SUPREME COURT NO. 99012-1
NO. 37150-6-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MARTINEZ,

Petitioner.

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

The Honorable Gayle Harthcock, Judge

PETITION FOR REVIEW

ERIN MOODY
Attorney for Petitioner

NIELSEN KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. PETITIONER AND COURT OF APPEALS DECISION

Petitioner Michael Martinez seeks review of the Court of Appeals' decision in State v. Martinez, filed April 8, 2021 ("Op."), which is appended to this petition.

Mr. Martinez was convicted of three counts of first-degree child molestation and one count of second-degree child molestation, with "ongoing pattern of sexual abuse" enhancements on each first-degree count. CP 58-62, 64-67, 73. These verdicts resulted from allegations that the Court of Appeals correctly characterized as hard to believe. Op. at 21. Mr. Martinez's two accusers each testified that Mr. Martinez perpetrated every alleged act of abuse just feet or inches away from other people. See id. Yet no other witness testified to even a suspicion of inappropriate behavior.

In closing argument, the prosecutor repeatedly misrepresented one accuser's testimony, making it sound as if both accusers had alleged identical patterns of abuse, when in fact their testimony differed significantly. Defense counsel objected only to the last of these repeated misstatements.

The Court of Appeals held the objected-to misstatement was misconduct that might have influenced the guilty verdicts. Op. at 28-29. Nevertheless, it declined to reverse any of Mr. Martinez's convictions, concluding, "We cannot say whether . . . [the jury believed the accusers] because of the jury's proper evaluation of the evidence or because of the prosecutor's mischaracterization." Op. at 29.

With respect to the un-objected-to misstatements, the Court of Appeals declined to consider prejudice at all, including whether a curative instruction would have neutralized their effect. It concluded those issues were waived because the misstatements were insufficiently racist or otherwise "particularly inflammatory." Op. at 29-30.

Finally, the Court of Appeals refused to address Mr. Martinez's claim that defense counsel was ineffective for failing to object to all the prosecutor's improper remarks. The court thus impliedly concluded this issue was waived, as well.

Collectively, these errors by the Court of Appeals conflict with numerous decisions from this Court and Division One. This Court should accept review and reverse Mr. Martinez's convictions.

B. ISSUES PRESENTED FOR REVIEW

1. If the appellate court "cannot say" whether the jury would have convicted but for the prosecutor's misconduct, is there a "substantial likelihood" that misconduct affected the verdict? (Yes.)

2. Can the appellate court determine whether the prosecutor's improper statement was "flagrant and ill-intentioned," and therefore reviewable even though unpreserved, without deciding whether a curative instruction would have neutralized the resulting prejudice? (No.)

3. When the defendant raises claims on appeal alleging both that the prosecutor's unpreserved misconduct was flagrant and ill-intentioned, and that defense counsel was ineffective for failing to object to

that misconduct, may the appellate court resolve those claims without ever performing any prejudice analysis at all? (No.)

C. STATEMENT OF THE CASE

Mr. Martinez was born and raised in a small house in Yakima, Washington, where he lived with his parents and his sister. RP 477-79.[1] The house was about 600 square feet, with one story and two bedrooms. RP 479-80. From 2007 until he moved away in 2013, Mr. Martinez's bedroom was a trailer in the family's back yard. RP 355, 479, 556-58, 676.

The Martinezes sometimes hosted extended family gatherings at their house, and sometimes young children would spend the night there. RP 291-92, 318-19, 663-64. These included Mr. Martinez's cousins, H.C. and her sister and P.R. and her brothers. RP 320-22, 359, 397, 605, 670.

When Mr. Martinez graduated from high school in 2010, he got a job and began attending community college. RP 555-56. In late 2012, Mr. Martinez began living with his girlfriend. RP 555-56. From that point on, the two spent every night together, staying either at Michael's girlfriend's house or in the trailer behind the Martinez family home. RP 556-57. In 2013, the couple moved into their own house, after Mr. Martinez's girlfriend became pregnant with their first child. RP 558-59. They had two more children, in 2016 and 2018. RP 560. Mr. Martinez supported the

[1] The trial transcripts cited in this brief are designated RP 1-843, except for the transcripts of the hearing on the motion to sever. The transcripts for that hearing are cited as RP (May 15, 2018) at 1-17.

family by working construction, landscaping, and other jobs. RP 480, 559-61.

In December of 2017, H.C. told her mother that Mr. Martinez had touched her vagina when she was younger. RP 306-09. After H.C. made this allegation, P.R.'s mother asked P.R. whether Mr. Martinez had ever touched her, and P.R. said he had. RP 365-66, 399-401. At that point, law enforcement became involved. RP 421-22.

When they first made their allegations, H.C. was 17 years old and P.R. was 13. RP 288, 354-55. H.C.'s allegations went back six to nine years, P.R.'s one to seven years. RP 288, 313, 358-61. Neither H.C. nor P.R. had ever told anyone about the alleged touching before. RP 308, 328, 364.

The State charged Mr. Martinez with one count of first-degree rape of a child and one count of first-degree child molestation, involving H.C. and allegedly occurring between February 15, 2008, and December 31, 2011; two counts of first-degree child molestation, involving P.R. and allegedly occurring between June 1, 2010, and December 31, 2015; and one count of second-degree child molestation, involving P.R. and allegedly occurring on or about January 1, 2017. CP 21-23. The State also alleged that counts one through four were "part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time." CP 21-23.

Mr. Martinez pleaded not guilty and moved to sever the charges involving H.C. from the charges involving P.R. CP 10-17; RP (May 15, 2019) at 3. The court denied the severance motion and Mr. Martinez proceeded to trial on all five counts in late August 2019. RP (May 15, 2019) at 14-16; RP 1-21.

1. The Accusers' Testimony

Nineteen-year-old H.C. testified that Mr. Martinez repeatedly touched her vagina when she was between the ages of eight and 12. RP 312-13. She testified variously that this occurred about 10 times and that it occurred between 20 and 50 times, but she could recall only two distinct instances. RP 295-98, 300-03, 319-20, 330-31.

H.C. said the first incident occurred when she was sharing a bed with her cousin, who was 11 or 12 years old at the time, and her younger sister, in her cousin's "tiny" bedroom. RP 320-23. She said Mr. Martinez entered the bedroom, knelt by the bed, and reached into her shorts; that this woke up her younger sister, who then asked what was going on; that Mr. Martinez avoided detection by "hid[ing] down a little"; and that H.C. told her sister the family's dog had woken her up." RP 295-97.

H.C. described the second event as similar but occurring in the living room where she and several of her cousins were sharing a bed of blankets and pillows made up on the floor. RP 311-12.

Fifteen-year-old P.R. testified that Mr. Martinez touched her inappropriately on three occasions. RP 360. She said the first occasion

occurred when she was six years old and sleeping in a bedroom at the house Mr. Martinez shared with his parents and sister. RP 375-76, 380, 480. She said that several adult family members were awake and present in the kitchen and living room when this occurred. RP 359, 375. Without anyone noticing, Mr. Martinez entered the bedroom where P.R. was sleeping, got into bed with her, attempted unsuccessfully to remove his shirt, and touched her vagina over her clothes. RP 371-77. She said Mr. Martinez stopped when she got up and "ran to the kitchen to throw up" because she had eaten some bad food. RP 374.

