

NO. 49164-8--II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT RICHARD REED,

Appellant.

RESPONDENT'S BRIEF

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

Reed's convictions should be affirmed because:

- (1) Reed did not suffer ineffective assistance of counsel; and
- (2) Reed waived his claim of misconduct when he did not object at trial.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO ASSIGNMENT OF ERROR

- A. **Did Reed suffer ineffective assistance of counsel when the evidence he complains of being excluded was admitted?**
- B. **Did Reed waive his claim of prosecutor misconduct when he did not object at trial?**

III. STATEMENT OF THE CASE

J.R. was born on April 11, 2001. RP at 268. In 2003, J.R.'s mother Michelle Crippen and J.R.'s father Robert Reed divorced. RP at 268. Reed paid child support to Crippen, however he had no contact with J.R. or their daughter until 2013. RP at 269. J.R. has developmental disability and suffers from both autism and ADHD. RP at 270, 318. His maturity level is about the level of a child of eight or nine years of age. RP at 270.

Because Crippen was a single mother, her mother, Jeanette Gilson, helped her raise J.R. and his sister. RP at 274. J.R. became very close to his grandmother. RP at 274. In August of 2010, Crippen and her children

moved to the Tri-Cities. RP at 273. In April of 2013, due to a work opportunity in the area, Crippen and her children moved in with Gilson at her home in Castle Rock. RP at 218, 272-73. While J.R.'s sister had been doing well in school in the Tri-Cities, J.R. had been struggling in school. RP at 273. J.R. was in his first year of middle school and turned 12 in April of 2013. RP at 273. After they moved from the Tri-Cities, J.R. began attending Huntington Middle School in Kelso. RP at 274. Once he began attending Huntington, J.R. did better in school. RP at 2730-74.

During the summer of 2013, J.R. told his mother he wanted to see his father. RP at 140, 275. Crippen arranged for J.R. to meet Reed at a Dairy Queen. RP at 140, 276. J.R. enjoyed being with Reed and further meetings were arranged. RP at 276. Eventually, J.R. began spending weekends with Reed. RP at 276. Reed took J.R. to the demolition derby at the Cowlitz County Fair. RP at 276.

On the weekend they went to the fair, when they were driving, Reed asked J.R. if somebody had every touched him. RP at 142. J.R. thought this was "weird," but other than this he enjoyed spending the weekend with Reed. RP at 143. The weekend visits with Reed continued in August and September of 2013. RP at 143. Eventually, J.R. would go to Reed's every weekend and on Wednesdays. RP at 144. Reed would buy J.R. candy, something his grandmother and mother would not allow

him to have. RP at 144, 233. Reed also bought him really expensive shoes. RP at 144. Reed's apartment had two bedrooms and one bathroom. RP at 145. J.R. was given one of the rooms, and Reed bought him a new comforter for his bed. RP at 146. J.R. would wet his bed. RP at 146. Reed began sleeping with J.R., in J.R.'s bed, sometimes until 11:00 at night and other times the whole night. RP at 146.

Once the fall began, Crippen had the opportunity to work from home. RP at 277. Crippen's daughter wanted to attend school with her friends in the Tri-Cities. RP at 277. J.R. had been doing well in his special education class at Huntington and was building a relationship with Reed. RP at 278. For this reason, Crippen and Gilson decided Crippen and her daughter would return to the Tri-Cities, and J.R. would continue to live with Gilson. RP at 279. After moving, Crippen called J.R. every morning, every night, and returned from the Tri-Cities to see J.R. on the weekends. RP at 279-80.

One evening, J.R. was watching television in the living room of Reed's apartment. RP at 147. Reed was in a chair, and J.R. was on the floor. RP at 147. Reed told J.R. to go and take a shower. RP at 147. J.R. responded by telling Reed he had just taken a shower. RP at 147. Reed told J.R. to pull down his pants. RP at 148. J.R. pulled down his pants. RP at 148. Reed then smelled J.R.'s private area. RP at 148. After

smelling J.R.'s private area, Reed licked J.R.'s penis. RP at 148. Reed "played with" J.R.'s penis. RP at 148. Reed then put his mouth on J.R.'s penis and sucked it until "[i]t got hard." RP at 148. After this, Reed pulled his own pants down and told J.R. to suck his penis. RP at 148-49. J.R. sucked Reed's penis. RP at 149. Reed's penis became hard and a "[s]limy," "[w]hitish"-colored substance came out of Reed's penis and went into J.R.'s mouth. RP at 149. Reed told J.R. that if he told anyone about this sexual encounter, he would never see his mother, sister, or grandmother again. RP at 149-50.

