

NO. 50003-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALEXANDER BROWN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 16-8-00728-4

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defense counsel present a motion to continue to the trial court?
2. Did defense counsel make a motion to continue after his motion to compel evidence was denied?
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4. Can appellant claim prejudice resulting from the alleged denial of a motion to continue when his defense counsel told the trial court that he was ready to proceed immediately before trial commenced?
5. Did appellant provide a sufficient factual basis to compel either production or *in camera* review of the rape victim's psychiatric and medical records?
6. Did the trial court abuse its discretion when it denied appellant's motion to compel production of the rape victim's psychiatric and medical records?
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8. Was appellant prejudiced by the trial court's factual characterization of a hymenal scallop as "deep" (which wasn't testified to) as opposed to "different" (which was testified to)?
9. Is Finding of Fact VI supported by sufficient evidence?
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12. Are the guilty findings in this case supported by sufficient evidence?

13. Does this case present cumulative error?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Appellant, then thirteen year old Alexander Brown (hereinafter appellant), was arraigned in the Juvenile Division of the Pierce County Superior Court on September 26, 2016¹ on three counts of rape of a child in the first degree committed upon victim J.K., and one count of child molestation in the first degree committed upon victim R.K.² At arraignment, a scheduling conference was set for October 5, 2016. Supp. CP 2. On October 5, 2016 the scheduling conference was set over until October 19, 2016, by an attorney filling in for defense counsel, Mr. Steinmetz. Supp. CP 3. On October 19, 2016, defense counsel set over the scheduling conference until November 16, 2016, with a speedy trial waiver. Supp. CP 4, 5. On November 16, 2016, trial was set for January 24, 2017, with a speedy trial waiver. Supp. CP 6,7.

On January 10, 2017, appellant's counsel moved to continue the trial date "based on primarily [his] trial schedule." 1/10/17 VRP 4. The trial court set a status conference for January 13, 2017. *Id.* at 12.

¹ Supp. CP 1

² CP 1-2.

On January 13, 2017, appellant's counsel withdrew his motion to continue. 1/13/17 VRP 17. The matter was continued to January 20, 2017, the Friday before the scheduled Tuesday, January 24 trial date. *Id.* at 34, CP 6.

On January 20, 2017, appellant's trial counsel presented a motion to compel production of records. 1/20/17 VRP 36-42, 48-49. That motion was denied. *Id.* at 49-53. Appellant's trial counsel did not make a motion to continue at that time. 1/20/17 VRP 35, 35-56.

Trial commenced on January 24, 2017. Appellant was found guilty at trial on two counts of rape of a child in the first degree. Appellant was found not guilty of one count of rape of a child in the first degree, and one count of child molestation in the first degree. CP 58-68. Respondent timely appealed.

2. FACTS

Appellant was born on April 20, 2003. Finding of Fact III. J.K. was born on November 16, 2005. Unchallenged Finding of Fact I. From April 2016 through July, 2016, J.K. resided at 186th Street in Puyallup, WA, Pierce County (the "new house"). Unchallenged Finding of Fact IV. J.K. and appellant have neither been married nor have been in a domestic partnership. Unchallenged Finding of Fact III. At the "new house," after pulling J.K.'s pants down, appellant placed his finger into J.K.'s vagina.

Finding of Fact VI.³ On July 24 or July 25, 2015, at appellant's house in Pierce County,⁴ after pulling J.K.'s pants down, appellant inserted his fingers into J.K.'s vagina. Finding of Fact VI.⁵

C. ARGUMENT.

1. THE FACTS DO NOT SUPPORT APPELLANT'S ASSERTION THAT THE TRIAL COURT DENIED A CONTINUANCE MOTION.

Appellant's trial counsel presented a motion to continue on January 10, 2017. 1/10/17 VRP 4. The support for that motion was "based on primarily [his] trial schedule." 1/10/17 VRP 4. Appellant's trial counsel voiced concerns about being able to complete the victim interviews (*Id.* at 4-5) and asserted that another client's trial, scheduled for January 17, 2014, could create a conflict. *Id.* at 5-6. The trial judge did not rule at that time, and set a status conference for January 13, 2017, in the afternoon. *Id.* at 12.