P.R. testified that the second incident occurred while she was watching TV in the living room. RP 378-79. While her mother and aunt were in the kitchen, "[a] couple feet" away, Mr. Martinez stood in front of the couch, leaned over her, and touched her vagina through her clothing. RP 379-81.

P.R. testified that the last occasion occurred two or three years before the trial, at the home Mr. Martinez shared with his wife. RP 361. She said Mr. Martinez set up an air mattress in the living room for P.R. and her two brothers to sleep on. RP 361-62. While Mr. Martinez's 19-year-old sister and her boyfriend slept on a nearby couch, Mr. Martinez came out of his bedroom, knelt at the head of the air mattress, and grabbed P.R.'s breast for about a minute while she lay next to her two brothers. RP 288, 293, 383, 386-87. He stopped and "walked away" when one of P.R.'s brothers started moving. RP 387. P.R. stayed still and stared at the ceiling

for about ten minutes, until one of her brothers "woke up and started puking." RP 388.

On direct examination, P.R. stated unequivocally that she could remember only three incidents in which Mr. Martinez touched her. RP 360. She did so despite the prosecutor's repeated attempts to elicit testimony that more incidents occurred. RP 360-64. The exchange was as follows:

> Q. Do you recall any other times Mr. Martinez touched you between those two incidents?
> A. No.
> Q. Do you recall about how many times Mr. Martinez - -
> A. All I can remember is three times.
> Q. Did Mr. Martinez only touch you three times or did - -
> A. I can only recall - -
> Q. Did he touch you more than three times?

RP 360. After the court overruled defense counsel's objection that the question had been asked and answered, the prosecutor asked some detailed questions about the third alleged incident of touching, and tried once more to elicit P.R.'s testimony that more than three incidents occurred:

> Q. Now, we talked about three incidents now. The first two occurred at his parents' house?
> A. Yes.
> Q. The last one at Michael's house?
> A. Yes.
> Q. Did they happen anywhere else?
> A. No.
> Q. All the times Michael touched you was over the clothing?
> A. Yes, from what I can remember.
> . . .
> Q. Are you able to estimate how many times he touched you?

RP 360-64. At this point, the court sustained a second objection that the question had been asked and answered, and the prosecutor moved onto another line of questioning. RP 364.

2. Defense Witness Testimony

Mr. Martinez testified that he never committed any of the acts alleged. RP 498-99, 509.

Other defense witnesses testified to the reasons it would have been difficult for the alleged abuse to occur, on so many occasions and over so many years, unobserved. RP 485-86, 593, 602, 666-68, 677.

Mr. Martinez, his mother, and his sister all testified that it would have been impossible for Mr. Martinez to enter the house at night without waking other family members. RP 485-86, 602, 666-68. They all explained that the only way into the house at night was through the back door, and that this way of entering made a lot of noise. RP 486, 593, 677. They described the entire house as squeaky, especially the door to sister's bedroom, and Mr. Martinez's mother testified that her dogs would have barked if someone had come into the house in the middle of the night. RP 594, 602, 666-68. Mr. Martinez's sister testified that she would have awoken if someone had come into the room and walked along the foot of her bed, as Mr. Martinez would have had to do to reach a child sleeping there. RP 600-03.

Mr. Martinez's girlfriend testified that she is a light sleeper and believed she would have awoken if Mr. Martinez had left their bed on New Year's Day 2017. RP 450.

All the witnesses agreed that P.R. had spent the night at the Martinez home on many occasions, but the frequency with which H.C. stayed at the Martinez house was disputed, even among the State's witnesses. RP 293, 347, 399, 482, 590, 604-05, 663. H.C. testified that she stayed the night at the Martinez house more than her sister, because her sister and Mr. Martinez's sister did not get along. RP 293. But H.C.'s mother testified that any time one of her daughters spent the night, the other did as well. RP 347. And, contrary to H.C.'s testimony that she stayed at the Martinez house 20 to 50 times, Mr. Martinez and his mother and sister all testified that she stayed over on only a couple of occasions. RP 482, 590, 663.

3. Severance Motion, Closing Argument, and Verdicts

Defense counsel did not renew the motion to sever at or before the close of evidence; thus, the trial court's ruling on that motion was waived on appeal. See CrR 4.4(a)(2).

The State elected one specific incident of touching to support each charge. RP 725-26. In closing argument, the prosecutor addressed the counts involving P.R. as follows:

> She testified, again, that *she knew it started before this first time that she could remember*. …
>
> What the state has to prove, we have these two separate incidents [occurring at the Martinez house]. The first incident that she recalls would be the support for [Instruction] No. 13. For [Instruction] No. 14, it was that second incident that she talked about.
>
> The second incident she was able to recall, again, *she talked about how this was going on all the time.* We heard

> testimony she was spending the night at this residence quite frequently. She was there all the time.

RP 760-62 (emphasis added). Defense counsel did not object to these statements. RP 761-62.

When he addressed the alleged aggravating circumstance, the prosecutor told the jury: "We also heard evidence that this happened not just once, not just twice, not just three times, *but this happened all the time, 20 to 50 times for [H.C.], just as many for [P.R.]*" RP 766 (emphasis added).

Defense counsel immediately objected that this statement "assumes facts not in evidence." RP 766. The court overruled the objection, commenting, "[t]he jury will rely on their recollection of the testimony." RP 766.

The jury acquitted Mr. Martinez on count one, the first-degree rape charge. RP 802. It returned a verdict of guilty on all the other counts, and it found that counts two through four were "part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time." RP 802-05.[2]

The court imposed a total term of 209 months to life, followed by a life term of community custody. RP 831-32.

[2] Inconsistent with the charging information, the jury was erroneously instructed to consider the "ongoing pattern" aggravator with respect to count five, as well. CP 55. It found the aggravator applied, but the court vacated that finding. CP 73.

4. Court of Appeals Decision

Mr. Martinez raised several claims on appeal, including that defense counsel was ineffective in failing to renew the motion to sever at or before the close of evidence, because this waived a viable ground for reversal on appeal; that the prosecutor committed misconduct three times in closing by arguing facts not in evidence; that the two instances of unpreserved misconduct were flagrant and ill-intentioned and therefore reviewable on appeal; and that defense counsel was ineffective for failing to object to these two improper statements. Am. Br. of App. at 21-31, 35-37, 47, 52-53.

The Court of Appeals called Mr. Martinez's first ineffective assistance claim "one of his most convincing arguments," but it declined to provide relief because it concluded defense counsel may have had a strategic reason not to renew the severance motion. Op. at 21-22. The court reasoned that, since each accuser's allegations were individually hard to credit, defense counsel may reasonably have concluded that *both* accusers' allegations were collectively even harder to credit. Id. It held he must therefore pursue relief through a personal restraint petition. Id. at 22.

The Court of Appeals also agreed that the prosecutor committed misconduct when he told the jury that P.R. testified to between 20 and 50 acts of abuse. Id. at 27. It found there was a substantial likelihood this misconduct led to the jury's special "ongoing pattern" findings with respect to the counts involving P.R., and it ordered those findings be vacated. Op.

at 27-28. But the court declined to reverse Mr. Martinez's four convictions. Id. at 28-29. The latter decision stemmed from two errors.