The next time J.R. went to Reed's apartment, a similar sexual encounter took place in the living room. RP at 150. Reed again sucked J.R.'s penis and made J.R. suck his penis. RP at 151. Reed again told J.R. not to tell or he would not see his mother, sister, or grandmother again. RP at 150. This time, Reed also told J.R. he would buy him an "Xbox." RP at 151. The sexual abuse continued every time J.R. would go over to Reed's apartment. RP at 152. J.R. did not tell anyone about what was happening out of fear that Reed would follow through on his threat to keep him from seeing his family members. RP at 152. Although he did not like the sexual abuse, J.R. did enjoy going over to Reed's, where he would receive candy and do "fun stuff." RP at 152.

In October of 2013, J.R. was suspended from school. RP at 152. Because he refused to follow the rules his grandmother set for him, J.R. was sent to live with Reed. RP at 236-38. In October of 2013, J.R. went to live with Reed at his apartment in Longview. RP at 278, 280. J.R. lived with Reed in October and November of 2013. RP at 280-81.

On one occasion, while living with Reed, J.R. took a shower. RP at 154. Reed entered the bathroom, opened the shower curtain, and “washed” J.R.’s penis. RP at 154. Reed used his hands and soap, and made J.R.’s penis get hard. RP at 155. Reed did this three or four more times while J.R. was living with him. RP at 155. On another occasion, using an electric razor, Reed shaved J.R.’s pubic hair. RP at 156, 240-41. Also, during their period of living together, Reed continued to have oral sex with J.R. RP at 156.

J.R. continued to fear that if he told someone what was happening he would never see his mother again. RP at 157. However, the sexual abuse made him angry. RP at 156. During one of these encounters, J.R. bit Reed on the arm. RP at 157.

On November 7, 2013, J.R. got in trouble at school. RP at 157, 324. J.R.’s special education teacher, Shawna Driscoll, called Reed and asked him to give J.R. a “pep talk.” RP at 325. Once he was told Reed was on the phone, J.R. did not want to come to the phone. RP at 325.

However, because it had been agreed to as part of his behavioral plan, J.R. eventually agreed to come to the phone. RP at 325-26. Once J.R. had the phone, he wrapped the cord around his neck and said he wanted to kill himself. RP at 326. J.R. ran out of his classroom. RP at 157, 326. J.R. went outside and started rolling down a hill and getting muddy. RP at 327. Reed came to the school. RP at 158. When Reed arrived, J.R., threw mud at him. RP at 158.

J.R. went to his grandmother's house on Thanksgiving weekend. RP at 238. Gilson noticed that J.R. was staying close to her and following her around. RP at 239. Eventually, J.R. began to cry and told Gilson he needed to talk to her. RP at 239. J.R. told Gilson about the sexual abuse. RP at 239. After Gilson contacted Crippen, the police investigated. RP at 240. On December 13, 2013, a forensic interview of J.R. was conducted by Kristen Mendez at the Children's Justice and Advocacy Center. RP at 202, 210. The interview was observed by Detective Todd McDaniel of the Cowlitz County Sheriff's Office. RP at 212.

After the interview, Detective McDaniel investigated further. RP at 338. Detective McDaniel contacted Reed, who agreed to speak with him. RP at 339. Detective McDaniel informed Reed that J.R. had said he had molested him. RP at 340. Reed then told Detective McDaniel that when he watched television, J.R. would just come over to him and put his

face in Reed's crotch. RP at 340-41. Reed also told Detective McDaniel, J.R. would look at him in the shower. RP at 340. Reed told Detective McDaniel J.R. would jump on his bed when he was sleeping and "hump" him. RP at 342. Reed said J.R. would pat him on the rear end. RP at 342. Reed also said that when he was angry, J.R. would stick his penis out of his pants. RP at 342. Reed described J.R.'s penis as an "inny and not an outie." RP at 342. Reed said he knew this about J.R.'s penis because he had seen J.R. in the shower. RP at 343. Reed said he had also lifted J.R.'s scrotum to view a rash, and then made J.R. take a shower. RP at 344. Reed told Detective McDaniel that he would make J.R. shower with the bathroom door open so that mold did not collect. RP at 344.

Reed told Detective McDaniel that he believed J.R.'s grandmother had put J.R. up to saying Reed molested him. RP at 345. He denied sucking J.R.'s penis or J.R. sucking his penis. RP at 346. Reed also said the allegations "pissed him off." RP at 347. Reed said he showed J.R. a picture of a penis and vagina online to show him how babies were made. RP at 347-48. Reed told Detective McDaniel J.R. had bit him. RP at 348-49. Reed also said that he talked to J.R. about having sex with his girlfriends. RP at 349.

Reed was charged with Rape of a Child in the Second Degree and Child Molestation in the Second Degree and the case proceeded to trial.

CP at 19; RP at 56. At trial, J.R., Crippen, Gilson, Driscoll, Mendez, and McDaniel all testified. RP at 137, 201, 218, 267, 313, 335. Reed called several witnesses, including Kizzy Woodard, who had babysat J.R. for him. RP at 440.

