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

STATE OF WASHINGTON, Respondent

v.

JEREMY DAVID LIEBICH, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-01048-2

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. Sufficient evidence was presented to support each of Liebich's convictions.**
- II. The trial court properly admitted statements J.L. and K.S. made to Dr. Copeland pursuant to ER 803(a)(4).**
- III. The trial court properly excluded evidence of a non-witness's bad character.**
- IV. Cumulative error did not deny Liebich of a fair trial.**

STATEMENT OF THE CASE

J.L. and K.S. were sexually abused for years by Liebich, J.L.'s father and K.S.'s step-father. After J.L. disclosed the abuse, she was removed from her father's home and police investigated the case. Soon after, the State charged Liebich with four counts of rape of a child in the first degree against J.L. and one count of child molestation in the first degree and one count of attempted child molestation in the first degree against K.S. CP 3-5. The case proceeded to trial and Liebich was convicted of all counts, and the jury further found that the crimes against J.L. were committed over a long period of time and part of a pattern of abuse. CP 110-19. The trial court sentenced Liebich to an exceptional sentence of 516 months to Life pursuant to RCW 9.94A.507. CP 151. Liebich timely filed this appeal.

At trial the State presented J.L., K.S., K.S.'s mother, April Mason, a police officer, a forensic scientist, a nurse, and two doctors as witnesses in its case in chief. The testimony at trial was as follows:

J.L. was born on December 6, 2004. RP 440. She has never been married. RP 441. J.L. testified that she has lived with a lot of different family members in her life. RP 442. There was a time when she lived with someone she considers "Aunt Jamie," later identified at trial as Jamie Anselm. RP 442. When she lived with Ms. Anselm, J.L.'s father, Liebich, and Ms. Anselm's six children also lived with her. RP 442. Prior to living with Ms. Anselm, J.L. lived for a few months with just her father, Liebich, alone. RP 443. Prior to that she lived in a house with Liebich, her stepmother, April Mason, and her three step-siblings, and her young half-brother, who was the child of Liebich and her stepmother. RP 443-44. J.L. was six or seven years old when Ms. Mason, her stepmother, became a part of her life. RP 448.

J.L. described living in a house with her stepmother, father, and siblings, and sharing a room with her stepsister that had blue carpet and was the size of two bedrooms. RP 449. J.L. had one end of the room and her stepsister had the other half. RP 449. While they lived in that house, Liebich would come into J.L.'s room approximately twice a week, mostly at night. RP 449-50. J.L. described one incident where Liebich came into

her room after she was asleep. RP 449-51. Liebich woke J.L. up by getting into her bed with her. RP 450. Liebich got underneath the covers of her bed and pulled down J.L.'s pants and underwear. RP 449-50. Liebich then took his penis out and put it inside J.L.'s vagina. RP 451. J.L. was in excruciating pain; it burned really badly. RP 451. This same thing happened two to three times a week. RP 452.

J.L. described another occasion when she still lived with Ms. Mason, the other children, and her father, when her father had been going to take a shower and he poked his head into the bedroom and either used a hand signal or cocked his head to the side, which J.L. understood to be a direction to come with him. RP 453. This signal had come to have significant meaning in J.L.'s life; when she saw her father make that signal, she knew what was happening. RP 453. J.L. knew they would be going into a different room and he would "do the same thing." RP 453. On that time J.L. described at trial, after her father used the signal to summon her, J.L. followed him into the master bedroom's bathroom, where there was a shower. RP 452. Liebich started the shower, he took off J.L.'s clothes, took off his clothes, positioned J.L. on her hands and knees, and used his penis to penetrate her vagina. RP 454-56. While his penis was inside her vagina, Liebich thrust back and forth with his body. RP 456.

The rapes happened so frequently that J.L.'s body got used to it and it became less painful; when her father would rape her, she would try to focus on something else and not what was happening to her. RP 455.

J.L. described a rape that occurred in the bedroom that Liebich and Ms. Mason shared, in the house she lived in with Ms. Mason, her father, and all her siblings. RP 457. At that time, Ms. Mason was at work, and all the other kids were gone. RP 458. Both J.L. and Liebich were lying in the bed in the master bedroom, and J.L.'s pants and underwear came off. RP 458. Liebich then put his penis inside J.L.'s vagina. RP 459.

At some point after those incidents, J.L. and her father moved into an apartment where just the two of them lived. RP 461. Liebich raped J.L. much more frequently once they lived alone as there was more privacy. RP 461. J.L. described one time in her bedroom in that apartment when Liebich raped her. RP 462. J.L. was lying down on her side, her knees were up, Liebich pulled down her pants and underwear, he pulled out his penis and put his penis inside her vagina. RP 462.

After living in the apartment alone with her father, J.L. and her father moved in with Ms. Anselm and her children. RP 462-63. Ms. Anselm lived at Cascade Park Apartments, which was near J.L.'s elementary school. RP 584. Liebich continued to rape her while they lived there. RP 463. J.L. brought one particular occasion to mind and described

it for the jury: it happened in the bathroom of Ms. Anselm's apartment; Liebich poked his head or used a finger to signal J.L. to come to him. RP 464. Liebich pulled down J.L.'s pants and underwear, she got on her hands and knees, Liebich pulled down his pants, and put his penis inside her vagina. RP 465. The bathroom doors were closed and J.L. believes they were locked. RP 465.

Liebich continued raping J.L. up until a few days before she was put into foster care. RP 466. She was taken into CPS custody on April 27, 2016. RP 380. J.L. described the last rape that happened a few days before she was taken out of her father's care: it happened in the bathroom at Ms. Anselm's apartment, her pants and underwear were removed, J.L. got on her hands and knees, and Liebich put his penis inside J.L.'s vagina. RP 467.

Liebich also anally raped J.L. RP 468-69. J.L. described the first time Liebich anally raped her. RP 469. "[I]t was horrible, horrible pain. Once his penis entered my butt it was – I couldn't even describe the pain, it was horrible. I was in tears at that point." RP 469. This first anal rape occurred in a house they lived in with April in J.L.'s bedroom. RP 469-70. On this particular occasion, it was hot in the house so J.L. was only wearing a nightgown. RP 470. She was lying in bed on her side, and

Liebich put his penis “into [her] butt.” RP 470. Once he penetrated her, Liebich thrust his body back and forth. RP 470.