By January 13, 2014, the bases for continuance asserted the week prior had evaporated because the defense witness interviews had been concluded and the competing trial had settled. 1/13/17 VRP at 13. At that

³ The evidentiary sufficiency of this finding of fact is addressed *infra*.

⁴ Appellant's house is in Pierce County, Washington. Unchallenged Finding of Fact V.

⁵ The evidentiary sufficiency of this finding of fact is addressed *infra*.

time, Appellant's trial counsel withdrew his motion to continue, pending the possible granting of a motion for victim J.K.'s counseling records:

THE COURT: I see. So there's two issues here as I see it. There's the continuance request, and what I'm hearing Mr. Steinmetz say today is that -- Well, you correct me if I misunderstood you, Mr. Steinmetz. What I hear you saying today is that you're essentially withdrawing the continuance request pending the possible granting of a motion for records.

MR. STEINMETZ: That's fair, yes. I haven't brought the motion [to compel] yet, so for whatever issues that are raised by the State, we get to ask. There's no question about that. You're going to have to make a decision, and I think once we make that decision, then that will impact whether or not we're seeking to continue the trial.

1/13/17 VRP 17. The trial court approached the matter with caution:

I'm not going to continue it today. I'm going to deny the motion for a continuance, but with the understanding that, theoretically, if the Court were to grant a motion that I haven't even seen yet, then potentially there could be a need for a delay. I can't forecast the outcome of those issues. But the parties need to continue to prepare for trial because this matter is set for trial on the 24th.

Id. at 20. The trial court at that time heard testimony from the victim's mother regarding the impact of a continuance upon her two children. *Id.* at 21-25. Appellant's trial counsel raised no other time for trial concerns at this hearing. *Id.* at 13-33. The matter was continued to January 20, 2017, the Friday before the scheduled Tuesday, January 24 trial date. *Id.* at 34, CP 6.

On January 20, 2017, appellant's trial counsel presented his motion to compel production of records. 1/20/17 VRP 36-42, 48-49. That motion was denied. *Id.* at 49-53. Appellant's trial counsel did not make a motion to continue at that time. 1/20/17 VRP 35 (where defense counsel states that the only motion before the court is the motion to compel.) *Id.* at 35-56.

Trial commenced on January 24, 2017, with the following exchange:

THE COURT: . . . Are the parties ready to proceed?

MS. MARTINELLI: . . . The State is prepared to proceed.

THE COURT: . . . Mr. Steinmez, you ready to proceed?

MR. STEINMETZ: . . . Yes, your honor.

1/24/17 VRP 1.

The record does not reveal any instance where appellant's trial counsel presented a motion to continue to completion and that motion was denied. By the time the trial date arrived, no viable reason for a continuance was before the trial court. When Mr. Steinmetz said he was ready to proceed, he meant it. Appellant's denial of continuance argument is not well taken.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO COMPEL PRODUCTION OF THE ALLEGED VICTIM'S COUNSELING RECORDS.

- a. The record on appeal is devoid of evidence indicating abuse of discretion.

Four days before trial, appellant made a motion “for order directing production” pursuant to CrR 4.7. CP 18, 1/20/17 VRP 35-56. This motion was directed at (a) records created by a school counselor and held by the school district, and (b) records held by the alleged victim’s therapist. CP 19, 21. Appellant presented no evidence in support of his motion. CP 17-27; 1/20/17 VRP 35-56.