J.R. testified to the details of the sexual abuse. RP at 147-151, 154-57. During cross-examination, Reed's attorney asked J.R. about a prior boyfriend of Crippen's named Joe. RP at 171. J.R. told Reed's attorney he was friends with Joe. RP at 171. Right after asking J.R. about Joe, Reed's attorney asked about Reed asking J.R. if someone had ever touched him. RP at 172. Later, Reed's attorney asked J.R. if he had been babysat by Kizzy Woodard.¹ RP at 184. J.R. indicated Woodard had babysat him. RP at 185. Reed's attorney did not ask J.R. about a statement he had made to Woodard. RP at 185.

Later, just before Woodard was called as a witness, the prosecutor informed the court that Reed's attorney had indicated he planned to have Woodard testify that J.R. had told her that "his mom's boyfriend did bad things to him." RP at 433. The prosecutor argued that under ER 613, J.R. had to be given the opportunity to be confronted with this out-of-court statement for it to be admitted into evidence as a prior inconsistent statement. RP at 434. The Court agreed that Woodard could not testify to

¹ Reed's attorney mistakenly said the last name "Willard" at the time, but J.R.'s response, her unique first name, and her later testimony made it apparent who he was referring to.

hearsay from J.R. RP at 437. Reed's attorney informed the court that he would advise Woodard not to "say something she's not supposed to and what she cannot say." RP at 439.

When Woodard testified, she said that Reed had given her information about J.R. RP at 451. She then said J.R. had let her know too. RP at 451. The prosecutor objected to hearsay and was overruled. RP at 451. Woodard testified that Reed had told her J.R. had been molested by his mother's boyfriend. RP at 452. Immediately after testifying to this, Woodard attempted to introduce a statement of J.R.'s. RP at 452. The prosecutor again objected to hearsay, and Reed's attorney apologized and moved on to another question. RP at 452.

On cross-examination the prosecutor asked Woodard about Reed telling her J.R. had been molested by his mother's boyfriend. RP at 457. Despite the court's earlier instruction, Woodard interrupted the prosecutor and stated: "[J.R.] also told me as well, sir." RP at 457. Later, the prosecutor concluded the cross-examination of Woodard by impeaching her with her conviction for Making a False Statement to a Public Servant from June 19, 2012. RP at 459. Reed's attorney attempted to introduce the details of this conviction on redirect examination, but the prosecutor's objection to relevance was sustained. RP at 459.

When Reed testified at trial, he continued to maintain that J.R. had instigated the sexual activity, testifying that on his first overnight stay J.R. walked over and placed his face in Reed's crotch while he was watching television. RP at 476, 518. Reed testified that while he was sleeping on Sunday morning, J.R. got in bed with him and started "humping" him. RP at 478. Reed claimed that when J.R. would get mad at him he would pull his pants down and threaten to urinate on him. RP at 493. Reed said when he would shower, J.R. would open the shower curtain and watch him. RP at 496-97. Reed also claimed J.R. had patted him on the rear. RP at 521.

Reed testified that because of his concern about J.R.'s sexual conduct, he told "lots of people." RP at 544. However, despite his claim that he suspected J.R. was molested after he thrust his face into Reed's crotch during his first overnight stay, Reed could not recall if he had told Crippen or Gilson. RP at 544-45. Reed testified that he touched J.R.'s testicle to observe a rash and "got a whiff of urine" then made J.R. take a shower. RP at 522. Reed also confirmed that he had required J.R. to shower with the bathroom door open. RP at 523. Reed testified that he had observed J.R.'s penis because he had him shower with the door open. RP at 551. Reed also testified that he talked to J.R. about sex and showed

him a diagram of a penis and a vagina to explain the “birds and the bees.”
RP at 528.

Reed claimed that he had told Crippen in August he was going to pursue full custody of J.R. RP at 504. He claimed that after Crippen told him no, and they argued, he decided not to pursue custody. RP at 504. However, Reed maintained that Gilson and Crippen had set him up. RP at 546. Reed claimed that, despite the fact that Crippen had never been required to provide child support to him, her plan was to set Reed up for molesting her son so that she could avoid paying potential child support if Reed were to ever gain custody. RP at 555-56.

During closing argument, referencing prior testimony, the prosecutor noted that J.R. was developmentally disabled and had both autism and ADHD. RP at 583. The prosecutor referenced earlier testimony about how J.R. had challenges controlling his emotions when his routine was off. RP at 583-84. The prosecutor argued that J.R.’s behavioral difficulties did not make him “more likely to come with some master plan or some scheme to frame his father.” RP at 548. The prosecutor argued that this would not be expected of someone with developmental disability. RP at 584. Referencing J.R.’s developmental disability, the prosecutor stated:

That doesn't make him somehow more likely to concoct something like that. If anything, it makes it less likely because he doesn't have the sophisticated thought to come up with that type of a plan that sort of is. So with disability, a master plan...it's just not going to happen with him.

And the other part is when a child is young or at a young level, they say things straight out, it's like the child who sees the person at the grocery store and says something you wish they hadn't said if you've had a young child like someone is wearing something funny or why is this person doing that.