The first person J.L. ever told was her stepmother. RP 470-71. She didn’t tell anyone about it before because she was in fear. RP 470. Her father was in the military and he told her how he always had a knife on him, that he had guns and knives placed around the house. RP 471. Living with Ms. Anselm was stressful, and J.L. had a bad week, and was visiting Ms. Mason at her house and ended up telling her something about what her father was doing. RP 471-73.

Soon after that J.L. was removed from her father’s care and put in foster care; she then went to live with her mother. RP 473-74. J.L. had been wanting to go live with her mother for a while; she had discussed it with her mother and with her father. RP 475.

During Liebich’s cross-examination of J.L. he asked her: “So when you drove up here with your mom, do you recall your mom disappearing?” RP 483. The State objected on relevance grounds. RP 483. After hearing argument from both parties, the trial court ruled that the fact that J.L.’s mother left and had a relationship with someone else was irrelevant and would confuse the jury. RP 485-86.

Ms. Mason testified that she is J.L.’s stepmother. RP 443. Ms. Mason has four children from her first marriage, one of whom is K.S. RP

503. She then married Liebich, J.L.'s father, in November 2009. RP 504-05. Ms. Mason and Liebich have one child in common. RP 504. J.L. came to live with Ms. Mason and Liebich in the end of February 2011. RP 533. During their marriage, Ms. Mason and Liebich lived in at least four different residences, all in the State of Washington. RP 507. They separated and each got their own apartment in December 2014. RP 537. Ms. Mason and Liebich shared a bed during their marriage. RP 518. However, at times, Ms. Mason would wake up at night and find Liebich was not in bed with her. RP 519. Ms. Mason would find Liebich either in K.S. and J.L.'s room or the garage. RP 519. This happened many times. RP 519. When Ms. Mason asked Liebich about it he would tell Ms. Mason that one of the girls had a nightmare and he was helping them go back to sleep. RP 519.

About a year prior to trial, on April 22, 2016, Liebich and J.L. came over to Ms. Mason's apartment to bring a wheelchair to Liebich and Ms. Mason's child in common as he had recently broken his leg. RP 509-10, 513, 722. Ms. Mason, J.L., and Ms. Mason's daughter M. were outside the front of the apartment chatting, and J.L. appeared to be upset. RP 511. M. asked J.L. why she was upset and J.L. and M. went into the apartment to talk. RP 511. J.L. ended up talking with Ms. Mason alone in one of the bedrooms of Ms. Mason's apartment. RP 511-12. J.L. disclosed the sexual

abuse to Ms. Mason at that time. RP 509-10, 512. J.L. was crying hysterically. RP 512. Ms. Mason then texted Liebich to see if J.L. could stay for the weekend, which she had done on other occasions in the past, and Liebich said yes. RP 512-13. Ms. Mason did not call police or CPS as she was not J.L.'s biological parent; she was in contact with J.L.'s mother, trying to get her up to Vancouver as soon as possible to report it. RP 514. Ms. Mason did tell her daughter K.S.'s father and stepmother about the allegations. RP 514.

A few days after J.L. disclosed to Ms. Mason, Ms. Mason was driving in a car with K.S. and her other daughter M., and Ms. Mason told them she had seen something on Facebook about a little girl who had been abused for a long time and said that she hoped her girls would tell her if something like that were to ever happen to them. RP 515, 517. M. responded, "Yes, Mom, eww, I would never have any – I would always tell you." RP 516. K.S. responded differently than M.; K.S. started crying. RP 516. K.S. then wrote down what happened on a piece of paper and gave it to her mom. RP 517. K.S. disclosed allegations of abuse on that paper. RP 517. Ms. Mason did not call police or CPS as she was in shock. RP 517. She did tell other adults to try to figure out the next step of handling this that wouldn't jeopardize her or her children's safety. RP 517. Ms. Mason was contacted by law enforcement or CPS on Wednesday

April 26. RP 517. Ms. Mason gave the note that M.S. wrote to police. RP 517.

K.S. was 11 years old at the time of trial. RP 348. She was born on March 30, 2005 and has never been married. RP 348-49. K.S.'s mother is April Mason. RP 350. K.S. was living with her mom, her older brother, and younger sister when Liebich moved in. RP 349-50. Ms. Mason then had K.S.'s little brother, and they all lived together for a while. RP 350. K.S. went to live with her father for two years in 2014 and soon prior to the time of trial she moved back to live with her mother. RP 349, 368.

K.S. described to the jury how Liebich molested her, and testified to the following: The first time K.S. remembers, she was about five years old; it was nighttime and she was on the top bunk of the bunkbed she shared with J.L., asleep RP 351-52. Liebich came into her bedroom and climbed up onto the top bunk. RP 352. Liebich then pulled K.S. on top of him and put his hands down her pants. RP 352. K.S. was scared and didn't know what to do. RP 352. At first she struggled a little, trying to get away, but that did not do anything. RP 352. K.S. then let it happen. RP 354. Liebich was lying on the bed on his back, and he pulled K.S. on top of him, so that she too was lying on her back, looking at the ceiling. RP 354. When Liebich put his hands down her pants he was grabbing her "lady area." RP 355. Liebich's hand was inside K.S.'s underwear, making skin-

to-skin contact. RP 356. This time lasted five to seven minutes by K.S.'s approximation. RP 354.

On another occasion, in the same bedroom, late at night, Liebich came in again. RP 356. He put his hands down her pants, making skin-to-skin contact, touching the "same place" as she described in the first incident. RP 357. This time, K.S. struggled more than she did the first time. RP 356.

On a third occasion, when they lived in a different house, K.S. was alone with Liebich in the house during the daytime. RP 357. K.S. was up in the bedroom she shared with J.L. watching TV when Liebich came into her room. RP 358. He got K.S. to lie down on the bed and then he touched her underneath her shorts and underwear. RP 358-59. He told K.S. not to tell her mom. RP 358.

On yet another occasion, in the same bedroom as the third occasion, K.S. struggled and kept trying to pull away when Liebich tried to touch her. RP 359. K.S. would keep pulling up her pants, and pulling away from Liebich as he tried to touch her. RP 359. K.S. kept struggling to the point when Liebich finally stopped and left. RP 359.