First, the Court of Appeals applied the wrong standard for relief. Id. at 29. It acknowledged that the prosecutor's misconduct invited the jury to cumulate evidence, because it made the two accusers' allegations appear identical and therefore mutually corroborating. Id. at 28-29. But the court concluded:

> [I]t is evident the jury believed both accusers. *We cannot say whether this is because of the jury's proper evaluation of the evidence or because of the prosecutor's mischaracterization of P.R.'s testimony.* For this reason, we cannot say there is a substantial likelihood that the prosecutor's misconduct resulted in Mr. Martinez's four convictions.

Id. at 28-29 (emphasis added).

Second, the Court of Appeals refused to review the other two instances of misconduct—the prosecutor's assertions that P.R. experienced more incidents of molestation than she could remember and that these incidents occurred "all the time," RP 760-62—because it concluded they were not flagrant and ill-intentioned. Op. at 29-30. Specifically, the court concluded that misconduct cannot be flagrant and ill-intentioned unless it "relate[s] to race []or [is] . . . particularly inflammatory." Op. at 30.

Finally, the Court of Appeals failed to address, or even acknowledge, Mr. Martinez's claim that defense counsel was ineffective for failing to object to two of the prosecutor's improper statements. It is not clear why this failure occurred—the court denied Mr. Martinez's motion for

reconsideration calling this to the panel's attention—but it completely shielded two incidents of serious misconduct from any prejudice analysis.

D. REASONS REVIEW SHOULD BE ACCEPTED

The Court of Appeals' decision merits review under RAP 13.4(b)(1), (2), and (4).

Review is warranted under RAP 13.4(b)(1) and (2) because the Court of Appeals' decision conflicts with several opinions, from this Court and Division One, addressing claims of prosecutorial misconduct. The court's application of the "substantial likelihood" standard for reversible misconduct conflicts with this Court's decisions in State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978), and In re Glasmann, 175 Wn.2d 696, 710-11, 286 P.3d 673 (2012). And its holding that misconduct is not "flagrant and ill intentioned" unless it is race-based or "particularly inflammatory" conflicts with numerous decisions, from this Court and Division One of the Court of Appeals, holding that misconduct is flagrant and ill-intentioned if it could not have been neutralized by a curative instruction. E.g., PRP of Phelps, 190 Wn.2d 155, 170, 410 P.3d 1142 (2018); Glasmann, 175 Wn.2d at 704; Charlton, 90 Wn.2d at 661-62; State v. Stith, 71 Wn. App. 14, 21-23, 856 P.2d 415 (1993).

Finally, review is appropriate under RAP 13.4(b)(4) because this petition presents an issue of substantial public interest that this Court should address. As noted, the Court of Appeals ignored Mr. Martinez's claim that counsel was ineffective for failing to object on two of the occasions the

prosecutor seriously misrepresented P.R.'s testimony. Because the court also found this misconduct was not flagrant and ill-intentioned, it declined to consider the effect of that misconduct on the verdict. The Court of Appeals thus completely shielded the unpreserved misconduct from any prejudice analysis.

This should never occur. Unpreserved misconduct is flagrant and ill-intentioned if it could not have been cured by an instruction, and counsel cannot strategically forgo an instruction that would have effectively mitigated prejudice. Thus, a situation cannot arise in which unpreserved misconduct escapes a prejudice analysis under both of those rubrics.

1. The Court of Appeals' "substantial likelihood" analysis conflicts with this Court's decision in Charlton and Glasmann.

As noted, the prosecutor falsely asserted in closing argument that both accusers testified to "20 to 50" incidents of molestation. RP 766. The Court of Appeals correctly held that this comment was misconduct, and that there was a substantial likelihood it led the jury to find the "ongoing pattern" aggravators for the first-degree molestation counts involving P.R. Op. at 28. The court also acknowledged that this misconduct might have resulted in Mr. Martinez's four convictions. Op. at 29 ("[*w]e cannot say* whether [the jury believed both accusers] because of [its] proper evaluation of the evidence or because of the prosecutor's mischaracterization of P.R.'s testimony") (emphasis added). But the court then concluded that, since it could not tell whether the verdicts resulted from the evidence or the

misconduct, there was no substantial likelihood that the misconduct affected the verdict. Op. at 29.

This analysis conflicts with this Court's precedent on the "substantial likelihood" standard for reversal. In Charlton, this Court explained that standard as follows:

> The question we must ask is whether there is substantial likelihood the prosecutor's comment affected the verdict. . . . *If we are unable to say from the record before us whether the petitioner would or would not have been convicted but for the comment, then we may not deem it harmless.*

90 Wn.2d at 664 (emphasis added).

This Court recently reaffirmed this standard in Glasmann, where it explained that "reviewing claims of prosecutorial misconduct is not a matter of determining whether there is sufficient evidence to convict the defendant." 175 Wn.2d at 710-11. The Glasmann court explained that, in most cases of prosecutorial misconduct, "'competent evidence fully sustains a conviction.'" Id. at 711 (lead opinion) (quoting Charlton, 90 Wn.2d at 665) (emphasis omitted); id. at 715 (Chambers, J., concurring). Nevertheless, prosecutorial misconduct is reversible—*i.e.*, there is a "substantial likelihood" that it affected the verdict—so long as the appellate court "cannot say that the jury would not have returned [different] verdicts" but for the misconduct. Id. at 712.

In this case, Mr. Martinez was prejudiced not only by the prosecutor's serious misstatement of the evidence, but also by the fact that the trial court effectively ratified that misstatement when it overruled

defense counsel's timely objection. See Am. Br. of App. at 49-50. The Court of Appeals correctly concluded that the misconduct might have led the jury to credit both accusers' accounts. Op. at 29. Under the long-standing "substantial likelihood" standard, Mr. Martinez's convictions must be reversed.

2. The Court of Appeals' "flagrant and ill-intentioned" analysis conflicts with numerous decisions from this Court and Division One of the Court of Appeals.

When defense counsel fails to object to the prosecutor's improper argument, that failure waives the issue on appeal unless the argument was "'so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'" State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011) (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)).

In Mr. Martinez's case, the Court of Appeals held that "[m]isconduct meets [the flagrant and ill-intentioned] standard in a narrow set of cases, where a jury could draw improper inferences from comments on a defendant's race or membership of a group or when a prosecutor's remarks are particularly inflammatory." Op. at 29. It held that, because the prosecutor in Mr. Martinez's case did not make this kind of personal or identity-based appeal to prejudice, it would not consider the effect of the misconduct or whether a curative instruction would have neutralized it. Op. at 30.

This holding is contrary to precedent. Unpreserved prosecutorial misconduct is "flagrant and ill-intentioned," and therefore reviewable on appeal, if an instruction would not have cured the resulting prejudice. Glasmann, 175 Wn.2d at 704 ("Because Mr. Glasmann failed to object at trial, the errors he complains of are waived unless he establishes that the misconduct was so flagrant and ill intentioned that an instruction would not have cured the prejudice."). Contrary to the Court of Appeals' analysis, that standard may be met even if the improper comment is not a race-based or similar appeal to prejudice—for example, where the prosecutor violates clearly established case law or a ruling in limine. Charlton, 90 Wn.2d at 661-64 ("[w]e have consistently held that unless prosecutorial conduct is flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect, any objection to such conduct is waived by failure to make an adequate timely objection and request a curative instruction"; prosecutor's comment on defendant's invocation of spousal privilege met that standard); Stith, 71 Wn. App. at 21-23 (prosecutor's comments flagrant and ill-intentioned, and therefore incurable by instruction, where they violated both ruling in limine, excluding prior convictions evidence, and constitutional prohibition against comment on right to silence).