At his lower maturity level, it's similar. He's going to be just speaking things straight out. And we heard a little bit from Ms. Driscoll who's been teaching those students for many years.

RP at 584. The prosecutor then further argued that J.R.'s emotion and reluctance when testifying were inconsistent with scheming to set up Reed. RP at 585. The prosecutor also argued that because Gilson and Crippen loved J.R., they would not have wanted to unnecessarily force him to undergo the humiliating experience of testifying publicly to having committed sexual acts on his father.² RP at 585. Reed's attorney did not object to the prosecutor's closing argument. RP at 583-85. The jury found Reed guilty of both Rape of a Child in the Second Degree and Child Molestation in the Second Degree. RP at 629.

² This was a reasonable inference based on Crippen's tearful testimony about how difficult the process had been on J.R. RP at 561-62. This included J.R. having to testify to sucking his father's penis. RP at 149, 585.

IV. ARGUMENT

A. REED DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

Reed did not suffer ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 335.

Whether counsel is effective is determined by the following test: "[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302 (1978) (citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, "[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation,

and second, that he was prejudiced thereby.” *Id.* at 263. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) (citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122, review denied, 105 Wn.2d 1013 (1986)). The second prong requires the defendant to show “there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* at 173.

Here, Reed maintains that his attorney was ineffective because he did not question J.R. about a whether or not he told Kizzy Woodard that his mother’s boyfriend had molested him. Reed’s claim fails both prongs of the *Strickland* test. First, there were legitimate tactical reasons for Reed’s attorney not to question J.R. about this claim. The evidence was irrelevant, and—based on how the witnesses testified—an attempt to introduce it would likely have created a contrary impression to what was intended by Reed’s attorney. Second, Reed suffered no prejudice, because in spite of the court’s instruction not to testify to hearsay, Woodard still testified that J.R. told her his mother’s boyfriend had molested him.

1. Legitimate trial tactics supported Reed's attorney's decision regarding the presentation of the evidence.

Reed's attorney was not ineffective when he chose not to ask J.R. whether or not he had told Kizzy Woodard that his mother's boyfriend had sexually abused him. "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable[.]" *Strickland v. Washington*, 446 U.S. at 689. Two important considerations must be considered when analyzing Reed's attorney's strategy. First, the relevance of the claimed potential prior inconsistent statement is unclear. No evidence was presented in the State's case in chief that J.R.'s sexual knowledge came solely from having been Reed's victim, thus there was no showing that prior abuse against J.R. by another would have been relevant to challenging J.R.'s credibility. Further, even if this evidence had minimal relevance, it would likely have been excluded under ER 403, because its probative value would have been substantially outweighed by unfair prejudice. Second, because ER 613(b) permits the introduction of extrinsic evidence of a prior inconsistent statement before or after the witness is given the opportunity to admit or

deny the statement, Reed's attorney's decision not to ask J.R. about the statement during cross-examination may have been part of a strategy that changed after Woodard testified.

“If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *State v. McNeal*, 145 Wn.App. 352, 362, 37 P.3d 280 (2002). The appellate court should strongly presume that defense counsel’s conduct constituted sound trial strategy. *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000). Trial counsel has “wide latitude in making tactical decisions.” *State v. Sardinia*, 42 Wn.App. 533, 542, 713 P.2d 122 (1986). “Such decisions, though perhaps viewed as wrong by others, do not amount to ineffective assistance of counsel.” *Id.* Of course, if trial counsel would not have succeeded in a course of action a defendant claims should have been taken at trial, it cannot form the basis of an ineffective assistance claim. *State v. Nichols*, 161 Wn.2d 1, 14-15, 162 P.3d 1122 (2007) (“[T]here is no ineffectiveness if a challenge to the admissibility of evidence would have failed[.]”).

Normally, under the rape shield statute—RCW 9A.44.020—evidence of a victim’s past sexual behavior is inadmissible on the issue of credibility unless the prosecution presents evidence in its case in chief

tending to prove the victim's past sexual behavior. *State v. Horton*, 116 Wn.App. 909, 917, 68 P.3d 1145 (2003). This "statute was not intended to establish a blanket exclusion of evidence which is relevant to other issues which may arise in prosecutions for rape." *State v. Carver*, 37 Wn.App. 122, 124, 678 P.2d 842 (1984). However, "[i]n order to be admissible, evidence of prior sexual abuse must, of course, be relevant." *State v. Hancock*, 46 Wn.App. 672, 679, 731 P.2d 1133 (1987), *aff'd*, 109 Wn.2d 760, 748 P.2d 611 (1988). With regard to child victims, "[p]rior sexual abuse may be relevant ... to rebut the inference that the victim would not have knowledge of sexual acts and terminology unless the defendant were guilty as charged. *Id.* (citing *Carver*, 37 Wn.App. at 124). Of course, evidence is not relevant unless it has a "tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. It should not automatically be assumed that that a prior allegation of sexual abuse is relevant. Because unfortunately, "it is not uncommon for a child to be abused by more than one person[.]" *State v. Kilgore*, 107 Wn.App. 160, 181, 26 P.3d 308 (2001), *aff'd*, 147 Wn.2d 288, 53 P.3d 974 (2002).