The last time Liebich touched her, K.S. was about seven years old. RP 360. K.S. did not tell anyone about what happened because she was

scared of Liebich and what he could do because he was in the Marines and had guns. RP 361

K.S. also described her initial disclosure to her mom for the jury. She testified that one day she was in the car with her mom and sister when her mom asked the girls something about how if anyone ever touched them that they would tell her, right? RP 361. K.S. said, “Mom, something happened.” RP 361. But she wasn’t able to say the words so she wrote it down on a piece of paper. RP 361. After K.S. gave her mom the note her mom said that Liebich was “molesting” J.L. RP 371, 373. K.S. didn’t understand that word at the time so her mom said “the same thing that he did to you.” RP 373. K.S. didn’t know anything about what Liebich was doing to J.L. or that J.L. had disclosed when she wrote her note. RP 374.

Throughout her testimony K.S. referred to the body part that Liebich touched as “down there.” RP 362. What she meant by that was touching her where she goes pee from. RP 362-63. When Liebich touched her on that body part, his hand would be moving. RP 363.

Dr. Linnea Roy is a pediatric emergency physician who works at Randall Children’s Hospital in Portland, Oregon and at the hospital in Salmon Creek – Vancouver. RP 392. On April 28, 2016 Dr. Roy was working in the emergency room at the hospital in Vancouver and she treated J.L. RP 393. J.L. was brought in by her foster mother, who had

been told by CPS to bring her to the ER for an evaluation. RP 394. Dr. Roy did a sexual assault examination of J.L., including a pelvic exam. RP 394. Dr. Roy took swabs from J.L.'s vaginal area as part of the exam. RP 396. Dr. Roy noted no abnormal findings or injuries to J.L. during her exam. RP 398-99. She did find a small mole or skin lesion on J.L.'s labia. RP 401-02.

Maureen Palensky works as a nurse at Legacy Salmon Creek hospital. RP 403. On April 28, 2016 she was working and assisted in Dr. Roy's examination of J.L. RP 404. When Dr. Roy took swabs from J.L., Ms. Palensky would then make sure they got appropriately labeled and secured, which includes locking it up, until police take the evidence. RP 406.

Laura Kelly is a forensic scientist who works at the Washington State Patrol crime lab in Vancouver, Washington. RP 408. Ms. Kelly examined the sexual assault kit taken from J.L. by Dr. Roy, looking for the presence of body fluids and male DNA. RP 409. Ms. Kelly had oral swabs, perineal vulvar swabs, vaginal endocervical swabs, anal swabs, and a pair of underwear to examine. RP 412. After performing her tests, Ms. Kelly found indications of human saliva on the underwear, and a low amount of male DNA detected in the underwear. RP 413. Ms. Kelly testified that as time passes between an incident when DNA may have

been transferred and when the samples are collected, the DNA will break down and less DNA will be detected. RP 415.

Dr. Kimberly Copeland is a child abuse physician at Legacy Health System. RP 551. She became a doctor in 1991; she worked in pediatric emergency medicine for over 18 years before starting as the child abuse physician at Legacy in October 2011. RP 551-52. Dr. Copeland's duties include doing evaluations for children when there are concerns of neglect, physical abuse, and/or sexual abuse. RP 552.

When Dr. Copeland does a physical and sexual examination of a child she wants to get a complete medical history from the child in order to understand the concerns that have been raised about the potential abuse, but also to determine how the child is doing overall, both physically and psychologically. RP 556. Dr. Copeland asks questions during her examinations in order to provide medical care to the children she sees. RP 557. If there is an allegation of abuse, the identity of the perpetrator is relevant to Dr. Copeland's examination because she needs to know if the child is safe, and she needs to know the age of the perpetrator to help her determine whether the child may be at risk for sexually transmitted infections, and to determine if there may be injuries. RP 557-58.

Dr. Copeland examined K.S. and J.L. RP 558, 579. Dr. Copeland examined K.S. on May 16, 2016 after a referral regarding possible sexual

abuse. RP 558. Dr. Copeland recorded her examination with K.S. and a copy of the audio recording was admitted into evidence. RP 559-60. K.S. told Dr. Copeland that “Jay, he – I don’t know fully know the word for it, but he would just like put his hands down my pants.” RP 568. She indicated it started when she was five or six years old and ended when she was eight years old and that it happened “quite a few” times. RP 568-69. K.S. told Dr. Copeland that he would touch her “down there.” RP 571. She indicated the touching would go partway on the inside of her vagina and that every time he touched it hurt. RP 571.

Dr. Copeland indicated that all of the questions she asked K.S. were medically significant for her. RP 576.

Dr. Copeland saw J.L. on May 18, 2016 for her exam. RP 579. Dr. Copeland also recorded the medical history portion of her exam with J.L. RP 580. An audio copy of that conversation was admitted into evidence. RP 580. J.L. told Dr. Copeland that when she was depressed she cut herself on her arms. RP 607-08. She first did it when she was about ten years old, and then started it up again in the months prior to being removed from her father’s custody. RP 608. Her father told her he would kill himself if she didn’t stop cutting herself. RP 608.

J.L. told Dr. Copeland that her father started sexually abusing her when she was five or six years old. RP 613. Dr. Copeland told J.L. that she

needed to understand the type of contact her father had with her so she could figure out if J.L. was healthy, if she was at risk of infection, and so that it would help her with her physical exam. RP 614. After that J.L. started describing the abuse to Dr. Copeland. She told Dr. Copeland that her father started using his fingers first to touch her “private area.” RP 615, 617. He would put his fingers all the way on the inside of her private area. RP 618. J.L. indicated she felt pain when he did that to her, but that she got used to it over the years. RP 618. Sometimes after the incidents it would burn when J.L. peed for a day or day and a half. RP 619-20.

J.L. told Dr. Copeland that when she was somewhere between the ages of seven and nine her father started using his penis to touch her on her “front and backend.” RP 621. She said he would insert his penis all the way inside both her front and her backend. RP 622. Sometimes after these encounters white stuff would come out her front area when she would go to the bathroom. RP 623. J.L. described the pain of being raped to Dr. Copeland. RP 623-24. She described the vaginal rapes as “it felt like a pan burnt you on the inside and they were washing it over with hot, boiling water.” RP 623-24. But she said that the anal rapes hurt the most of all. RP 624.