In reaching its contrary conclusion, the Court of Appeals relied on Phelps, 190 Wn.2d at, 170. Op. at 29. But while Phelps discussed race-based and other "inflammatory" appeals, it did not hold that these are the

only instances of misconduct that rise to the level of "flagrant and ill-intentioned." 190 Wn.2d at 170-72. Instead, it merely distinguished the alleged misconduct in that case—the prosecutor's use of the term, "grooming," in closing argument—from the far more inflammatory statements in State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988); and Glasmann, 175 Wn.2d at 701-02, some of which were race-based and some of which were not. Phelps, 190 Wn.2d at 170-72.

Crucially, the Phelps court then went on to consider what the Court of Appeals did not: whether a jury instruction could have cured any prejudice resulting from the prosecutor's comments. Compare Phelps, 190 Wn.2d at 171-72 (any possible prejudice curable by instruction that closing argument is not evidence) with op. at 30 (declining to consider effect of curative instruction because comments "are not the type of remarks that qualify for review").

In his briefing to the Court of Appeals, Mr. Martinez explained in detail why an instruction could not have cured the prejudice resulting from the prosecutor's serious, repeated misrepresentation of P.R.'s testimony. Am. Br. of App. at 51-52 (prosecutor's closing argument repeatedly misrepresented detailed testimony that was likely hard for jury to recall, and any effective instruction would have been comment on evidence). This is the real test for reviewable unpreserved misconduct. State v. Emery, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012) (because defendant bears burden

of preserving misconduct claim, "[r]eviewing courts should focus less on [prosecutor's intent] . . . and more on whether the resulting prejudice could have been cured").

3. By applying an incorrect "flagrant and ill-intentioned" standard, and then ignoring Mr. Martinez's claim that counsel was ineffective for failing to seek a curative instruction, the Court of Appeals completely insulated the prosecutor's misconduct from any prejudice analysis.

Both the federal and Washington constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when (1) his or her attorney's conduct "falls below a minimum objective standard of reasonable attorney conduct and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993). In addition to arguing that no instruction could have cured the prejudicial effect of the prosecutor's repeated misconduct in closing argument, Mr. Martinez also argued that defense counsel was ineffective for failing to object to that misconduct. Am. Br. of App. at 52-54.

This ineffective assistance claim is the natural and necessary corollary to a claim that unpreserved misconduct is flagrant and ill-intentioned. The "flagrant and ill-intentioned" standard stems from the defendant's duty to object to prosecutorial misconduct: on appeal, the

defendant may not complain about prejudice he could have avoided simply by seeking a timely curative instruction. Emery, 174 Wn.2d at 761-62. By the same token, if an instruction would have cured the prejudice stemming from the misconduct, then counsel's failure to seek that instruction cannot be explained by any legitimate strategy, and counsel performed unreasonably. See State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (counsel performs unreasonably, for purposes of ineffective assistance analysis, if her conduct cannot be explained by legitimate tactic).

Under either analysis, the appellate court must consider prejudice, *i.e.*, the probable effect of the misconduct on the verdict. See State v. Mireles, 16 Wn. App. 2d 641, 659-61, 482 P.3d 942 (2021) (failure to object to curable misconduct *per se* unreasonable, but reversible only if reasonable probability it affected the verdict); Glasmann, 175 Wn.2d at 704-08 (incurable / flagrant and ill-intentioned misconduct reversible only if substantial likelihood it affected verdict).

E. CONCLUSION

This Court should accept review under RAP 13.4(b)(1), (2), and (4) and reverse Mr. Martinez's convictions.

DATED this 23rd day of June, 2021.

Respectfully submitted,
NIELSEN KOCH, PLLC

ERIN MOODY, WSBA No. 45570
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. MICHAEL NACHO MARTINEZ, Appellant.	)))))))))	No. 37150-6-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — Michael Martinez appeals after a jury found him guilty of four counts of child molestation—one count involving one accuser and the other three involving a second accuser. One of his most convincing arguments is that he received ineffective assistance of counsel when defense counsel failed to renew his denied pretrial motion to sever charges. Had the motion been granted, there would have been two trials, one for each accuser.

CrR 4.4(a)(2) requires counsel to renew a denied pretrial motion to sever before or at the close of all the evidence. Failure to renew a denied pretrial motion to sever results in waiver of any claimed error with respect to that motion.

Based on the record, we are unable to determine whether defense counsel's failure to renew the denied motion was a reasonable strategic decision. Martinez must seek relief through a personal restraint petition.

But we agree the prosecutor committed misconduct by mischaracterizing one of the accuser's testimony and there is a substantial likelihood that this misconduct resulted in the jury finding the presence of the "ongoing pattern of sexual abuse" aggravator with respect to counts 3 and 4. We remand for the trial court to vacate those two findings and for resentencing. We otherwise affirm his convictions.

FACTS

Michael Martinez was born in 1991. He and his family lived in a small 600 square foot, two-bedroom house. His family consisted of his mother, Dana, his father, Mario, and his sister, Lilyanna.[1] Martinez slept in the living room until around 2006, when he moved into a trailer in the backyard.

The Martinez family sometimes hosted gatherings where cousins and friends spent the night in their home. Those overnight guests included H.C. and P.R., Martinez's accusers.

[1] Because multiple witnesses share the surname Martinez, we refer to those witnesses by their first names. We mean no disrespect.

H.C. is Martinez's cousin and was born in 2000. P.R. is the daughter of Dana's best friend, Wonvisa Ramirez, and was born in 2004.

In December 2017, H.C. told her mother, Cristina, that Martinez touched her when she was younger. She said it happened when she spent the night at the Martinez house. Cristina then told Ms. Ramirez, P.R.'s mother, about H.C.'s allegations. When Ms. Ramirez asked P.R. if anything happened to her, P.R. started crying. At that point, law enforcement began its investigation.

Based on H.C.'s accusations of abuse from February 2008 to December 2011, the State charged Martinez with one count of first degree rape of a child (count 1) and one count of first degree child molestation (count 2). Based on P.R.'s accusations of abuse from June 2010 to December 2015, and also on January 1, 2017, the State charged Martinez with two counts of first degree child molestation (counts 3 and 4) and one count of second degree child molestation (count 5). The State also alleged the "ongoing pattern of sexual abuse" aggravator with respect to each count except count 5.

Martinez pleaded not guilty to all counts. Three months prior to trial, he moved to sever the charges involving H.C. from the charges involving P.R.

Motion to Sever

At the severance motion hearing, Martinez argued that a trial on five counts involving two alleged victims would cause the jury to cumulate evidence and infer guilt in one case based on evidence from the other. The State disagreed, arguing any prejudice could be mitigated by a limiting instruction.

