evidence in violation of a motion in limine. Finally, he claims cumulative error deprived him of his right to a fair trial. We affirm.

FACTS

Amador served as a Seattle Police Department officer for 21 years. Amador and his first wife Melanie[1] had two daughters, A.A. and C.A. The

[1] We refer to several parties by their first names for clarity and to protect the identity of the victims and mean no disrespect by doing so.

Amadors did not have a harmonious family dynamic. Amador frequently demeaned, belittled, and disrespected Melanie. As a form of disciplining the children, Amador often used a common police "takedown technique" known as "pinning." "Pinnings" involved "hold[ing] the girls down by their arms so they couldn't get up."[2]

Around the age of 10, the younger daughter C.A. began struggling emotionally. She started cutting herself in the seventh grade. C.A. had frequent "mood swings" and "outbursts." Amador would "pin" C.A. in order to bring her "back under control." In June 2013, C.A. expressed concern about the pinnings to her cousin. Her cousin alerted Child Protective Services (CPS), who opened an investigation. CPS interviewed C.A. and the other family members, who all denied any abuse by Amador. CPS recommended family counseling and individual counseling sessions for C.A., which she attended for a brief period of time. CPS concluded its investigation in September 2013 and determined any allegation of abuse or neglect was "unfounded."

In October 2014, Melanie learned Amador was having an affair. At that time, Amador moved in with his girlfriend Shannon. Amador and Melanie divorced in December 2015. Amador married Shannon in July 2016 and shortly thereafter, they had a daughter together.

Amador and Melanie's oldest daughter A.A. began dating Nicolas in July 2015 when she was 21 years old.[3] In January 2016, A.A. told Nicolas that

[2] According to testimony at trial, police officers sometimes use this takedown technique on their own children.

[3] Nicolas and A.A. married in July 2017.

someone close to her had "brainwashed" her and sexually abused her from a young age. A.A. did not disclose any details about the abuse. She said she never told anyone about the sexual abuse and asked Nicolas not to tell her parents.

Approximately a month later, A.A. gave Nicolas more details about the sexual abuse, which included multiple acts of rape. In March 2016, A.A. revealed to Nicolas that her father had been the one abusing her. Nicolas encouraged A.A. to tell her therapist, which she did. A.A. also told her younger sister C.A., who encouraged A.A. to inform the police. A.A. reported the sexual abuse to the police on April 1, 2016.

The State charged Amador with one count of domestic violence child molestation of A.A. in the first degree, one count of domestic violence child rape of A.A. in the second degree, one count of domestic violence child rape of A.A. in the third degree, and one count of incest with A.A. in the first degree. The State also charged Amador with one count of domestic violence child molestation of C.A. in the third degree. Amador moved to sever the counts related to A.A. from the count related to C.A. The trial court granted his motion to sever.

During trial, several witnesses testified about the overly affectionate relationship between Amador and A.A. Family friend Sandra McLaughlin testified that Amador and A.A. did not seem to have a "healthy relationship." Sandra said Amador had an "infatuation" with A.A. and "everything revolved around only" her.

Melanie testified similarly, saying Amador was "obsessed" with A.A., starting from the time she was 4 years old. Amador would buy A.A. whatever

she wanted and take only her on what he called "dates." He often described A.A. as beautiful or "hot." Melanie said that when A.A. turned 8 or 9 years old, Amador began showering with her. He continued this until A.A. moved out of the house at 19 years old. Melanie testified that she tried to confront Amador but he would not listen to her. She also testified that Amador would "make" A.A. take naps with him in his bed while he was nude. Although Melanie felt uncomfortable with this behavior, she never told anyone. When CPS became involved, Melanie minimized her concerns out of fear of losing her children.

C.A. also testified about her perceptions of the relationship between her father and A.A. Amador often told C.A. that A.A. was smarter and better behaved. He gave A.A. presents, took her on trips and outings, and "always had her by his side." C.A. testified that Amador showered with A.A. "[a]ll the time" from age eight or nine until A.A. moved out of the house during college. C.A. testified that Amador used the pinning technique on both her and A.A., but when he pinned A.A., it was usually in his bedroom with the door closed. C.A. said A.A. and Amador sometimes spent hours in his bedroom and when C.A. tried to enter the room, she found the door blocked by a dresser.

C.A. discussed the time her cousin reported the family to CPS based on her complaints about Amador's pinnings. C.A. testified Amador told her that because of her actions, CPS could take her away and he could lose his job so that he could no longer afford to pay for school. Amador told C.A. she "would be messing up both [girls'] futures" and responsible for ruining the family. C.A.

testified that when she spoke with the CPS investigator, she minimized the problems in the family so she "wouldn't be in trouble."