Dr. Copeland described some physical findings from her exam of J.L. She indicated she saw linear marks on her right forearm and faint

scarring that corresponded with J.L.'s cutting behavior. RP 634. Dr. Copeland indicated that self-harm behaviors were concerning as they're associated with depression and suicidal ideation, both of which J.L. experienced. RP 634. Dr. Copeland noted that J.L.'s description of the pain she felt was significant. RP 639. Dr. Copeland indicated that type of pain would be expected as the urethra and hymen are both extremely tender areas, and the pain J.L. described was consistent with being touched by a hand and penis. RP 639. J.L. also had changes to her hymen that Dr. Copeland observed during her physical exam of J.L. RP 644. She had a prominent outward flap, a yellowish non-tender cyst looking thing, missing hymen tissue, and a transection, which is a tear through the hymen that goes completely through the width of the membrane of the hymen down to the base where it attaches. RP 645. These findings on J.L.'s hymen were consistent with penetrative trauma. RP 648. The type of trauma that could cause the full thickness injury that J.L. experienced would be painful. RP 648-49.

Dr. Copeland explained the hymen for the jury. RP 646. She indicated that is a membrane that is the last tissue before the vaginal vault. RP 646. Many myths about the hymen exist; such is that there is no opening – this is not true – all hymens have openings from the time of birth. RP 646.

Jamie Anselm was Ms. Mason's best friend for a long period of time; they've been friends for nearly 20 years. RP 540. Ms. Anselm and Ms. Mason often got together with their families. RP 547. Some weekends, Ms. Anselm's entire family, her six children and herself, would come stay with Ms. Mason and Liebich and their combined five children. RP 547. At some point Ms. Mason and Ms. Anselm stopped being friends. RP 372. Liebich and Ms. Anselm considered becoming more than friends, considered a dating relationship; some thought they were in a dating relationship. RP 372, 586, 729.

Ms. Anselm testified for Liebich. RP 701. Ms. Anselm has known Ms. Mason for more than half of her life; they were good friends. RP 701-02. When Ms. Anselm moved back to Vancouver from Montana she and her children lived with Ms. Mason and Liebich in the spring of 2010 for about three months. RP 703. From that point forward, Ms. Anselm and her family would spend weekends with Liebich and Ms. Mason frequently. RP 704.

In the Fall of 2014, Ms. Anselm was living in an apartment at Cascade Park Apartments. RP 706. She lived in the same apartments through April 2016. RP 706. Ms. Anselm and Ms. Mason stopped being friends during the Fall of 2014. RP 706. In June 2015, Liebich came to live with Ms. Anselm; J.L. was spending the summer with her

grandmother and mother. RP 708. When J.L. returned from her summer away she also lived with her dad in Ms. Anselm's apartment. RP 709. Ms. Anselm's six children and her mother also lived in her small apartment. RP 708-09. After J.L. moved in to Ms. Anselm's apartment she would see her stepmother, Ms. Mason, or her biological mother most weekends. RP 715.

Ms. Anselm indicated J.L. was never alone with Liebich in the apartment, and the apartment had very thin walls. RP 716.

Liebich did not testify at trial.

In closing arguments, the prosecutor described the distinct acts that J.L. testified to. He argued there was the incident in the room she shared with K.S. when Liebich came in at night, the incident that occurred in the master bedroom, the incident that occurred in the bathroom in the house they shared with Ms. Mason, a time when it occurred in the apartment she lived in with just her father, and other acts that occurred when she was living with Ms. Anselm, and also, J.L. described an act of anal rape. RP 807-09. In regards to K.S., the prosecutor argued the separate incidents being her waking up in the middle of the night in the bunkbed with Liebich pulling her on top of him and touched her vagina. RP 811. K.S. also described the time she was able to resist what Liebich was trying to do. RP 812.

The jury returned guilty verdicts on all counts charged: four counts of rape of a child in the first degree involving J.L., and one count of child molestation in the first degree and one count of attempted child molestation in the first degree involving K.S. RP 841-42. As to the four counts of rape of a child, the jury found that it was part of an ongoing pattern of sexual abuse. RP 842-43.

Prior to sentencing Liebich filed a motion to vacate the convictions arguing the State presented insufficient evidence that the crimes occurred in the State of Washington, that the trial court erred in admitting the statements the victims made to Dr. Copeland, and that the trial court erred in preventing Liebich from introducing evidence of J.L.'s mother's bad character. CP 140-42; RP 855. In his argument that the State presented insufficient evidence at trial to prove his guilt, Liebich only alleged that there was insufficient evidence that the acts occurred in the State of Washington. RP 141. Liebich did not allege that the State presented insufficient evidence by failing to sufficiently describe each separate act of rape and molestation. CP 140-42; RP 855. The trial court denied Liebich's motion. RP 860-63.

The trial court accepted the jury's verdicts and findings on the aggravator and sentenced Liebich to 318 months to life on counts 1 through 4, to run concurrently to each other, and 198 months to life on

count 5 and 148.5 months to life on count 6 running concurrently with each other but consecutively to counts 1 through 4. RP 881-82. This appeal timely follows.

ARGUMENT

I. The Trial court properly denied Liebich's motion for arrest of judgment and all Liebich's convictions are supported by sufficient evidence.

Liebich argues that the trial court abused its discretion in failing to grant his motion for arrest of judgment due to insufficient evidence. The trial court properly denied Liebich's motion. Sufficient evidence was presented to the jury to establish all the elements of every crime of which Liebich was convicted. His claim fails.