The court analyzed the four severance factors and denied the motion. For the first factor—the strength of the State's evidence on each count—the court stated:

> I also note that in the SIR[2] that . . . [Cristina] reported that she had learned that Michael had admitted to abusing H.C. and another female cousin. So there's some strength there as well if that actually comes into evidence.
>
> . . . [I]f in fact that admission does come into evidence—state's case would be fairly strong at least as to [H.C.]. And then [H.C.] bolsters the other case in her testimony [because she told an officer she saw Martinez abuse P.R. once]. So I think the state's evidence is fairly strong on these cases.

Report of Proceedings (RP) (May 15, 2019) at 12.

For the second factor—the clarity of the defenses—the court found little likelihood of confusion because Martinez denied everything.

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[2] The first document filed by the State in a criminal prosecution is an abbreviated narrative prepared by law enforcement and signed under oath. The narrative supports probable cause, which must be determined at the initial preliminary hearing. The narrative, known as a "Suspect Identification Report," is colloquially shortened to SIR.

For the third factor—court instructions to the jury to consider each count separately—the court noted: "[J]uries—are willing to and capable of following that instruction and in fact by law are presumed to follow the court's instructions." RP (May 15, 2019) at 13.

For the fourth factor—cross-admissibility of evidence—the court stated: "[T]his is the one that gives me the most pause, given the—the time frame of these occurrences." RP (May 15, 2019) at 13. But it concluded the overlap in time between both victims' allegations make it mostly "an ongoing thing." RP (May 15, 2019) at 14. The court rejected Martinez's argument that the evidence would be inadmissible under ER 404(b):

> [T]he court could allow in these cases evidence of prior molestations or rapes of children under a common scheme or pattern or plan with designing to molest young children due to the marked similarities of the events.
>
> Part of the marked similarity of these events are the location, the relationship of the children to—to either—by—blood or by friendship, these are children of either a friend of the mother's of the defendant or either a relative of the mother's, I believe, and that's how they ended up in that household at the time of the events.
>
> So, the cross-admissibility is the most bothersome to me, because it does lead the court to consider that there may be an inference of guilt.
>
> But when I weigh the inherent prejudice of that to the defendant against the important consideration of judicial economy—And I note that the cross-admissibility of evidence is not . . . an entirely exclusionary factor under the case law, but just one of the factors to consider—I believe that the consideration of judicial economy . . . overrides the inherent prejudice that occurs, that can be overcome by proper instructions to the jury. . . .

RP (May 15, 2019) at 14-15.

The court concluded: "I don't believe that the defense has raised the manifest prejudice that's necessary under the circumstances sufficient to outweigh the concern for judicial economy and I'll deny the motion at this time." RP (May 15, 2019) at 16. The court said it expected defense counsel to renew the motion at trial.

Trial

State's Witnesses

H.C.'s Testimony

H.C. testified that her extended family was "always together" for dinners, holidays, and birthdays. RP at 291.[3] H.C. slept over at Martinez's house "[a]ll the time" because she was close to Lilyanna, Martinez's sister. RP at 293. She always slept with Lilyanna, usually in her bedroom. Three children often slept in one bed.

H.C. said the first time Martinez touched her, she was around eight years old. She was sleeping with her sister and Lilyanna, who is about three years older than she is. Martinez came into Lilyanna's bedroom and put his fingers inside of H.C.'s vagina. When H.C.'s sister woke up and asked what was happening, H.C. made up a lie. Martinez left after H.C.'s sister went back to sleep.

[3] "RP" references are to the verbatim report of proceedings of the trial unless otherwise indicated.

H.C. said the next time it happened was in the Martinez living room. They set up blankets and pillows on the floor to sleep on. Martinez laid next to H.C. and put his hands on her vagina. She could not remember how old she was or how much time had elapsed between the first incident and the second.

H.C. testified that it happened again on Lilyanna's 15th birthday. This time, Martinez placed H.C. on top of him while he was sitting on the couch. She said they were both facing the ceiling but she could feel his body behind her and remembered feeling "something wet" below her waist. RP at 300. She later testified that she remembered "seeing white stuff." RP at 331.

When the prosecutor asked H.C. to talk about another time Martinez touched her, she said: "He just touched me in the living room. It's like what I'm telling you he did every single time. He always touched me when I was sleeping, when it was nighttime, like it's all the same." RP at 302. She continued: "When he moved to the trailer, he still found himself a way inside the house touching me." RP at 303. When the State asked how many times Martinez touched her, H.C. responded, "Probably like 10 or more," and "mostly every time I spent the night." RP at 303, 298. She kept thinking it would stop, but "[h]e kept doing it every time I went back," either in Lilyanna's room or the living room. RP at 298. She said it stopped when she was 12 or 13 years old.

H.C. testified that one year or two after Martinez stopped touching her, she saw him come into the living room where the children were sleeping and touch P.R. H.C. said P.R. did not open her eyes but was "moving as if having a bad dream or something." RP at 305. Martinez laid next to P.R. in the same way he laid next to H.C. H.C. thought Martinez's hands were in P.R.'s pants under the blanket.

The prosecutor asked again if H.C. could remember any more specific instances of touching. H.C. responded: "No. Honestly, it's all the same. He touched me the same every single time . . . besides the couch thing . . . it was always at night when everyone was sleeping." RP at 310.

On cross-examination, H.C. testified that she stayed at the Martinez home between 20 and 50 times from when she was 8 to 12 years old. She said Martinez abused her each of those 20 to 50 times.

P.R.'s Testimony

P.R. testified that Martinez started touching her when she was five or six years old. She could "remember a few times that it happened," but did not know exactly when it happened first, other than it was the summer after first grade. RP at 356. She was in Lilyanna's room at night, while her mother and brothers were awake in the living room.

Martinez leaned over her and put his hand on her vagina. P.R. felt the left side of his body on her right shoulder.

P.R. remembered a time Martinez touched her during the day. She was sitting on the couch while everyone else was in the kitchen. Martinez put his hand on her vagina over her clothes. P.R. tried moving off of the couch. She thought this happened after the incident at night. The following exchange took place:

> [THE STATE:] Do you recall any other times Mr. Martinez touched you between those two incidents?
> [P.R.:] No.
> [THE STATE:] Do you recall about how many times Mr. Martinez—
> [P.R.:] All I can remember is three times.
> [THE STATE:] Did Mr. Martinez only touch you three times or did—
> [P.R.:] I can only recall—
> [THE STATE:] Did he touch you more than three times?
> [THE DEFENSE]: Objection. It's been answered.
> THE COURT: The objection is it's been asked and answered?
> [THE DEFENSE]: Yes, your Honor.
> THE COURT: Overruled.

RP at 360.

The State then asked about the third incident P.R. could recall. P.R. said it happened on New Year's Eve in 2015 or 2016. Several people were drinking at the house Martinez and his girlfriend, Gloria Campos, shared. Martinez set up an air mattress in his

living room for P.R. and her brothers to sleep on. Lilyanna and her boyfriend slept on the couch in the living room. P.R. said she woke up to Martinez grabbing her breast over her shirt.

The State again asked if P.R. could "estimate how many times he touched you?" RP at 364. The court sustained Martinez's asked-and-answered objection.

Defense

Gloria Campos's Testimony

Ms. Campos testified that Martinez has been her boyfriend since 2012 and is the father of their three children. She testified that P.R. had spent the night twice in the house she shares with Martinez, once on New Year's Eve.