A.A. testified about her relationship with Amador. A.A. said Amador treated her far better than her mother or sister. He bought her gifts and took her out on what he referred to as "dates," including nice restaurants, shopping, and the theater. She also described pinnings from an early age. A.A. said the pinnings occurred "usually every day." When she was 9 years old, Amador would pin her on his bed and put his hand on her breast or bottom and "just talk." He also started "coming into the bathroom while [she] was showering" and getting into the shower with her. Amador would make her touch his penis "in his bedroom or in the bathroom." A.A. testified that by age 11, Amador was touching her genitals and performing oral sex on her. Amador also forced A.A. to perform oral sex on him and give him "handjob[s]." At age 12, the sexual abuse escalated to anal sex.

A.A. testified the sexual abuse was "confusing" and she "thought it was what I . . . was supposed to be doing." Amador told A.A. that it was their "secret relationship" and that all daughters that have a close relationship with their father "get pinned by their dad." A.A. testified that she trusted Amador and as she got older, he convinced her she "was responsible" for the sexual abuse. A.A. said, "It was just like one, like, 15-year-long nightmare instead of individual times. It was my normal." A.A. testified she "didn't tell anybody" about the abuse because she was "scared" and "thought it [was] my fault." But when she started college, A.A. "was just thinking about it all the time, like, every day realizing more and more

that it had been, like, so wrong." A.A. started suffering from depression, anxiety, and nightmares and "just wanted to talk about it with someone," so she confided in Nicolas, then her therapist and sister soon thereafter.

A.A. testified she decided to report the sexual abuse to the police only after she confronted Amador about it. A.A. said Amador "agreed" he "messed up" and told her he "shouldn't have done that." But Amador kept "making sure, you're not going to tell anybody, right?" A.A. had an "unsettling" feeling that he was apologizing only because he "didn't want to get in trouble," not because he hurt her. A.A. also knew Amador's new wife Shannon was about to give birth to a girl and was concerned Amador would do the same thing to her half-sister.

The jury found Amador guilty on the four counts related to A.A. Amador then entered an Alford[4] plea to an amended charge of fourth degree assault of C.A. with sexual motivation. The court imposed a concurrent indeterminate sentence at the high end of the standard sentencing range of 280 months to life.

ANALYSIS

Amador appeals the four convictions related to A.A., arguing the trial court erred when it refused in camera review of C.A.'s counseling records; the State elicited improper opinion testimony from several witnesses that resulted in a due process violation, prosecutorial misconduct, and ineffective assistance of counsel; the court erred in allowing irrelevant and improper testimony in violation of a motion in limine; and cumulative error deprived him of his right to a fair trial.[5]

[4] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

[5] Amador does not appeal his conviction of fourth degree assault of C.A. with sexual motivation.

In Camera Review of Counseling Records

During discovery, Amador filed a notice of intent to subpoena C.A.'s counseling and medical records. C.A. moved for a protective order. Amador then requested in camera review of the records. Among the documents sought were records from Group Health Cooperative counselor William Norris, who worked briefly with C.A. during the CPS investigation in 2013. Amador claimed the records would "shed light" on C.A.'s mental state at the time of the CPS investigation and were "critical" to preparing a defense. In particular, Amador argued the records "undoubtedly" contained exculpatory evidence because C.A. had disavowed any sexual molestation by her father during the 2013 CPS investigation. According to Amador, the counseling records likely contained "further evidence of [C.A.]'s recantations, and likely with more detail."

The trial court acknowledged that the records could have some material value. However, it concluded that Amador had other means of accessing the same information, including an interview C.A. gave to CPS before engaging in counseling that "really lays out what she was thinking." As a result, the court determined that C.A.'s privacy interest in her counseling records outweighed the usefulness of the evidence. The trial court issued an order granting C.A.'s motion for a protective order as to her medical and counseling records, denied Amador's motion for in camera review, and quashed any subpoenas for those records.

On appeal, Amador claims the trial court's failure to conduct an in camera review of the records deprived him of the due process right to prepare and

present a defense. The State argues the trial court properly denied review of the privileged records given the low probability that they contained information beyond that already provided to the defense.