Initially, Liebich frames this issue in an interesting way. He claims the trial court abused its discretion for failing to grant his motion for arrest of judgment due to insufficiency of evidence. However, on appeal, Liebich argues the insufficiency of the evidence is due to the lack of specificity in testimony regarding the occasions of rape and molestation, while at the trial court level he claimed the insufficiency of the evidence was due to a failure to prove the crimes occurred in the State of Washington. The trial court never ruled on whether there was sufficient specificity in the evidence to sustain convictions for Liebich's many

crimes. *See* RP 860-63. The trial court only addressed whether there was sufficient evidence to establish that the crimes occurred in the State of Washington. This Court reviews a trial court's decision to deny a defendant's CrR 7.4 motion to arrest judgment for an abuse of discretion. *State v. Meridieth*, 144 Wn.App. 47, 180 P.3d 867 (2008). However, it's impossible for this Court to review a trial court's actions for an abuse of discretion when that claimed erroneous action never occurred. It is therefore impossible to review the trial court's decision on the grounds that Liebich argues on appeal. Liebich may raise sufficiency of the evidence for the first time on appeal because it is often the first time the issue may realistically be raised. *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998) (citing *State v. Alvarez*, 128 Wn.2d 1, 904 P.2d 754 (1995)). So while it's impossible for this Court to assess whether the trial court abused its discretion in ruling on a motion based on a ground never raised by the defendant at the trial court level, this Court could simply review the issue as a straight-forward sufficiency of the evidence claim. Furthermore, it may be to Liebich's advantage for this Court to review this issue simply as a sufficiency of the evidence claim as otherwise this Court would be reviewing whether the trial court abused its discretion in finding sufficient evidence as opposed to simply applying the sufficiency of the evidence standard itself. Instead of jumping through a determination of

whether a trial court abused its discretion in doing something, this Court may simply do the same thing the trial court did: review the evidence to determine whether sufficient evidence was presented.

However this Court reviews this issue, more than sufficient evidence was presented at trial to sustain Liebich's convictions. Due Process requires that the State prove every element of a crime beyond a reasonable doubt. U.S. CONST. amend. XIV; WASH. CONST. art. I, sec. 3; *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Rich*, 184 Wn.2d 897, 365 P.3d 746 (2016). In reviewing an insufficiency claim, this Court considers “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. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). This claim “admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). All reasonable inferences are viewed in the light most favorable to the state as well. *State v. Mines*, 163 Wn.2d 387, 179 P.3d 835 (2008). Circumstantial evidence and direct evidence are deemed equally reliable. *State v. Myers*, 133 Wn.2d 26, 941 P.2d 1102 (1997). All credibility determinations remain with the finder of fact. *State*

v. Drum, 168 Wn.2d 23, 225 P.3d 237 (2010) (citing *State v. Camarillo*, 115 Wn.2d 60, 794 P.2d 850 (1990)).

This standard of review focuses on whether the trier of fact *could* find the elements proved. *State v. Yallup*, ___ Wn.App.2d ___, 416 P.3d 1250, 1253 (2018) (citing *Jackson, supra*). To prove a defendant committed rape of a child in the first degree, the State must show that the defendant had sexual intercourse with a child under the age of twelve to whom he was not married and that the defendant was at least twenty-four months older than the victim. RCW 9A.44.073. “Sexual intercourse” has “its ordinary meaning and occurs upon any penetration [of the vagina or anus], however slight.” RCW 9A.44.010(1)(a). “Sexual intercourse” also occurs by penetration of the vagina or anus, however slight, by any object, including a body part. RCW 9A.44.010(1)(b). Therefore to prove Liebich committed rape of a child against J.L., the State had to prove that he was not married to his daughter, that he was more than twenty-four months older than his daughter, that his daughter was under the age of twelve, and that he used any object or body part to penetrate her vagina or anus. J.L. testified in graphic detail about her father using his penis to thrust into her vagina and anus on many occasions. J.L.’s description of the searing and burning pain she felt to have a grown man’s penis thrust into her six-year-old vagina is chilling. Her description of the first time he anally raped her

is even more so. It is abundantly clear that if the jury believed what J.L. described occurred beyond a reasonable doubt, that there was more than sufficient evidence to convict Liebich of four counts of rape of a child in the first degree.

In *Yallup*, Division III of this Court recently addressed a sufficiency of the evidence claim in a long-term sexual abuse case, wherein the defendant alleged no reasonable trier of fact could have been convinced the offenses occurred within the charging period as the abuse occurred over such a long period of time and so frequently that the victim was not able to specify exact dates of offenses. *Yallup*, 416 P.3d at 1253. There, this Court discussed the situation of the “resident child molester:” a person who has regular access and frequently abuses his victim, leading to a lack of specificity of timing for each offense.” *Id.* (quoting *State v. Brown*, 55 Wn.App. 738, 780 P.2d 880 (1989)). Liebich attempts to benefit from the frequency of his rapes of his daughter: because he raped her so frequently and in nearly identical ways, over many years, the victim could not describe each rape with exact specificity, and therefore he argues, he should not be convicted of any crime. However, this does not equate to insufficient evidence. And in fact, J.L. was able to describe at least six specific instances of rape upon which the jury could have rested their verdicts.

When convictions are based on “generic” testimony, there are three factors which must be present: 1) the victim “must describe the kind of act or acts with sufficient specificity to allow the trier of fact to determine what offense, if any, has been committed; “ 2) the victim “must describe the number of acts committed with sufficient certainty to support each of the counts alleged by the prosecution;” and 3) the victim “must be able to describe the general time period in which the acts occurred.” *State v. Hayes*, 81 Wn.App. 425, 914 P.2d 788 (1996). All those factors are firmly met in Liebich’s case.

In *Yallup*, the 14-year-old victim testified that the defendant had licked her vagina on multiple occasions when she was 10 and 11 years old; she reported that the occasions of abuse occurred at three different houses she lived at with her mother in the same town. *Yallup*, 416 P.3d at 1252. The victim indicated the first occasion was when she was 10 years old and towards the end of her fourth grade school year, and the last occasion was shortly before her 12th birthday. *Id.* She finished fourth grade in 2013 and turned 12 in August 2014. *Id.* In applying the three *Hayes* factors in *Yallup*, this Court found that the victim’s described acts sufficiently described the essential component of a rape, thus meeting the first factor. *Id.* at 1254. The victim also testified the acts occurred more than ten times, and since only two counts were charged, the second factor

was met. *Id.* And finally, the victim provided testimony about how old she was and locations the acts occurred at in order to adequately describe the time period when the acts occurred, thus fulfilling the third factor. *Id.* Finding those things, this Court declared, “[m]ore specificity from the victim was not required.” *Id.*

J.L. testified to much more detail than did the victim in *Yallup*. In applying the first factor, this Court should look to whether J.L. described the act with sufficient specificity to allow the jury to determine that it was rape that occurred. There is no question that J.L.’s testimony specifically, and with vivid detail, described acts of rape by her father. J.L. testified that one night Liebich came into her room when she was asleep and got into her bed, pulled her pants and underwear down and took his penis out and put it inside her vagina. RP 449-51. J.L. indicated the pain was excruciating and that it burned really badly. RP 451. J.L. also described many times, but also a specific time, when her father had her come into the bathroom, arranged her so she was on her hands and knees and he was behind her, and he inserted his penis into her vagina and thrust his body back and forth. RP 452-56. J.L. described a time when she was in her father’s bedroom and he took her pants and underwear off and put his penis inside her vagina. RP 457-59. J.L. described a time in her bedroom in the apartment she shared with only her father during which he raped her

while she was lying down with her knees drawn up by inserting his penis into her vagina. RP 461-62. J.L. described a time when her father put his penis inside her vagina while she lived with Jamie. RP 467. And, J.L. described an incident of anal rape: “it was horrible, horrible pain. Once his penis entered my but it was – I couldn’t even describe the pain, it was horrible. I was in tears at that point.” RP 469.