If evidence of prior sexual abuse is relevant, then "courts should use the general evidentiary principles in ER 403 to balance the probative

value of the evidence against the possible prejudice.” *Id.* at 177. When determining probative value the court should consider: the age of the victim, how explicit the child’s testimony was, evidence that would suggest an independent source of the child’s knowledge, whether the evidence suggests a motive to falsely accuse the defendant, and the remoteness in time of the prior abuse. *Id.* at 180. These factors should be balanced against prejudice—to both the trial process and the victim. *Id.* When determining prejudice, the court should consider if admission of prior sexual abuse would mislead the jury by focusing attention on the child, the possibility that the jury will infer the child willingly participated in or provoked the abuse, and the risk that the jury will doubt whether a child could be so unfortunate as to be abused twice when it is not uncommon for a child to be abused by more than one person. *Id.* at 180-81. Risks to the victim of admitting prior sexual abuse include forcing the child to testify about two traumatizing events rather than one, discouraging the reporting of abuse, and invasions of the child’s privacy.³ *Id.* at 181.

³ While ER 403 normally is concerned with the prejudicial effect on the jury, the court appears to be concerned with the protections for child victims that would be given to adult victims by the rape shield statute.

Here, Reed's sole argument regarding the prior sexual abuse is that it should have been introduced to challenge J.R.'s credibility.⁴ Yet, the State never presented evidence that J.R. would not have had knowledge of sexual acts and terminology unless the defendant were guilty. Unlike *Horton*, where the prosecutor elicited from the child victim that no one other than Horton had ever engaged in sexual intercourse with her, J.R. was never asked to answer such a question. Thus, evidence of sexual abuse by another person was not necessary to rebut such a claim. Unlike *Carver*, where Carver's attorney moved to admit similar sexual abuse of the victims by a person other than Carver to show their "independent familiarity with certain sexual acts," no such attempt was made to admit evidence for this purpose in Reed's case. *See Carver*, 37 Wn.App. at 123. Because it is a sad reality that being a child victim of sexual abuse by one person does not make that victim less likely to be sexually abused by

⁴ In *Carver*, the Court of Appeals explained that the rape shield statute's purpose was to encourage rape victims to prosecute and eliminate prejudicial evidence of prior sexual conduct. 37 Wn.App. at 124. The court reasoned that because prior sexual abuse was not misconduct by the child victim, this purpose would not be served by application of the statute to the child victim. *See id.* However, in *Carver*, rather than admitting prior sexual abuse to challenge the victim's credibility, it was admitted to show "independent familiarity with certain sexual acts." *Id.* at 123-24. In *Horton*, prior sexual abuse was admissible because the State opened the door to the victim's past sexual behavior when it elicited from her that she had not had sexual intercourse with anyone other than the defendant, making the prior sexual abuse admissible to rebut the inference of sexual knowledge. 116 Wn.App. at 917-18. Thus, in neither case was prior sexual abuse presented solely to challenge the victim's credibility, as Reed argues it should have been here. Although *Carver* contains language suggesting the rape shield statute does not apply to child victims, the statute itself does not contain such limiting language. It would seem that the purposes cited in *Carver* for protecting adult victims would also be served by applying the statute to child victims.

another,⁵ there is no showing that such evidence had any tendency to make it more or less likely that Reed had raped or molested J.R. Accordingly, the relevance of a separate allegation of abuse has not been demonstrated and thus, an objection to the relevance of this evidence would have been properly sustained.

Further, even if this allegation were shown to be relevant, it would most likely have been excluded under an ER 403 balancing test. In making this determination the *Kilgore* factors are helpful. J.R. was 12 at the time of the abuse and attending middle school. Thus, he was not an especially young child. While the abuse was explicit in nature, J.R. was a male around the age of puberty and would have been aware of male genitals and their function. There was not strong evidence of why J.R. would have had a reason to make a false allegation. And, the time at which J.R. would have lived with his mother's boyfriend was remote from the time Reed sexually abused him. Thus, the probative value of such evidence was minimal. The potential for unfair prejudice substantially outweighed the probative value. There was risk the jury would view J.R.'s actions negatively because it appeared that he voluntarily participated in the sexual conduct. There was also a substantial risk the jury would not have believed J.R. could be the victim of abuse by multiple

⁵ See *Kilgore*, 107 Wn.App. at 181.

men. Thus, even if minimally relevant, it is likely the evidence would have been excluded under ER 403.