Due process provides a criminal defendant "a right of access to evidence that is 'both favorable to the accused and material to guilt or punishment.' " State v. Knutson, 121 Wn.2d 766, 772, 854 P.2d 617 (1993) (quoting Pennsylvania v. Richie, 480 U.S. 39, 57, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987)). Mental health counseling records are privileged under RCW 5.60.060(9),[6] requiring the court to balance the privacy interest in those records with the usefulness of the evidence. See CrR 4.7(e); State v. Kalakosky, 121 Wn.2d 525, 547, 852 P.2d 1064 (1993) (citing the Victims of Sexual Assault Act, chapter 70.125 RCW). "[T]o obtain in camera review of privileged records a defendant must establish that the records are at least material." State v. Diemel, 81 Wn. App. 464, 468, 914 P.2d 779 (1996); see Richie, 480 U.S. at 57; Kalakosky, 121 Wn.2d at 550. This involves a " 'plausible showing' " that the evidence is both material and favorable. State v. Gregory, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006)[7] (quoting Richie, 480 U.S. at 58 n.15), overruled in part on other grounds by State v. W.R., 181 Wn.2d 757, 336 P.3d 1134 (2014).

Materiality requires a reasonable probability that the evidence would impact the outcome of a trial. Gregory, 158 Wn.2d at 791. "A reasonable

[6] We note the legislature has amended RCW 5.60.060 several times since 2013. LAWS OF 2016 Spec. Sess., ch. 24, § 1; LAWS OF 2016 Spec. Sess., ch. 29, § 402; LAWS OF 2018, ch. 165, § 1; LAWS OF 2019, ch. 98, § 1; LAWS OF 2020, ch. 42, § 1. None of the amendments changed the language of subsection (9).

[7] Internal quotation marks omitted.

probability is a probability sufficient to undermine confidence in the outcome." Gregory, 158 Wn.2d at 791. The defendant must demonstrate more than a mere possibility of materiality. State v. Knutson, 121 Wn.2d 766, 773, 854 P.2d 617 (1993). "A claim that privileged files might lead to other evidence or may contain information critical to the defense is not sufficient to compel a court to make an in camera inspection." Diemel, 81 Wn. App. at 469.

We review the decision whether to conduct in camera review of evidence for abuse of discretion. Diemel, 81 Wn. App. at 467. A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. State v. Vars, 157 Wn. App. 482, 494, 237 P.3d 378 (2010). This standard of review allows the trial court to act within a range of acceptable choices. State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012). We will not find an abuse of discretion merely because we would have decided the issue differently. L.M. v. Hamilton, 193 Wn.2d 113, 134-35, 436 P.3d 803 (2019). Here, the trial court's decision to deny in camera review of C.A.'s medical and counseling records was within a range of acceptable choices.

In his petition for in camera review, Amador argued:

> The CPS records contain evidence that [C.A.]'s mental state influenced her perception of events and of recantation at the time the original allegation was made. When [C.A.]'s depression was properly treated, her perception of the pinnings and Mr. Amador's intent changed to the point where governmental involvement was no longer necessary. It stands to reason that records with her counselor and prescribing doctor would contain additional discussions about the pinnings and [C.A.]'s perception of them.

We disagree with Amador's argument. C.A.'s counseling records pertain to the very short period of time when she saw Norris for individual counselling

related to depression.[8] C.A. infrequently met with Norris and she later stated that she "didn't really talk to him because I didn't like him." Therefore, any conclusion as to what C.A. discussed with Norris during this time period is speculation.

In addition, the likelihood that C.A.'s counselling records would have provided Amador with any relevant information about A.A.'s allegations is low. C.A. was unaware that the pinnings A.A. experienced were sexual in nature or that Amador had sexually assaulted A.A. in any manner until years after the counseling sessions. Furthermore, any additional information the records may have revealed about C.A.'s description of the pinnings would have been of little value. Amador was in possession of C.A.'s lengthy interview with CPS in which she minimized Amador's actions and blamed her perception of his actions on her struggle with depression. Amador had ample evidence to impeach C.A. in that regard.

We conclude the trial court properly weighed the competing interests and did not abuse its discretion in denying Amador's motion for in camera review of C.A.'s medical and counseling records.

Opinion Testimony

Amador argues the State deprived him of a fair trial by soliciting improper opinion evidence of witness credibility. Amador raises a due process violation argument as well as prosecutorial misconduct and ineffective assistance of counsel arguments related to the witness testimony.

[8] C.A. had her first counselling session with Norris on July 2, 2013. The record mentions a subsequent scheduled visit in August. The record contains little evidence of additional counselling with Norris and Amador conceded that C.A. did not receive continuous counseling with Norris.

A witness may not "testify to his [or her] opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Nor may a witness give an opinion as to another witness' credibility. State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995). Indeed, the Washington Supreme Court has held that "expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses" is clearly inappropriate for opinion testimony in criminal trials. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). Such testimony may constitute reversible error because it "violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury." State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014).