From J.L.’s vivid descriptions of the graphic acts her father perpetrated against her there is no doubt that she described with sufficient specificity the “kind of act or acts” perpetrated against her so as to allow the jury to determine what offense had been committed. Thus the first *Hayes* factor is easily met. The second *Hayes* factor focuses on the number of times the victim testifies that the acts occurred and whether the victim could attest that these specific acts occurred at least as many times as charges before the jury. J.L. testified that this occurred, on average, two times a week for years. It happened so many times she could not possibly keep an accurate count. But the state only charged four counts with her as the victim. In her testimony she described specific rapes that occurred on six different occasions and at six different locations. The State clearly presented more than sufficient evidence from which the jury could find four separate and distinct acts of rape of a child occurred. It happened, conservatively, at least a hundred times. Probably closer to a few or

several hundred times. J.L. described six of these acts in detail. The jury convicted Liebich for four of those acts. The State more than met its burden.

The third *Hayes* factor looks to whether the victim can describe the general time period during which the acts occurred. J.L. was able to testify to an end date of her rapes within a day or two: within a couple days prior to being rescued from her rapist by CPS on April 27, 2016. J.L. described her first memory of it occurring when she was living with her father in California. The State elicited testimony from J.L. as to the acts that occurred after moving to Vancouver and living with her father when J.L. was six years old (Ms. Mason testified J.L. came to live with her and Liebich in February 2011, which would have made her six years old). RP 533. Thus for a five year and two month window, J.L. identified many acts of rape. The third *Hayes* factor is clearly met.

J.L. clearly, articulately, and with stunningly horrific detail described how her father raped her for five years. She gave the jury many specific incidents by describing different rooms, different positions, different orifices penetrated, and different houses that the rapes occurred in. J.L. clearly described penetration of her vagina by her father's penis and clearly described the time period during which these occurred. There was more than sufficient specific evidence from which any rational juror

could have convicted Liebich. And the jury appropriately did so. Liebich's claim that J.L.'s testimony was insufficiently specific to support his conviction is without merit and should be rejected.

The same applies for K.S.'s testimony. Liebich was convicted of two counts involving K.S.: Child Molestation in the First Degree, and Attempted Child Molestation in the First Degree. CP 3-5. K.S. was able to describe four incidents to the jury with specificity, and she did not indicate it happened more than those four times. *See* RP 352-60. K.S. described three specific times when Liebich molested her. K.S. described one time when she was five years old and sleeping on the top bunk of the bunkbed in the bedroom she shared with J.L.. RP 352. Liebich climbed up onto the bed, laid down, and pulled K.S. on top of him, put his hands inside her pants and underwear and moved his hand around on the place she went pee from. RP 352-56. On another occasion, in the same room, late at night, Liebich put his hands down her pants and touched her in the same place he did the first time, making skin-to-skin contact. RP 357. K.S. struggled more this second time. RP 356. On yet a third occasion, in a different house than the first two incidents, K.S. was alone in the house with Liebich during the day. RP 357-58. Liebich came into K.S.'s bedroom and touched her underneath her shorts and underwear; he told her not to tell her mom. RP 358. And on the fourth and final occasion, K.S. was about

seven years old. RP 360. Liebich came into that same bedroom as in the third occasion, and tried to touch her, but K.S. kept pulling away. RP 359-60. Liebich tried to pull her pants down and K.S. pulled them back up; this occurred multiple times. RP 359. K.S. kept struggling until Liebich finally gave up and left, without having succeeded at his plan of molesting her. RP 359.

K.S. clearly testified to four specific incidents, describing each one separately. Liebich's claim that her testimony lacked sufficient specificity to allow the jury to properly convict him of any crimes against her lacks any merit. In analyzing this evidence within the three *Hayes* factors, all three factors are met here. First, K.S. described the acts with sufficient specificity to allow a jury to understand what offense Liebich committed. K.S. described Liebich coming into her bedroom, lying down, putting his hand down her pants and underwear, touching her on her "lady parts," which is where she went pee from, and moving his hand. This is clearly sexual contact. Under the second factor, K.S. testified to three occasions of completed molestation, and one occasion of attempted molestation. This second factor is met as Liebich was convicted of only one count of completed molestation, though K.S. described three separate incidents, and was convicted of one count of attempted molestation to which K.S. described one occasion when Liebich was unsuccessful in his attempts to

molest her. The third factor focuses on whether the victim was able to describe the general time period in which the crimes occurred. K.S. testified the first occasion was when she was five years old and the last was when she was seven years old. Thus the approximate two year period shows K.S. was able to describe the general time period in which the crimes occurred.

To prove a defendant guilty of child molestation in the first degree, the State must prove that the defendant had sexual contact with a child who was under the age of twelve and not married to the defendant and the defendant was more than thirty-six months older than the victim. RCW 9A.44.083. Liebich does not allege the State failed to prove K.S. was under the age of twelve, or that she wasn't married to him, or that he wasn't thirty-six months older than her. In fact, Liebich doesn't even allege that the facts that K.S. testified to would amount to sexual contact; he only argues that K.S. failed to specifically articulate separate incidents with any amount of specificity. With regards to K.S. this contention is demonstrably unsupported by the record. K.S.'s testimony specified four incidents, each one of which she was able to describe with specificity. The jury clearly believed K.S. and believed Liebich committed what she described. What K.S. described fully meets the elements of child molestation and attempted child molestation. The State presented

sufficient evidence so that any jury could have, and did, find him guilty of these crimes. Liebich was properly convicted of the crimes against both K.S. and J.L. His convictions should be affirmed.