Appellant sought “All notes, records, and reports relating to the alleged victim’s medical, sexual or social history or reports of sexual abuse by defendant or anyone else, or denial that abuse occurred. ...” CP 19. The resolution of this issue reposed in the trial court’s discretion. *State v. Diemel*, 81 Wn. App. 464, 467, 914 P.2d 779 (1996) (citing cases). Neither in the hearing nor in his motion for production did appellant make any particularized factual showing in aid of this argument. *See* CP 17-27; 1/13/17 VRP 35-57. Appellant presented no evidence, period. *Id.* There is thus no evidence in the record that the trial court

abused its discretion. The burden is on the appellant to prove abuse of discretion. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). In the absence of facts demonstrating that the trial court abused its discretion, “the presumption is conclusive that the discretion was rightly exercised.” *Garrett v. Nespelem Consolidated Mines*, 18 Wn.2d 340, 344, 139 P.2d 273 (1943) (addressing review of a civil default motion). *See also, State v. Grant*, 89 Wn.2d 678, 689, 575 P.2d 210 (1978) (holding that statements unsupported by affidavit or testimony were insufficient to demonstrate abuse of discretion in denial of motion to change venue).

“In order to make an adequate threshold showing to justify an in camera inspection, a defendant must make a particularized factual showing that information useful to the defense is likely to be found in the records.” *State v. Diemel*, 81 Wn. App. 464, 468-69, 914 P.2d 779 (1996) (citing *State v. Kalakosky*, 121 Wn.2d 525, 550, 852 P.2d 617 (1993)). Appellant’s failure to make any factual showing below precludes a finding of abuse of discretion on appeal.

Appellant asked the trial court to conduct a fact-specific *Kalakosky*-type inquiry,⁶ yet failed to produce the evidence required to

⁶ CP 21-23.

satisfy that inquiry. He cannot now claim that the trial court abused its discretion when it denied his motion for failure of proof.⁷

Appellant cannot successfully recast this failure of proof into an ineffective assistance of counsel argument. “To prevail on a claim of ineffective assistance of counsel, counsel’s representation must have been deficient, and the deficient representation must have prejudiced the defendant.” *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Although the first *Strickland* prong is satisfied by appellant’s deficiently presented a motion to compel testimony, the second *Strickland* prong fails because appellant cannot demonstrate that an adequately presented motion to compel would have yielded a different result. There is no evidence before this Court suggesting that an *in camera* review was warranted by the facts presented in this case.

⁷ The trial court expressed appellant’s failure of proof in terms of RCW 70.125.065, which requires an affidavit expressing reasons for the need for the sought-after evidence. CP 39-40. On appeal, the State relies upon the more fundamental requirement that a valid motion requires valid supporting evidence. “This court can affirm on any basis established by the pleadings and supported by the evidence, even if the trial court did not consider it.” *Ladenburg v. Campbell*, 56 Wn. App. 701, 703, 784 P.2d 1306 (1990) (citing *LaMon v. Butler*, 112 Wn.2d 193, 200–01, 770 P.2d 1027 (1989) and *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984)).

- b. Alternatively, even considering the conclusory and speculative statements made by appellant's trial counsel as evidence, the trial court did not abuse its discretion.

“If an accused requests disclosure of material that the prosecutor is not obliged to disclose, he or she must show that the requested information is material to the preparation of his or her defense.” *State v. Blackwell*, 120 Wn.2d 822, 828, 845 P.2d 1017 (1993).

Appellant's trial counsel presented this assertion in his motion to for production:

Here the records sought contain information pertaining to JKK's discussion of the allegations that are the very subject of this case. There is a high likelihood that JKK made statements that are inconsistent with prior and subsequent statements she has made. That is based on the fact that JKK has not been consistent in her previous statements.

CP 23. This assertion is nothing more than speculation.

Appellant's trial counsel presented the following unsworn claims to support that argument:

During the defense interview on January 12, 2017, JKK made several inconsistent statements and included new details regarding the alleged molests. But more importantly, JKK indicated during the interview that she was seeing a counselor that was referred by the Child Advocacy Center on a regular basis. The counselor, named Heather Schilling of All of a Kind Family Counseling, LLC conducted play therapy with JKK and apparently elicited additional information about the molests. Clearly, there are additional statements by JKK that have not been turned over to the defense.