Amador asserts the State elicited improper witness testimony by asking Nicolas, Melanie, and family friend Sandra whether they supported A.A.'s decision to report her allegations to law enforcement. Without objection, all three witnesses responded, "Yes."

Nicolas testified:

Q. Did you at some point learn that [A.A.] had decided to officially report [the sexual abuse] to law enforcement?
A. Yes.
Q. And were you a part of that decision, or was it just kind of something she said, "Hey, I'm going to do this"?
A. We had talked about it, and she had . . . come to the decision, and that was most — that made most sense to her, that she thought would be best.
Q. And once she made that decision, did you support her in it?
A. Yes.

Melanie testified:

Q. . . . Did [A.A.] tell you at some point . . . that she had made the decision to report [the sexual abuse] to the police?
A. Yes.
Q. And were you supportive of that decision?
A. Yes.
Q. Would you have been supportive if she made a different one?
A. Yes.

And Sandra testified:

Q. Did you later learn that [A.A.] had made the decision to report [the sexual abuse]?
A. Yes.
. . . .
Q. Did you support that decision?
A. I did.

Amador also alleges the State elicited improper opinion testimony from Amador's close friend and Sandra's husband Thomas McLaughlin, whom the State asked whether he had maintained contact with Amador since the allegations. Without objection, Thomas testified he had not. Thomas testified:

Q. Since [A.A. disclosed the sexual abuse], have you and your wife remained friends with Melanie?
A. Yes.
Q. Have you remained friends with [A.A.]?
A. Yes.
Q. Have you remained friends with [C.A.]?
A. Yes.
Q. Have you remained friends with the defendant?
A. I have not talked to him since.

Due Process

Amador asserts the State violated his constitutional right to due process by eliciting the witness testimony. But Amador did not object to any of the alleged opinion testimony during trial. As a general rule, appellate courts will not

review an issue raised for the first time on appeal. RAP 2.5(a). However, a party may raise manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). In order to demonstrate manifest constitutional error, the appellant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial. State v. A.M., 194 Wn.2d 33, 38, 448 P.3d 35 (2019).

Despite the clear prohibition of opinion testimony on credibility, "[a]dmission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a 'manifest' constitutional error." State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). In such cases, manifest error requires a showing that the testimony was "an explicit or almost explicit witness statement" that the witness believed the victim's accusations. Kirkman, 159 Wn.2d at 936. This requirement "is consistent with our precedent holding the manifest error exception is narrow." Kirkman, 159 Wn.2d at 936.

Nicolas, Melanie, and Sandra testified that they supported A.A.'s decision to speak with law enforcement. Thomas testified that he and Sandra had remained friends with Melanie, A.A., and C.A. but had not remained friends with Amador. None of the witnesses directly testified that Amador was guilty or expressly asserted that they believed A.A.'s version of events. Although a juror could infer from their testimony that the witnesses believed A.A.'s allegations credible and worthy of reporting to law enforcement, opinion testimony "relating only indirectly to a victim's credibility" does not rise to the level of manifest constitutional error. Kirkman, 159 Wn.2d at 922.

Nonetheless, even if the testimony amounted to nearly explicit opinions on credibility and guilt, in context of the entire trial, any error was not so prejudicial as to create practical and identifiable consequences in the outcome of the trial. The State presented overwhelming evidence that Amador sexually abused A.A. over many years. Additionally, the court properly instructed the jury on its role in assessing credibility[9] and we presume the jury follows the court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995). As a result, the error was not manifest and we will not review it for the first time on appeal.

Prosecutorial Misconduct

Amador claims the State committed prosecutorial misconduct by repeatedly soliciting the improper opinion testimony discussed above. The State argues Amador cannot meet the heightened requirements for prosecutorial misconduct where he failed to object at trial. We agree with the State.

To establish prosecutorial misconduct, a defendant must demonstrate that the conduct was both improper and prejudicial in the context of the entirety of the record and the circumstances at trial. State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008). Where, as here, the defendant fails to object at trial, the error is waived absent misconduct so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice. State v. Emery, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). To demonstrate this level of misconduct, "the defendant must show that (1) 'no curative instruction would have obviated any prejudicial

[9] Jury instruction 1 provides, "You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness." It then provides a number of factors a juror may consider in evaluating a witness' testimony.

effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.' " Emery, 174 Wn.2d 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

Had Amador objected to the first instance of alleged opinion testimony, the trial court could have evaluated the admissibility of the testimony and issued a curative instruction if needed. Amador cannot show that an instruction would not have cured or avoided any prejudice. Because we presume jurors follow instructions from the court, a curative instruction would have alleviated any prejudice from the testimony. See State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). Furthermore, a timely objection would have deterred the State from eliciting similar testimony from subsequent witnesses. Accordingly, Amador fails to demonstrate the flagrant and ill-intentioned misconduct necessary for his prosecutorial misconduct claim.