On that night, everyone went to bed around 1:00 a.m. P.R. and her brothers shared an air mattress in the living room. Ms. Campos and Martinez slept in their bedroom with their two young children. Ms. Campos said Martinez did not molest P.R. that night; she would have woken up if he had gotten out of bed because she is a light sleeper.

Martinez's Testimony

Martinez testified that Gloria Campos has been his girlfriend since the summer of 2012. They spent every night together—either in the trailer or at Ms. Campos's house. In

2013, he permanently moved into Ms. Campos's house. He denied he did any of the things H.C. or P.R. described.

Lilyanna's Testimony

Martinez's sister, Lilyanna, testified that H.C. attended birthday parties and barbeques at the Martinez's home. She said H.C. spent the night "[p]robably once or twice" and would always sleep with her in her bed or in the living room. RP at 590. Lilyanna said H.C. was never alone in their house. She said if Martinez entered the house from where he slept in the trailer, he would have to go through the heavy back door, which closed loudly. The hinges squeaked and the doorknob would have to be jiggled.

Lilyanna's bedroom door also squeaked, and she kept her door mostly shut at night. The living room floor squeaked when stepped on in certain places. Their small house had thin walls, and Lilyanna is a light sleeper so she could hear everything. Lilyanna would have woken up if Martinez had entered her bedroom during the night.

Lilyanna testified that P.R. "basically lived" at the Martinez house at one point. RP at 605. P.R. and her younger brother slept with her in her bedroom. P.R. always slept by the wall because she would fall off the bed. Lilyanna said P.R. was never alone because there were always so many people around the house. Lilyanna never saw Martinez molest P.R.

When Lilyanna learned of the allegations against her brother, she spoke with him and their mother. Martinez told Lilyanna about the allegations but said nothing else. Lilyanna talked to H.C.'s mother, Cristina, but did not discuss her conversation with Martinez. She said she never told Cristina that Martinez admitted anything.

Dana's Testimony

Martinez's mother, Dana, testified that H.C. visited her home under 10 times when H.C. was between 8 and 12 years old. H.C. spent the night two times and slept with Lilyanna in her bedroom.

Dana testified that P.R. frequently spent the night at her house and was like a daughter to her. P.R. was never alone in the house because there were so many people around.

Lilyanna is older than H.C. and P.R. When either girl spent the night, Lilyanna always slept on the outside of the bed so the younger girl would not fall off.

Dana is a light sleeper and would check on the children throughout the night. She slept with her bedroom door open. The family's dogs barked at everyone, including Dana and Martinez. She would have woken up if anyone, including Martinez, entered the house at night. Dana reiterated that neither P.R. nor H.C. was ever alone in her house.

Dana learned of the allegations against Martinez from Cristina, H.C.'s mother. Dana told Martinez what Cristina told her the next morning. A few days later, Dana and Lilyanna went to Cristina's house. They did not discuss Martinez, but instead discussed Cristina's son. Dana said neither she nor Lilyanna said anything about Martinez admitting the allegations.

After this testimony, the defense rested. Over the defense's objection, the State recalled Cristina to the stand for rebuttal.

State's Rebuttal

Cristina Martinez's Rebuttal Testimony

Cristina testified that she, Lilyanna, and Dana discussed the allegations against Martinez in December 2017. Lilyanna came to Cristina's house to talk, and Dana arrived shortly thereafter. They had a conversation outside, where Lilyanna said she had spoken with Martinez. The prosecutor asked, "Did you come to an understanding whether or not Michael admitted the allegations?" RP at 710. The defense objected based on hearsay, which the court sustained. The court sent the jury out so the issue could be discussed further.

The State argued the question went to impeachment because Lilyanna denied talking about the allegations. The court asked whether ER 613(b), prior inconsistent

statement of a witness, applied. The State said yes. The defense agreed this was proper impeachment testimony and requested a limiting instruction:

> [T]hat it is not substantive evidence and that the jury may consider it only for the purpose of deciding whether Lilyanna Martinez and Dana Martinez were credible on the matter asserted, namely . . . whether they made statements that my client, Mr. Martinez, ever made any admissions of guilt with respect to these charges.

RP at 712. The court asked whether the limiting instruction would be written or oral, and the defense said, "[I]t's an oral instruction for the court to give now in respect to the testimony." RP at 713.

The trial court then brought the jury back in and instructed: "You may not consider the evidence in the form of testimony for any other purpose other than for the purpose of impeachment of Ms. Lilyanna Martinez and Dana Martinez. It is not to be considered by you as substantive evidence." RP at 714.

The State asked what understanding Dana, Lilyanna, and Cristina had come to after the conversation at Cristina's house. Cristina answered:

> She told me just what—that he admitted to it. Then they said that he was hurt, too, as a young boy by a woman. I asked, who was it? . . . She said, it doesn't matter. Even though it was a woman, it's the same effect that the girls felt.

RP at 715.

The State then asked if Cristina talked to Martinez about the allegations. Cristina answered: "No, but he texted me. He wanted to speak." RP at 716. The State's exhibit 55—the text message from Martinez—was then marked. The message read:

> Hey auntie do you think i could talk to you. I've be giving you guys space because i wasent sure if you guys wanted to talk yet, but i would really like to talk to you if u would let me and it doesn't have to be alone if u don't want. Its just going to be me no-one knows im texting you right now except for gloria. Ive wanted to talk from the beginning but it sound like nobody wanted to or was ready. I love you guys ive always have and i would really like to talk to someone.

Ex. 55. The defense objected five times to the exhibit's admission for lack of foundation. Cristina said she had received it after talking with Lilyanna and Dana, it came from Martinez's phone, she e-mailed a copy of it to the police, and she did not respond to Martinez.

The State rested. The defense renewed its motion to dismiss, which the court denied. The defense recalled Martinez to ask him about exhibit 55. He testified: "It's a text message. I was trying to reach out to my aunt so I could talk about this incident and clear it up." RP at 739.

State's Closing Argument

The prosecutor argued H.C. "talked about [the touching] happening almost every time she spent the night at her cousin's . . . about 20 to 50 times." RP at 758. "It was constantly the same type of abuse that she was subjected to by the defendant." RP at 760.

The prosecutor then argued, "[P.R.] knew it started before this first time that she could remember." RP at 760-61. And "she talked about how this was going on all the time. We heard testimony she was spending [the] night at this residence quite frequently. She was there all the time." RP at 762. Defense counsel did not object to these statements.

The prosecutor then discussed the charged aggravator:

> [THE STATE]: We also heard evidence that this happened not just once, not just twice, not just three times, but this happened all the time, 20 to 50 times for [H.C.], just as many for [P.R.].
>
> [THE DEFENSE]: Objection, assumes facts not in evidence.
>
> THE COURT: Overruled. The jury will rely on their recollection of the testimony.

RP at 766.

Jury Deliberations, Verdict, and Sentencing

During deliberations, the jury sent out a written note: "Jury requests further explanation of the impeachment of Dana Martinez and Lilyanna Martinez including the ruling regarding submission of State's Evidence #55." Clerk's Papers (CP) at 25. The

defense told the court this seemed like two separate issues and the jury was confused, but stated, "I don't know that we can give much of an answer other than reread your instructions or reread Instruction No. 1." RP at 792. The State agreed. The court suggested writing an answer to that effect, and the defense said, "Yeah. I'm afraid it won't be satisfactory to them. I don't know what else we can do." RP at 793. The court responded: "Please refer to your jury instructions and in particular reread Instruction No. 1." CP at 25. Instruction 1 was the lengthy standard instruction to jurors informing them of their general duties.