CP 19. This is not only speculation that the victim made inconsistent statements to her therapist, but it was also speculation founded upon unspecified inconsistencies. This claim—even had it been established with evidence—provided nothing near what would serve as an adequate basis for appellant’s motion to compel production.

Appellant’s trial counsel also argued:

This is not entirely a fishing expedition because we found out about the records, we know that there is a pattern, and we expect to see that pattern repeated in these records, and that pattern is something that is, at minimum, very helpful to the defense by the inconsistent statements and, at maximum, may actually result in something that is exculpatory to that. And I think that therefore that is sufficient showing to take a look at these particular records.

1/20/17 VRP 38. “A claim that privileged files might lead to other evidence or may contain information critical to the defense is not sufficient to compel a court to make an in camera inspection.” *Diemel*, 81 Wn. App. at 469.

Prior to the hearing, the State’s response noted appellant’s failure to provide any declarations in support of his motion along with appellant’s failure to identify “specific instances of inconsistencies and/or new details and their potential significance.” CP 30. In his rebuttal argument, appellant’s trial counsel argued:

That's fine. As I read the statute, 71.25.065 [sic⁸], it does not -- it requires the reasons to be set forth, which I think I have done in the motion. It does not require specific statements that are, in other words, a listing of what the expected testimony is: In this interview she said this; in this interview she said this; and in this interview she said that. There have been plenty of inconsistencies as to where it happened, which house they were living in at the time. There have been other inconsistencies into how these occurred, whether she was looking for a hole in the blanket or not and that somehow she was able to observe my client or whether she just saw my client's shoes and identified him through that.

These are the kinds of inconsistencies that exist in this case, but I don't think the required showing from the statute requires that I list out every single statement that she's made and what she's also said inconsistent with that. I do think I can save the Court a little bit of time by simply saying that she had been inconsistent in that, and I think that sets out some specific reasons why we expect these records to be relevant, and that's what I've done.

1/20/17 VRP 48. This argument vaguely asserts some inconsistencies, but neither describes them nor relates them to the facts of this case.

Balanced against these conclusory statements, the trial court had testimony of the victim's mother at the January 13, 2017 hearing:

There's nothing that's been said in her counseling appointments that would not already be in the forensic interview, you know, and that was recorded, you know, every detail that has been recorded in our defense interviews yesterday. I mean, there's nothing in counseling other than just her emotional feelings that she's trying to work through with her counselor, like that is very much her safe place.

⁸ The relevant statute is 70.125.065.

1/10/17 VRP 27. When asked by the trial court whether she'd been present for the counseling, the victim's mother said:

A lot of it, yeah. So we usually sit down and have a meeting with myself and the counselor, just kind of, you know, how she's doing and just kind of a progress update, and, you know, sometimes we'll have sessions where all three of us will get to sit and [JKK] will talk a little bit, but it's definitely -- as I said, my daughter is very shy so to get her to open up to someone in the first place was definitely a challenge, and then this counselor has been amazing. She has done play therapy with them, which at first I thought was crazy. I didn't understand how just playing with someone for an hour would build into that -- you know, being able to counsel them and have Jenna open up to her as much as she has, and that's definitely a good person for her recovery and her healing and her being able to process all of this.

1/10/17 VRP 28. When asked about interactions where Ms. Kim was not present, Ms. Kim responded:

MR. STEINMETZ: Do you have any idea how many times or what percentage of the time you've been in the room versus the time you haven't been in the room?

MS. KIM: I would say percentage, it's standard that she goes back with her and then kind of fills me in on what happens at the end of every visit.

1/10/17 VRP 30.