Ineffective Assistance of Counsel

Amador argues he received ineffective assistance of counsel because counsel repeatedly failed to object to the opinion testimony. To prove ineffective assistance of counsel based on failure to object, a defendant "must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted." In re Pers. Restraint Petition of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).[10] Courts engage in a strong presumption of effective representation. State v. McFarland, 127 Wn.2d 322,

[10] Footnotes omitted.

335, 899 P.2d 1251 (1995). For a successful claim of ineffective assistance of counsel, a defendant must establish both objectively deficient performance and resulting prejudice. Emery, 174 Wn.2d at 754-55.

Regardless of whether counsel should have objected, Amador is unable to demonstrate prejudice. Prejudice requires "a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." McFarland, 127 Wn.2d 335.

A.A. gave detailed testimony about the sexual abuse she suffered and how it progressed over several years. C.A. and Melanie substantiated this evidence with testimony that until A.A. moved out of the house during college, Amador forced A.A. to shower with him, took naps with her in the nude, and used a dresser to block the bedroom door while he "pinned" her. Melanie, C.A., and Sandra also detailed Amador's almost obsessive devotion to A.A., including taking her on "dates," keeping her with him at all times, and describing her as "hot." This evidence amply supports the credibility of A.A.'s allegations. Given the overwhelming evidence presented at trial, Amador cannot demonstrate the prejudice required for ineffective assistance of counsel.

Violation of Motion in Limine

Prior to trial, Amador moved in limine to prohibit evidence of the "perceived youthfulness" of his wife Shannon.[11] The trial court agreed, noting the evidence to be highly prejudicial, not relevant, and "close to profile evidence about Mr. Amador."

[11] Shannon is six years older than A.A.

Despite the court's ruling, the State asked Shannon on cross-examination, "How close in age are you to [A.A.]?" Amador objected to the testimony as a violation of the motion in limine. The court recessed to hear from the parties. During this discussion, the court characterized the motion in limine as a "motion to exclude testimony commenting on Shannon Amador's perceived youthful appearance." Over defense's objection, the court allowed the testimony on cross-examination, concluding that the motion in limine was "to exclude testimony about perceived youthfulness, which isn't the question that was asked."

Amador argues the trial court mistakenly admitted this "irrelevant and inflammatory profile evidence." The State disagrees that the testimony amounted to "profile" evidence and claims harmless error. We conclude this evidence was irrelevant and improperly admitted but the error was harmless.

"Evidence which is not relevant is not admissible." ER 402. "Relevant evidence" is evidence having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. The appellate court reviews evidentiary decisions for abuse of discretion. Vars, 157 Wn. App. at 494.

Nothing about Shannon's age or similarity in age to A.A. had "any tendency to make the existence of any fact that is of consequence to the determination of" whether Amador sexually abused A.A. "more probable or less probable" as required for relevant evidence under ER 401. The evidence was not relevant and should have been excluded.

However, improperly admitted evidence may amount to harmless error. See State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Evidentiary error requires prejudice for reversal. Neal, 144 Wn.2d at 611. "An error is prejudicial if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.' " Neal, 144 Wn.2d at 611 (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). Improperly admitted evidence is harmless if it is of minor significance in relation to the evidence as a whole. Neal, 144 Wn.2d at 611.

Shannon's similarity in age to A.A. is unlikely to have materially affected the outcome of the trial. Shannon testified in person. Her "perceived youthfulness" was visible to the jury. Furthermore, the State did not otherwise raise or argue the issue of Shannon's age. The testimony played a minimal role in relation to the evidence at trial. Admission of this irrelevant evidence was harmless error.

Cumulative Error

Amador argues for reversal under the cumulative error doctrine. The cumulative error doctrine requires reversal when the combined effect of several errors denies the defendant a fair trial. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). "The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial." Weber, 159 Wn.2d at 279. Here, the admission of the testimony as to Shannon's similarity in age to A.B and defense counsel's failure to object to the solicitation of alleged improper opinion evidence were not prejudicial. Because these errors had no effect on the outcome of the trial, cumulative error does not apply.

We affirm the jury convictions of one count of domestic violence child molestation of A.A. in the first degree, one count of domestic violence child rape of A.A. in the second degree, one count of domestic violence child rape of A.A. in the third degree, and one count of incest with A.A. in the first degree.

WE CONCUR:

NIELSEN KOCH P.L.L.C.

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