Of course, even if evidence is admissible, a defense attorney must make strategic decisions regarding whether such evidence will be helpful to the overall defense and over when and how to present such evidence. *Cf. State v. Piche*, 71 Wn.2d 583, 589-90, 430 P.2d 522 (1967) (“[T]rial practice, despite persistent efforts toward its advancement, remains more of an art than a science....the law must afford the attorney a wide latitude and flexibility in his choice of trial psychology and tactics.”). “Counsel is not, at the risk of being charged with incompetence, obliged to raise every conceivable point...which in retrospect may seem important to the defendant.” *Id.* at 590. A defense attorney’s representation is to be evaluated as to whether it fell below an objective standard of reasonableness. *In re Pers. Restraint of Stenson*, 142 Wn.3d 710, 742, 16 P.3d 1 (2001) (citing *Strickland*, 466 U.S. at 688.). There are not detailed rules for reasonable conduct because, “[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.” *Id.* (quoting *Strickland*, 466 U.S. at 689.).

ER 613(b) states: “Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an

opportunity to explain or deny the same[.]” “Under ER 613(b), however, it is sufficient for the examiner to give the declarant an opportunity to explain or deny the statement, either on cross-examination or after the introduction of extrinsic evidence.” *State v. Johnson*, 90 Wn.App. 54, 70, 950 P.2d 981 (1998). It follows that because ER 613(b) permits a party to establish this foundation after the admission of the extrinsic evidence of a prior inconsistent statement, an attorney may strategically elect to wait and see how the trial unfolds before deciding whether to utilize such evidence.

Here, it was a legitimate trial tactic for Reed’s attorney to evaluate how J.R. and Woodard came across as witnesses before deciding whether to introduce the extrinsic evidence of a potential prior inconsistent statement. Because of the explosive nature of allegations of child sexual abuse, a plan to adjust based on how witnesses presented, demonstrated a careful and intelligent approach to presenting such evidence. If J.R. presented as credible and Woodard—who Reed’s attorney knew would be impeached with a prior conviction for Making a False Statement to a Public Servant—did not, then presenting evidence of a prior claim of sexual abuse through her would likely have backfired. By introducing this evidence through Woodard, Reed’s attorney would have been required to recall J.R. If J.R. denied the prior statement and the jury believed Woodard to be lying, then her testimony would have been detrimental to

Reed's defense. Had J.R. confirmed the prior statement, and been believed by the jury to have been the victim of prior abuse, then Reed's attorney risked the perception that he was attacking a child who was sexually abused by two different men. Thus, even if a statement of prior sexual abuse was relevant, there was a legitimate tactical reason to refrain from using it once it became apparent that Woodard was coming across as less credible than J.R.

2. Reed did not suffer any prejudice.

Because the testimony Reed complains of was admitted despite the court's instruction not to introduce hearsay, Reed did not suffer any prejudice. With regard to the second prong of the *Strickland* test: "Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *Nichols*, 161 Wn.2d at 8 (citing *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). With regard to ER 613(b), if two statements are inconsistent in their final effect, then they are sufficiently inconsistent. *See Sterling v. Radford*, 126 Wn. 372, 375, 218 P. 205 (1923) ("[I]nconsistency is to be determined, not by individual words and phrases alone, but by the whole impression or effect of what has been said or done. On a comparison of the two

utterances, are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?”).

Here, in spite of the court’s admonition against introducing hearsay statements of J.R. through Kizzy Woodard, Woodard still testified that in addition to Reed telling her J.R.’s mother’s boyfriend had molested him, J.R. told her as well.⁶ RP at 457. When Woodard testified that J.R. told her that his mother’s boyfriend had molested him, the alleged statement of prior sexual abuse was heard by the jury. The prosecutor objected without stating a basis, and the court did not rule on this objection. RP at 457. Thus, the statement was admitted into evidence.

Reed’s attorney then suggested throughout his closing argument that another person had done to J.R. what he alleged Reed had done to him. RP at 604, 608-09, 611-13, 620-21. Reed’s attorney also argued J.R. blamed Reed because it was too late to blame the actual perpetrator. RP at 609. Thus, not only was Woodard’s claim that J.R. told her he had been molested by his mother’s boyfriend admitted, but it was also argued that this prior sexual abuse was inconsistent with the claim that Reed had sexually abused J.R. Because the evidence Reed argues was excluded was actually admitted and then utilized by Reed’s attorney to attack J.R.’s credibility, Reed fails to demonstrate that the result of the proceeding

⁶ This is something Reed acknowledges in his appellate brief. *Opening Brief of Appellant* at 9-10.

would have been different had his attorney employed a different strategy. Accordingly, Reed suffered no prejudice.

B. BECAUSE REED DID NOT OBJECT DURING THE PROSECUTOR'S CLOSING ARGUMENT, HIS CLAIM OF MISCONDUCT WAS WAIVED.

Reed waived his claim of prosecutor misconduct when he did not object to the prosecutor's closing argument. "A defendant's failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error, unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)). Although Reed did not object to the prosecutor's closing argument, he now claims misconduct for the first time on appeal. Reed's claim of misconduct is without merit. The prosecutor argued a reasonable inference from the evidence and did not vouch for J.R.'s credibility. Because there was nothing improper about this argument, an objection would not have been successful. Further, even if it is assumed there was improper argument, Reed fails to show this argument was so flagrant and ill-intentioned that it evinced enduring and resulting prejudice that could not have been neutralized by an admonition to the jury had an objection been made at trial.