II. The trial court properly admitted statements J.L. and K.S. made to Dr. Copeland pursuant to ER 803(a)(4).

Liebich argues the trial court erred in admitting statements J.L. and K.S. made to Dr. Copeland pursuant to ER 803(a)(4). As the statements were clearly made for the purpose of medical diagnosis and treatment, and were necessary to the doctor's accurate diagnosis and treatment of the victims, the trial court properly admitted these statements. Liebich's claim fails.

This Court reviews a trial court's decision on the admission of evidence for an abuse of discretion. *State v. Foxhoven*, 161 Wn.2d 168, 163 P.3d 786 (2007). A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. *Id.* "Hearsay" is a statement made outside of court that is offered during trial "to prove the truth of the matter asserted." ER 801(c). Hearsay evidence is only admissible if it falls within a recognized exception to the hearsay bar. ER 802; *State v. Athan*, 160 Wn.2d 354, 158 P.3d 27 (2008). One such exception is found in ER 803(a)(4). Hearsay statements are admissible under ER 803(a)(4) when they were made for the purpose of medical

diagnosis or treatment, or to describe medical history or past or present symptoms, pain, or sensations, if those statements are reasonably pertinent to diagnosis or treatment. ER 803(a)(4). Typically, to be admissible under ER 803(a)(4), the declarant's motive must be consistent with receiving treatment or obtaining a diagnosis, and the information admitted under this rule must be information upon which the medical provider reasonably relied on in making his or her diagnosis. *State v. Fisher*, 130 Wn.App. 1, 108 P.3d 1262 (2005).

Liebich argues the victims were too young to understand that the statements they made to Dr. Copeland were for a medical purpose. Liebich cites to *State v. Florczak*, 76 Wn.App. 55, 882 P.2d 199 (1994) and *In re Personal Restraint of Grasso*, 151 Wn.2d 1, 84 P.3d 859 (2004) to support this claim. *Florczak* dealt with the statements a 3-year-old child made to a counselor about sexual abuse. *Florczak*, 76 Wn.App. at 58, 65. Division I of this Court found that child hearsay statements are admissible under ER 803(a)(4) even if the child did not understand the statements he or she made were necessary for medical diagnosis or treatment if corroborating evidence supports the child's statements. *Id.* at 65. Liebich appears to argue in his brief that this corroborating evidence must be physical injury. However, *Florczak* indicates just the opposite: "*Butler* and its progeny did not restrict the type of evidence that may corroborate child hearsay

statements under ER 803(a)(4). However, ... we conclude ... that evidence must be part of the totality of the circumstances in which the child makes the statements.” *Id.* at 65-66 (referring to *State v. Butler*, 53 Wn.App. 214, 766 P.2d 505, *rev. denied*, 112 Wn.2d 1014 (1989)).

Initially, there is no reason to believe K.S. and J.L. did not understand the purpose of their statements to Dr. Copeland. Both girls were 11 years old at the time they spoke with Dr. Copeland. 11 year old children understand what a doctor is and why they go to doctors in a much different way than a 3-year-old might. The trial court recognized this when it found that these eleven-year-old children were old enough to understand the statements were for a medical purpose, as opposed to maybe a five or six-year-old child. RP 141. Also, both girls saw a medical doctor who also performed a physical medical examination during the same appointment, an appointment that occurred at a medical facility with a medical assistant attending along with the doctor. This is quite a different scenario than that presented in *Florczak* where a 3-year-old made statements to a counselor, someone who just spoke with her, and never did any physical medical examinations. Furthermore, there is significant evidence that both K.S. and J.L. understood the purpose of their statements to Dr. Copeland. Upon seeing K.S. and J.L. at her office, Dr. Copeland asked each victim about their medical history. With regards to K.S., Dr. Copeland performed a

sexual assault exam on her with a medical assistant also present. RP 558. She confirmed that K.S. knew she was a doctor. RP 560-61. She asked K.S. clearly medically-related questions, like whether K.S. had started having periods yet, whether she was having sleep disturbances or symptoms of depression. RP 567-68. Dr. Copeland inquired about whether K.S. was in pain during any of the abuse or felt like she sustained any injuries, also asking her about changes in going to the bathroom or seeing any blood. RP 571-72. These questions were medically significant for Dr. Copeland so that she could understand K.S.'s overall well-being, whether she had genital-urinary issues, understanding her sexual maturity rating, and to understand the nature of the contact so that Dr. Copeland could understand the risk of infection or injury that K.S. was facing. RP 576.

Dr. Copeland also completed a medical history with J.L. and a full physical exam including a sexual assault exam. RP 579. Dr. Copeland explained who she was to J.L. and throughout J.L.'s discussion with Dr. Copeland, Dr. Copeland asked J.L. questions to help her understand J.L.'s sexual maturity rating, whether she had started having periods or not, the frequency, duration, and substance of her periods, they discussed J.L.'s groin disorder, injuries J.L. remembers sustaining, vaginal discharge, sleep disturbances, symptoms of depression, J.L.'s cutting behaviors and suicidal ideation. RP 579-612. When Dr. Copeland asked J.L. why she

was there to see Dr. Copeland, J.L. responded that it was “to make sure I was healthy, to make sure nothing was wrong with me, make sure everything was working fine and everything.” RP 612. That statement alone clearly shows J.L. understood she was seeing Dr. Copeland for a medical purpose, to discuss her health and bodily functioning. That statement combined with the actual physical examination done at a doctor’s office with a medical assistant and doctor, and the questions Dr. Copeland asked, it was clear that J.L. was there and was speaking with Dr. Copeland for a medical purpose. J.L.’s statements were made for medical diagnosis or treatment purposes and squarely fall within the hearsay exception under ER 803(a)(4).