The jury acquitted Martinez of rape of a child in the first degree, but found him guilty of all four counts of child molestation. In addition, it found that the State had proved the "ongoing pattern of sexual abuse" aggravator with respect to each of the four molestation counts. Because the State had not charged the aggravator in conjunction with the second degree molestation count, the court later vacated that aggravator finding. The court imposed a sentence of 209 months to life. Martinez appealed.

ANALYSIS

Martinez raises four general arguments on appeal: error in not severing the charges, ineffective assistance of counsel, prosecutorial misconduct, and cumulative error. We address each in the order raised.

1. SEVERANCE OF CHARGES

Martinez contends the trial court abused its discretion in denying his motion to sever the charges involving H.C. from the charges involving P.R. The State argues Martinez failed to preserve this issue for appeal. We agree with the State.

Although Washington courts often consider severance and joinder together, their distinctions are relevant here. Joinder permits two or more offenses to be charged together, with each offense as a separate count, when they are "of the same or similar character, even if not part of a single scheme or plan." CrR 4.3(a)(1). Properly joined offenses "shall be consolidated for trial unless the court orders severance . . . ." CrR 4.3.1(a).

"'Severance' refers to dividing joined offenses into separate charging documents." *State v. Bluford*, 188 Wn.2d 298, 306, 393 P.3d 1219 (2017). A court grants severance when doing so "will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b). In general, a defendant must move for severance pretrial. CrR 4.4(a)(1). If the pretrial motion is denied, the defendant must renew the motion before or at the close of evidence to preserve the issue for appeal. CrR 4.4(a)(2). "If the party does not timely make or renew a severance motion, '[s]everance is waived.'" *Bluford*, 188 Wn.2d at 306 (alteration in original) (quoting CrR 4.4(a)(1), (2)). The

purpose behind the rule is to permit the trial court to exercise its discretion when it has a comprehensive understanding of the facts so it can best weigh the potential prejudice of having similar counts joined together in one trial.

Waiver

As a preliminary matter, we must determine whether Martinez preserved this claim of error. Martinez moved to sever the charges before trial. The court denied the motion but expected him to renew it at the close of evidence, which he did not. The State points to the plain language of the rule: "Severance is waived by failure to renew the motion." CrR 4.4(a)(2).

Martinez responds that his pretrial motion to sever was also an objection to joinder, which need not be renewed for appeal. *See State v. Bryant*, 89 Wn. App. 857, 865-66, 950 P.2d 1004 (1998). We disagree. The State filed a single charging document for all counts and therefore did not move for joinder. The severance rules control here. *See Bluford*, 188 Wn.2d at 310 ("[W]here multiple charges are originally brought in a single charging document, the State has no need to bring a joinder motion to the court. In that situation, the severance rules . . . are the only means by which a defendant can secure separate trials on the charged offenses."). By the clear language of CrR 4.4(a)(2), Martinez waived this claim of error.

Martinez argues his counsel was ineffective for failing to renew his severance motion. We now analyze his severance argument through the lens of an ineffective assistance of counsel standard.

Ineffective Assistance of Counsel

Martinez contends his counsel's failure to renew the severance motion at the close of evidence constitutes ineffective assistance. For purposes of direct review, we disagree.

A defendant claiming ineffective assistance of counsel must show: (1) counsel's performance fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (applying the two pronged test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Where a defendant fails to establish the first prong of ineffective assistance of counsel, we need not address the second prong. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 847, 280 P.3d 1102 (2012); *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996) ("If either part of the test is not satisfied, the inquiry need go no further.").

Defense Counsel's Reasonableness

We presume counsel's performance was effective, and Martinez bears the burden to prove otherwise. *State v. Crow*, 8 Wn. App. 2d 480, 507, 438 P.3d 541, *review denied*,

193 Wn.2d 1038, 449 P.3d 664 (2019). In doing so, he "must show there was no legitimate strategic or tactical reason for counsel's action." *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Martinez argues his trial counsel had no strategic reason not to "perform what amounted to the ministerial task of renewing the motion." Appellant's Am. Br. at 36. He argues that the evidence pertaining to each victim was weak, and the State likely could not have obtained convictions without having both victims bolster each other's claims in a single trial.

His argument is fairly strong. With one possible exception, neither accuser produced a witness to any of the 20 to 50 instances of alleged abuse that occurred in a very small house with several people around. Also, there was no physical evidence, and H.C. did not accuse Martinez until years after the alleged events. The accusations made by P.R. had similar infirmities. Although she testified she was abused on just three occasions, it is difficult to understand how Martinez could have molested her even three times without detection. Perhaps the only way a jury could have found Martinez guilty of any of the counts was for each accuser's accusations to bolster the other's accusations.

But there may have been a legitimate strategic reason not to renew the severance motion. For instance, H.C. testified that Martinez molested her basically every night she

stayed at the Martinez home. Yet, defense counsel did an excellent job establishing how unlikely this was, given the extremely small house, the sleeping arrangements with the young accusers closest to the bedroom wall, and the unlikeliness that Martinez could molest the two accusers so many times without others knowing. Defense counsel may have reasonably concluded that winning one trial was easier than winning two trials.

From this record, we cannot decide whether defense counsel's failure to renew the motion to sever was a reasonable strategic decision. Martinez's ineffective assistance of counsel claim cannot be decided on direct appeal because his argument depends on evidence outside of this record. He must seek relief through a personal restraint petition. *McFarland*, 127 Wn.2d at 335. Because Martinez has failed to establish the first prong of his ineffective assistance claim, we need not analyze the second prong, prejudice.

2. OTHER INEFFECTIVE ASSISTANCE

Martinez contends his trial counsel was ineffective for failing to properly object to exhibit 55 and failing to request a written limiting instruction. We address each issue in turn.

As stated above, to prevail on his ineffective assistance of counsel claim, Martinez must show both that his counsel's performance was deficient and that deficiency

prejudiced his case. *Id.* at 334-35. We presume counsel's performance was effective, and Martinez bears the burden to prove otherwise. *Crow*, 8 Wn. App. 2d at 507.

Exhibit 55

Martinez first argues his counsel was deficient for failing to properly object to exhibit 55, the text message he sent to his aunt Cristina, on the grounds that a proper foundation had not been laid. He contends the court would have excluded the message if counsel had objected on grounds of relevancy. We disagree.

"To prove that failure to object rendered counsel ineffective, [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 of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (footnotes omitted).

The exhibit was admitted after Cristina testified that Lilyanna and Dana told her Martinez admitted to the abuse. When asked whether she had spoken with Martinez about the allegations, Cristina said: "No, but he texted me." RP at 716. Defense counsel objected to the admission many times for lack of foundation, and the court required proper authentication before allowing the message into evidence.

The text message arguably was relevant to show that Martinez knew that his sister and mother had recently met with his aunt to discuss the molestation accusations. Although the record is unclear, the message may have been sent soon after the three women met. If so, Martinez fails to convince us that a "relevancy" objection would have been sustained.