With all claims of misconduct, “the defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial.” *Id.* at 718 (citing *State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Luvene*, 127 Wash.2d 690, 701, 903 P.2d 960 (1995)). The court reviews the effect of allegedly improper comments not in isolation, but in the context of the total argument and the issues in the case. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Even if it is shown that the conduct was improper, “prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury’s verdict.” *Stenson*, 125 Wn.2d at 718-19.

If the defendant objects at trial, to prove prosecutorial misconduct, the defendant must first establish that the question posed by the prosecutor was improper. *Id.* at 722 (citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). However, when the defendant fails to object, a heightened standard of review applies: “[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is 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. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). (citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. York*, 50 Wn.App. 446, 458-

59, 749 P.2d 683 (1987)). The wisdom underlying this rule is so that a party may not “remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal.” *State v. Bebb*, 44 Wn.App. 803, 806, 723 P.2d 512 (1986); *see also Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960) (“If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.”).

“Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney’s comments as well as their prejudicial effect.” *Russell*, 125 Wn.2d at 85. If a defendant—who did not object at trial—can establish that misconduct occurred, then he or she must also show that “(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict.” *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (citation omitted); *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704 (2012). Under this heightened standard, “[r]eviewing courts should focus less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice

could have been cured.” *Id.* at 762; *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) (“Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.”). Importantly, “[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (citations omitted).

“In closing argument a prosecuting attorney has wide latitude in drawing and expressing reasonable inferences from the evidence.” *State v. Gentry*, 125 Wn.2d 570, 641, 888 P.3d 1105 (1995). When a prosecutor does no more than argue facts in evidence or suggest reasonable inferences from the evidence there is no misconduct. *See State v. Smith*, 104 Wn.2d 497, 510-11, 707 P.2d 1306 (1985). Any allegedly improper statements by the State in closing argument “should be viewed within the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.2d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Juries are presumed to follow jury instructions absent evidence to contrary. *State v. Kirkman*, 159

Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)).

A prosecutor's remarks, even if they would otherwise be improper, are not misconduct if they were "invited, provoked, or occasioned" by defense counsel, so long as the remarks do not go beyond a fair reply and are not unfairly prejudicial. *See State v. Davenport*, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984) (quoting *State v. LaPorte*, 58 Wn.2d 816, 822, 365 P.2d 24 (1961)). "When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." *State v. Contreras*, 57 Wn.App. 471, 476, 788 P.2d 1114 (1990). Although a prosecutor may not shift the burden of proof to the defendant, *see. e.g., In re Glasmann*, 175 Wn.2d 696, 713, 286 P.3d 673 (2012), a prosecutor's "remarks even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements. . . ." *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1005 (1995) (citing *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994)). Arguing that facts indicate a witness is truthful is not misconduct. *State v. Fiallo-Lopez*, 78 Wn.App. 717, 730, 899 P.2d 1294 (1995). Even strong "editorial comments" by a prosecutor are not

improper if they are in response to arguments made by the defendant. *State v. Brown*, 132 Wn.2d 529, 566, 940 P.2d 546 (1997).

Here, the prosecutor argued reasonable inferences from the evidence presented. J.R. was 12-years-old at the time he was victimized. The jury had listened to J.R.'s testimony and was able to directly discern his maturity level. J.R.'s mother, Michelle Crippen, testified that he suffered from autism and ADHD. RP at 270. Crippen also testified that his maturity level was equivalent to an eight or nine year old. RP at 270. J.R.'s former special education teacher, Shawna Driscoll, testified to her experience with children in special education.⁷ RP at 315. Driscoll explained how special education students do not advance in reading, math, or social skills as quickly as general education students. RP at 315. Although she had J.R. as a student in seventh and eighth grade, he was developmentally disabled, his reading was at a first-grade level, and his math was at a second-grade or third-grade level. RP at 317-18. Driscoll testified that J.R. could only develop simple plans. RP at 328. Kristen Mendez, who had the experience of forensically interviewing almost a thousand children, testified that during her interview of J.R. she noticed his manner of speaking and behaviors were younger than the average 12-

⁷ Reed argues that no expert testified that J.R. suffered from developmental disability; however under ER 702, Driscoll's training and experience as a special education teacher did qualify her as an expert. RP at 314-16. Further, because Reed did not object he cannot raise this issue for the first time on appeal.

year-old. RP at 204, 205. Mendez also noted that J.R. was less mature for his age level, therefore she interviewed him more as she would have an eight to ten-year-old to make sure he understood. RP at 212. Reed even told Detective McDaniel that J.R. had a lesser mental state. RP at 348. Thus, there was overwhelming evidence that J.R. had a reduced maturity level due to his disabilities.