“The mere possibility that an item of undisclosed evidence might have helped the defense or might have affected the outcome of the trial ... does not establish ‘materiality’ in the constitutional sense.”. *State v. Mak*, 105 Wn.2d 692, 704-05, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986),

overruled in part on other grounds by *State v. Hill*, 123 Wn.2d 641, 645 (1994); *State v. Bebb*, 108 Wn.2d 515, 523, 740 P.2d 829 (1987).

“Generally, a trial court's decisions regarding discovery under CrR 4.7 will not be disturbed absent manifest abuse of discretion.” *State v. Garcia-Salgado*, 170 Wn.2d 176, 183, 240 P.3d 153 (2010).

A manifest abuse of discretion arises when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. We need not agree with the trial court's decision for us to affirm that decision. We must merely hold the decision to be reasonable.

State v. Lile, ____ Wn.2d ____, ____ P.2d ____ (July 20, 2017).

The trial court, balancing appellant's cursory and conclusory summaries against the testimony presented by the victim's mother reasonably concluded that appellant had not demonstrated that the therapist and counselor records were either admissible nor likely to lead to admissible evidence. CP 52. *State v. Knutson*, 121 Wn.2d 766, 773, 854 P.2d 617 (1993). Appellant cannot demonstrate an abuse of discretion.

The trial court decided the motion to compel on this alternative basis (on the merits) and considered appellant's trial counsel's conclusory statements as asserted facts.⁹ Under this alternative prong, appellant was not prejudiced by his failure to present evidence to the trial court because

⁹ “It seems to me that the court could and perhaps should deny the motion because of these procedural problems alone, but I have considered the request substantively. CP 52.

his argument was accepted as evidence. It follows that ineffective assistance of counsel also cannot be predicated upon this alternative basis.

- c. Alternatively, the trial court properly refused appellant's motion to compel for untimeliness pursuant to RCW 70.02.060.

The fourteen day time limit of RCW 70.02.060 applies to this case:

Before service of . . . compulsory process on a health care provider for health care information, an attorney shall provide advance notice to the health care provider . . . involved through service of process or first-class mail, indicating the health care provider from whom the information is sought, what health care information is sought, and the date by which a protective order must be obtained to prevent the health care provider from complying. Such date shall give the patient and the health care provider adequate time to seek a protective order, but in no event be less than fourteen days since the date of service or delivery to the patient and the health care provider of the foregoing. Thereafter the request for discovery or compulsory process shall be served on the health care provider.

RCW 70.02.060.¹⁰ Appellant acknowledged the untimeliness of his motion to the trial court. CP 53-54. The record contains no evidence demonstrating facts precluding the presentation of the motion in a timely fashion. 1/20/17 VRP 35-56. The trial court did not abuse its discretion when it denied appellant's untimely motion to compel because (a) the motion was untimely.

¹⁰ It may be debatable whether RCW 70.02.060 applies to both the therapist and the school counselor who helped the victim, but appellant told the trial court that it applies (CP 24-25, 1/20/17 VRP 41-42) and the trial court relied upon that assertion. (CP 39-40, 1/20/17 VRP 51). Regardless, it is now the law of the case. See *State v. Smith*, 122 Wn. App. 294, 298-300, 93 P.3d 206 (2004) (applying the doctrine to jury instructions).

Appellant cannot predicate an ineffective assistance of counsel claim on this untimely motion. Although deficient performance is demonstrated by the untimely motion with no reasonable excuse, appellant cannot demonstrate the required prejudice for the same reasons argued above: (1) there is no evidence demonstrating a reasonable probability that appellant would have prevailed in a timely motion; and (2) the trial court properly considered, and rejected, the substance of appellant's motion to compel.

3. THE MISCHARACTERIZATION OF A
“DIFFERENT” HYMENAL SCALLOP AS A “DEEP”
HYMENAL SCALLOP DID NOT PREJUDICE
RESPONDENT.

a. “Different” versus “deep” makes no
prejudicial difference in this case.