On the other hand, if the State failed to establish that the text message was sent soon after the three women met, a relevancy objection may have been sustained. The message itself was innocuous, it merely showed that Martinez wished to clear himself of the accusations. In fact, that is what Martinez testified to after his aunt testified. If the State failed to establish a nexus between the text message and the meeting of the three women, no prejudice could have resulted from defense counsel's failure to object on grounds of relevancy.

Limiting Instruction

Martinez next argues his trial counsel was ineffective for not requesting a written limiting instruction to help the jury understand the limited purpose for which the court admitted Cristina's ER 613(b) testimony. Martinez argues a written limiting instruction should have been requested either before jury deliberations or after the jury expressed

confusion during its deliberations about the court's oral instruction and also about exhibit 55.[4]

Recall, Martinez's mother and sister testified that they met with Cristina but did not discuss Martinez or any admission. The State recalled Cristina and asked whether she understood that Martinez had admitted the allegations. Martinez objected, the court sent the jury out, and the parties agreed Cristina's answer was admissible under ER 613(b) for impeachment only. Defense counsel requested the court to issue an oral instruction to that effect, rather than a written instruction. Later, during deliberations, the jury expressed confusion about the oral instruction and tied the instruction to the impeachment testimony *and* exhibit 55. The court and counsel agreed the jury was confused and likely misunderstood the oral instruction. With this backdrop, we discuss Martinez's argument on appeal that his trial counsel should have proposed a written limiting instruction to clarify the law for the jury.

Whether to request a limiting instruction is a matter of trial tactics. *State v. Yarbrough*, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). Sometimes a confused jury is a

[4] Martinez additionally argues that defense counsel might have drafted a customized instruction weaving the standard limiting instruction language into the facts of the case. Weaving a standard instruction into the facts of a specific case risks commenting on the evidence. We question whether a customized instruction would have been appropriate.

good thing for a defendant who hopes the State has not proved its case beyond a reasonable doubt. This is especially true here, where exhibit 55 seems not to bolster the State's case, but instead neutralize it. Martinez's text message to his aunt admitted nothing. He just wanted to talk with her. If anything, the text message seems to bolster what Martinez's mother and sister said—that Martinez had admitted nothing.

We cannot say that defense counsel's decision not to ask for a written limiting instruction was an unreasonable tactical decision, given the jury's confusion. Confusion could have led to an acquittal or at least a mistrial.

3. PROSECUTORIAL MISCONDUCT DURING CLOSING

Martinez contends the prosecutor committed misconduct during closing argument by misrepresenting P.R.'s testimony that the abuse happened "all the time," just as often as it happened to H.C. and that it started before she could remember. RP at 762. He argues this conduct warrants reversal of the "pattern of sexual abuse" findings with respect to P.R. and his convictions. We agree in part.

In closing arguments, prosecutors have wide latitude in presenting their characterization of the evidence and the inferences the facts suggest. *In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 169, 410 P.3d 1142 (2018); *State v. Thorgerson*, 172 Wn.2d 438, 454, 258 P.3d 43 (2011). To establish prosecutorial misconduct, Martinez must

demonstrate that the prosecutor's remarks in closing argument were both improper and prejudicial. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). To show prejudice, a defendant must establish "'a substantial likelihood [that] the instances of misconduct affected the jury's verdict.'" *Thorgerson*, 172 Wn.2d at 442-43 (alteration in original) (internal quotation marks omitted) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). In considering whether prosecutorial misconduct warrants reversal, we do not view the improper comments in isolation but rather examine them in the context of the entire case. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). We address Martinez's contentions by dividing the instances into objected-to comments and unobjected-to comments.

Objected-to Comments

The defense objected to the prosecutor's comment that the abuse "happened all the time, 20 to 50 times for [H.C.], just as many for [P.R.]." RP at 766. This statement was improper; it was not a reasonable inference from the evidence. In fact, P.R. repeatedly stated she could only remember the three times she described.

It is evident that the jury believed the two accusers. H.C. testified Martinez molested her 20 to 50 times from when she was 8 until she was 12 or 13. On the other hand, P.R. could recall only three times Martinez molested her, twice in the Martinez

house when she was 5 or 6, and once in the house that Martinez shared with his girlfriend in 2017, when she would have been 13.

With respect to each of the two first degree molestation counts involving P.R., the State had to prove beyond a reasonable doubt that the charged offense was part of "an ongoing pattern of sexual abuse of the same victim . . . manifested by multiple incidents over a prolonged period of time." RCW 9.94A.535(3)(g). But P.R. testified to only two instances of molestation when she was under 12[5]—one was charged in count 3 and the other was charged in count 4. Had the jury relied on P.R.'s testimony rather than the prosecutor's mischaracterization of evidence, it could not have found the presence of the aggravators with respect to count 3 and count 4. We conclude there is a substantial likelihood that the prosecutor's mischaracterization of the evidence prejudiced Martinez. We remand for the trial court to vacate the jury's special verdict findings with respect to count 3 and count 4 and to resentence Martinez.

Martinez additionally argues that the prosecutor's mischaracterization of the evidence "invited the jury to cumulate evidence—exactly what the jury is *not* supposed to do when evaluating charges joined for trial." Appellant's Am. Br. at 49. Again, it is

[5] Child molestation in the first degree occurs when the victim is less than 12 years old. RCW 9A.44.083.

evident the jury believed both accusers. We cannot say whether this is because of the jury's proper evaluation of the evidence or because of the prosecutor's mischaracterization of P.R.'s testimony. For this reason, we cannot say there is a substantial likelihood that the prosecutor's misconduct resulted in Martinez's four convictions.

Unobjected-to Comments

When a defendant fails to object to an improper comment, the error is waived unless the remark was so flagrant and ill intentioned as to cause enduring and resulting prejudice that a curative instruction could not have remedied. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Misconduct meets this standard in a narrow set of cases, where a jury could draw improper inferences from comments on a defendant's race or membership of a group or when a prosecutor's remarks are particularly inflammatory. *Phelps*, 190 Wn.2d at 170. We focus less on whether the conduct was flagrant and ill intentioned and more on whether the prejudice could have been cured with an instruction. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). The test is whether the misconduct crosses a line that threatens the fundamental fairness of the trial. *Phelps*, 190 Wn.2d at 171.

Here, Martinez did not object when the prosecutor said P.R. "knew it started before this first time that she could remember," and said "this was going on all the time." RP at 760-61, 762. To the extent these unobjected-to remarks are not supported by P.R.'s testimony, they are not the type of remarks that qualify for review. They do not relate to race nor are they particularly inflammatory. For this reason, we will not review this claim of error.

4. CUMULATIVE ERROR

Martinez contends the cumulative effect of the errors outlined above deprived him of a fair trial. We disagree.

"The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial even where any one of the errors, taken individually, may not justify reversal." *In re Det. of Coe*, 175 Wn.2d 482, 515, 286 P.3d 29 (2012). Here, we have not found any nonprejudicial trial errors. The doctrine of cumulative error does not apply.

Affirm the convictions but remand to vacate two aggravator findings and for resentencing.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Pennell, C.J.

Siddoway, J.

NIELSEN KOCH P.L.L.C.

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