When he testified, Reed maintained that J.R.'s grandmother and mother were using J.R. to set him up. RP at 524, 546, 552-53. Obviously, this required J.R. to assist in the scheme. Reed surmised that J.R.'s grandmother and mother—who did not pay Reed any money—came up with a scheme to prevent Reed from gaining custody of J.R. so Crippen could avoid paying money to him in the future by having J.R. falsely accuse him of sexual abuse. RP at 554. Thus, Reed raised the issue that J.R. was part of a plan to set him up.

The prosecutor argued that J.R.'s developmental disability and lesser maturity level made him less likely concoct a sophisticated plan to set up Reed, as he claimed. This was based on facts in evidence—Driscoll specifically testified that J.R. could only develop simple plans. RP at 328. With training and experience in special education and direct knowledge of J.R.'s abilities, Driscoll was properly qualified to render such an opinion. In conjunction with this argument the prosecutor argued that children of

lower maturity levels are more likely to say things straight out, and used as an example a young child in a grocery store saying something out loud about a stranger. RP at 584. The prosecutor referred to Driscoll's testimony where she had testified about the lesser maturity level of J.R. as a special education student. RP at 584. As with any child of a lesser maturity level, J.R. would be more likely to blurt statements out without prompting. Therefore, the prosecutor's argument was not that J.R. was honest because he lacked maturity, but rather that he was unable to develop or carry out a sophisticated plan on behalf of Crippen or Gilson, as Reed was claiming due to his lesser maturity level. Because the prosecutor drew reasonable inferences from the evidence presented and did not vouch for J.R.'s credibility, his argument was not improper.

Of course, by not objecting, Reed waived his claim of misconduct. While the prosecutor could have more articulately phrased his point, there is no showing that this was a flagrant attempt to vouch for J.R.'s credibility. In fact, earlier in the trial when Driscoll testified that J.R. was honest, the prosecutor asked the court to strike her statement. RP at 328. The court then instructed the jury to disregard the statement. RP at 328. Thus, not only did the prosecutor not vouch for J.R.'s credibility, but also ensured that another witness was prevented from commenting on J.R.'s credibility. In light of the prosecutor's effort in this regard, it does not

make sense to interpret the prosecutor's argument to be flagrant or ill-intentioned.

Moreover, by not objecting, Reed did not afford the trial court the opportunity to provide a curative instruction. Reed has not even argued how a curative instruction would have failed to obviate any prejudicial effect of this argument. Had Reed objected to the argument he now claims to be improper, the court could have instructed the jury to disregard it. Because juries are presumed to follow the court's instructions, and the jury had been instructed that the lawyers' arguments were not evidence, there is no reason to believe a curative instruction would not have been effective. *See Kirkman*, 159 Wn.2d at 928.

Considered within the wider context of the prosecutor's argument and the issues in the case, there is simply not a substantial likelihood that the prosecutor's argument on this point affected the jury verdict. Reed's theory was that J.R. was molested by someone else. However, J.R. did not testify to be in molested by someone else. He testified and was cross-examined about having been sexually abused by Reed and described what occurred in detail. Reed, with no corroborating evidence, claimed J.R.'s mother and grandmother developed a plan that ultimately required teenage J.R. to testify in public to sucking his father's penis—something that no loving or concerned guardian would desire to put a child through

unnecessarily. Reed maintained their motive was to avoid the possibility of Crippen being required to pay him money in the future. This was highly questionable when Crippen had never been required to pay him money, he had never held custody, and had testified to giving up on any attempt to gain custody. Accordingly, Reed's unsubstantiated claim of a setup was unsupported by any evidence beyond his own testimony and was unlikely to be believed by a rational jury.

But it was Reed himself who most strongly corroborated J.R.'s testimony. While he gave "innocent" explanations for the evidence, Reed agreed with J.R. to several instances of sexual contact. Reed testified that J.R. put his face in Reed's crotch, claimed J.R. would "hump" him in bed, would walk around the apartment with his penis out, and admitted to touching and smelling J.R.'s private area. Reed also admitted to observing J.R.'s penis while J.R. was naked in the shower with the door open. The jury heard testimony from several witnesses called by the State and Reed. The jury observed these witnesses in court. After hearing his evidence, the jury found Reed guilty. Thus, the prosecutor's argument regarding J.R.'s maturity level, which the jury already was able to observe firsthand, did not result in prejudice that had a substantial likelihood of affecting the

jury verdict. Because Reed did not object, his claim of misconduct was waived.⁸

V. CONCLUSION

For the above stated reasons, Reed's convictions should be affirmed.

Respectfully submitted this 23rd day of March, 2017.



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⁸ Reed also argues his attorney was ineffective for not objecting the prosecutor's remark, however because the prosecutor's argument was a reasonable inference drawn from the evidence an objection would have been overruled. Further, there is no showing that this evidence impacted the outcome of the trial. Therefore, this claim of ineffective assistance is subsumed by the failure of his claim of misconduct.

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on March ^{23rd} 23, 2017.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR
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