Finding of Fact XVI, in pertinent part, states: “The genital examination revealed that J.K. had a deep hymenal scallop.” (emphasis added) CP 63. It should have read something like “The genital examination revealed that J.K. had a hymenal scallop that looked a little different.” 1/26/17 VRP 377.¹¹ This is a mistake.

However this is a mistake that does not matter. The witness testified that she could not definitively say whether the scallop was a

¹¹ The trial court expressly found that ARNP Michelle Breland was a credible witness who conducted an appropriate physical and genital examination. Unobjected-to finding of Fact XVIII.

healed injury. 1/26/17 VRP 378. When the witness was asked “You can’t say that it was injury, you can’t say that it was not?” the witness answered “Correct.” Finding of Fact XVI reflects this testimony:

The cause is impossible to determine. J.K.’s examination was ruled normal, which does not exclude the possibility of sexual abuse due to the elasticity of the tissue in the vaginal and hymenal region.

CP 63. Whether the finding of fact reads “deep,” or whether it reads “different,” the consequence of the finding is the same: inconclusive. No prejudice resulted from this mistake.

4. THE REMAINING CHALLENGED FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d

632 (1987), *review denied*, 111 Wn.2d 1033 (1988)(citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

(citations omitted) *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

a. Finding of Fact VI is supported by sufficient evidence.

J.K. knew and identified appellant. 1/24/17 VRP 40. J.K. used to live in the old house in Graham, right next to Rocky Ridge School. *Id.* at 42-43. Alex would come to the old house and the new house. *Id.* at 45. Alex would stay overnight. *Id.* at 45.

At night appellant would hurt J.K. *Id.* at 50-51. Appellant hurt J.K. by touching her vagina (“number one”) and her anus (“number two”).¹² This had been going on for almost two years. *Id.* at 52. It happened at J.K.’s new house and once at appellant’s house. *Id.* The last time it happened, it happened at J.K.’s house. *Id.*

So he would put my pants down to my ankles. Like I would have my shoes off, obviously, because I'm in my bedroom. And then he would put blankets over my head to where I couldn't see, and then he would use, I think three fingers, and then he, um, would touch me in number one, and then he would -- um, any time like I would move to go to a different position he would, um, he would like run out of the room.

The last time I caught him in my room trying to hide in the front of my bed. It's like the bed is like by my wall. The top bunk is full of animals. The bottom bunk has like a lot of animals on it. But, um, my dresser would be right there and there would be a little gap between them. He would hide

¹² The description used simple words to describe what adults refer to as the vagina and the anus. *Id.* at 51.

right there, and then I saw him, and then he like ran out -- he like gently went out of the room.

Id. at 52-53. Appellant's fingers went inside J.K.'s "number one area."

Id. at 53. Appellant never said anything to her when he was "doing this to [J.K.'s] body." *Id.* at 61.

The foregoing testimony was provided by J.K. It is undisputed that J.K. was a credible witness. Undisputed Finding of Fact XX.

The facts related above track closely with Finding of Fact VI. Finding of Fact VI is supported by substantial evidence.

b. Finding of Fact VII is supported by sufficient evidence.

Appellant once touched J.K. when both were at appellant's house. 1/24/17 VRP 52, 72. J.K. was in the living room on the floor. *Id.* J.K. was sleeping.¹³ Appellant pulled J.K.'s pants and underwear down. *Id.* at 73. Appellant touched J.K. "in [her] number one." *Id.* at 73. It hurt. *Id.* Appellant pulled J.K.'s pants and underwear down. *Id.* at 73. Appellant was always quiet when he was doing things to J.K.'s body and never said anything. *Id.* at 61. Appellant stopped when J.K. moved to get in a different position. *Id.* at 73.

¹³ On direct, J.K. was asked what "everybody else" was doing, and she responded "sleeping." 1/24/17 VRP 72. On cross-examination it was clarified that J.K. also had been sleeping. *Id.* at 78-79.

Appellant's mother testified that J.K. spent the night at appellant's house once. 1/26/17 VRP 455. "That was also the July 24th date, 2015."
Id.

The above related facts track closely with Finding of Fact VII. Finding of Fact VII is supported by substantial evidence. Appellant does not challenge the trial court's determination that J.K. was a credible witness. Findings of Fact XIX, XX.

c. Finding of Fact XXI is supported by sufficient evidence.

Finding of Fact XXI casts the findings of Findings of Fact VI and VII into the "beyond a reasonable doubt" standard. It is supported by substantial evidence for the same reasons as Findings of Fact VI and VII.

5. THE FINDINGS OF GUILT ARE SUPPORTED BY SUFFICIENT EVIDENCE.

Appellant's challenge to the findings of fact depends upon successful challenges to Findings of Fact VI, VII, and XXI. As discussed above, those findings of fact are supported by substantial evidence. In this case, the State has produced sufficient evidence for each of appellant's juvenile offenses. This is reflected in the challenged findings of fact, along with the unobjected-to findings of fact. CP 58-68.

6. THIS CASE DOES NOT PRESENT CUMULATIVE ERROR.

State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) contained numerous errors which necessitated a new trial. *State v. Clark*, 143 Wn.2d 731, 771, 24 P.3d 1006 (2001). This case contains one error: the indisputably nonprejudicial mischaracterization of a hymenal scallop as “deep” rather than “different.” CP 63.

Appellant seeks to add to his mix of claimed prejudice a claimed continuance he claims was denied. The validity of that claim is disputed above, but even if appellant did lose a motion to continue after losing the motion to compel, appellant did not need a continuance—appellant was ready to proceed to trial.¹⁴ 1/24/17 VRP 1. There is no prejudice found in this claimed issue.

Nor can prejudice *at this time* accumulate in the denial of appellant’s motion to compel. “The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial.” *In re Lui*, 188 Wn.2d 525, ____, 397 P.3d 90 (2017). “For relief based on the cumulative error doctrine, the defendant must show that while multiple trial errors, standing alone, might not be of sufficient gravity to constitute

¹⁴ As argued above, appellant withdrew his motion to continue. 1/13/17 VRP 17. Had appellant prevailed in his motion to compel, he surely would have been entitled to a continuance, but that issue is not presented in this case.

grounds for a new trial, the combined effect of the accumulation of errors most certainly requires a new trial.” (internal quotation omitted) *State v. Clark*, 187 Wn.2d 641, 649, 389 P.3d 462, 466 (2017). “In other words, petitioner bears the burden of showing multiple trial errors and that the accumulated prejudice affected the outcome of the trial.” *In re Cross*, 180 Wn.2d 664, 690, 327 P.3d 660, 678 (2014). In this case appellant cannot demonstrate prejudice flowing from the denial of the motion to compel production because appellant cannot identify the unknown unproduced material and cannot demonstrate prejudice resulting from its absence at appellant’s trial.¹⁵

After these nonprejudicial assertions of error are eroded away, one claim of error remains—evidentiary sufficiency—an outcome dispositive claim all by itself. Appellant’s claim of cumulative error is not well taken.

¹⁵ Were appellant to prevail on this issue in this appeal, he would be entitled to a remand for the trial court to conduct a review of the denied material, and further hearings, if necessary. See e.g., *State v. Allen*, 27 Wn. App. 41, 615 P.2d 526 (1980). Prejudice could only be evaluated at that point.

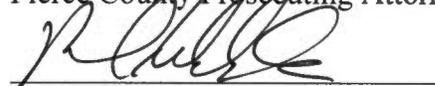
D. CONCLUSION.

Appellant took a flyer on a weak motion to compel, and failed.

Appellant had a fair trial. The trial court should be affirmed.

DATED: August 29, 2017.

MARK LINDQUIST
Pierce County Prosecuting Attorney



Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8.30.17 Theresa Ka

Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

August 30, 2017 - 4:03 PM

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