Furthermore, even if this court were to find that two eleven-year-old girls did not understand what a doctor was and why they would be speaking to a doctor about these issues, there was plenty of corroborating evidence such that these statements were still properly admissible under the reasoning in *Florczak, supra*. Ms. Mason corroborated the girls’ testimony by indicating there were many nights when Liebich would not be in bed and that when she asked him about it he indicated he was in the girls’ room because one of them had had a nightmare or something to that effect. The physical findings on J.L.’s sexual assault exam fully corroborates her statements to Dr. Copeland, as do the substance of the

statements themselves, both to Dr. Copeland and on the stand at trial – the detail of the sexual positioning and the pain these rapes caused J.L. are corroborative of what J.L. says occurred. Precocious sexual knowledge by a child is corroborating evidence of abuse. As is J.L.’s depression, cutting behaviors, and sleep disturbances. Both girls showed significant emotion during their disclosures to Ms. Mason, which corroborates their statements to Dr. Copeland. And their in-trial testimony corroborates their statements. Even if this Court were to find that these two eleven-year-old children did not understand the statements they made to Dr. Copeland were for medical purposes, there was still sufficient corroboration to admit the statements under ER 803(a)(4) and *Florczak, supra*.

Liebich briefly mentions the confrontation clause in his brief, but does not appear to argue such rights were violated. However, if this Court considers Liebich’s brief mention of the confrontation clause as a claim that his rights were violated, the State submits the following response. Liebich’s confrontation clause rights were not implicated by the admission of the statements the victims made to Dr. Copeland as both victims were available and testified at trial. Liebich had the ability to cross-examine the victims about the statements they made to Dr. Copeland, to test their veracity and reliability, and thus he was about to confront those witnesses. The Sixth Amendment to the U.S. Constitution guarantees criminal

defendants the right to confront the witnesses against him. U.S. Const. amend. VI. This constitutional guarantee prohibits the “introduction of testimonial statements by a nontestifying witness, unless the witness is ‘unavailable to testify, and the defendant had had a prior opportunity for cross-examination.’” *Ohio v. Clark*, ___ U.S. ___, 135 S.Ct. 2173, 2179, 192 L.Ed.2d 306 (2015) (quoting *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). The important point therein is that the constitution only prohibits introduction of testimonial statements by *nontestifying* witnesses. J.L. and K.S. were available to testify, did testify, and were cross-examined (confronted) by Liebich. Liebich’s constitutional rights were fulfilled. But even if the confrontation clause was implicated here, the girls’ statements to Dr. Copeland were nontestimonial.

In *Clark*, the U.S. Supreme Court held that only statements whose *primary purpose* was testimony are testimonial. *Clark*, 135 S.Ct. at 2180. In *State v. Scanlon*, 2 Wn.App.2d 715, 413 P.3d 82 (2018), Division I of this Court adopted *Clark*’s holding and adopted the primary purpose test. The identity of the person hearing the out-of-court statements is important in determining whether the primary purpose of the statements was for testimony. *Clark*, 135 S.Ct. at 2182. When the person to whom the declarant is speaking is not “principally charged with uncovering and

prosecuting criminal behavior,” statements made to that person are “significantly less likely to be testimonial than statements given to law enforcement officers.” *Id.* In *Scanlon*, this Court applied the holding in *Clark* to statements a victim made to medical providers. This Court noted that the victim’s statements were not made to law enforcement, that law enforcement officers were not present during any of the victim’s medical statements, and that the statements were made in the setting of the doctors’ office. *Scanlon*, 2 Wn.App.2d at 729. This Court also noted that the medical providers testified that their questions and the victim’s answers about the cause of his injuries was import to their medical treatment. *Id.* Similarly, Dr. Copeland testified that the information she obtained from J.L. and K.S. was important for her to know how to treat the girls, where they may have injuries, whether they may have been exposed to sexually transmitted infections, to determine their safety, and whether further treatment or referrals for physical and mental health were necessary. RP 576, 633. Dr. Copeland’s primary purpose in asking the girls what happened was not to create an out-of-court substitute for trial testimony. This Court has found that this primary purpose test is the controlling test for determining whether statements are testimonial. *Scanlon, supra*. The young girls interviewed by Dr. Copeland did not have a purpose of creating an out-of-court substitute for trial testimony; Dr. Copeland

testified her purpose was to evaluate and treat these children for medical issues resulting from potential abuse. From these facts it is clear that the statements the victims made to Dr. Copeland were nontestimonial as the primary purpose of the conversation between each victim and Dr. Copeland was for medical treatment and diagnosis. Thus their admission did not violate the confrontation clause as the statements were nontestimonial and because the declarants were available and did testify at trial.

The admission of the victims' statements to Dr. Copeland were not overly prejudicial to Liebich. Their statements to Dr. Copeland significantly mirrored their trial testimony, with additional details given, likely due to the more informal and less intimidating setting the statements were made in (a doctor's office compared to a courtroom full of strangers and their perpetrator), and that the statements were made closer in time to the abuse than at trial. The victims were both available at trial and were both confronted by Liebich. Their statements were constitutionally admissible under the confrontation clause, and statutorily admissible under ER 803(a)(4). And while any evidence presented at a trial that tends to show a defendant's guilt is prejudicial to a defendant, the question is whether the evidence's prejudicial impact substantially outweighs its probative value. ER 403. The statements made by child victims to a doctor

who is examining them are highly relevant and probative of a defendant's guilt or innocence. Typically evidence is overly prejudicial when its admission tends to arouse an emotional, irrational, or confused response from the jury. *State v. Rice*, 48 Wn.App. 7, 737 P.2d 726 (1987). The statements the victims made to Dr. Copeland were less likely to arouse emotional or irrational responses from the jury than the girls' own testimony. In reviewing the totality of the evidence presented and the court's decision in admitting these statements, it is clear that the trial court did not abuse its discretion. The trial court properly understood the law on this subject, considered the statements sought to be admitted. The trial court found the girls made statements to a medical doctor, for medical purposes, and found that their statements were relevant to the charges sought to be proven by the State. RP 141-46. The trial court's decision to admit the evidence was not an abuse of the court's discretion.

Even if this court finds the trial court abused its discretion in admitting the statements J.L. and K.S. made to Dr. Copeland, any error was harmless. If the State presented sufficient untainted evidence that is overwhelming and necessarily leads to a finding of the defendant's guilt, then the error is harmless. *State v. Koslowski*, 166 Wn.2d 409, 209 P.3d 479 (2009). The evidence presented by the State in Liebich's case was overwhelming. It was clear from the testimony, and never contradicted,

that J.L. and K.S. were unaware of the abuse the other suffered, and that each disclosed their abuse independent of each other's disclosure. J.L.'s graphic detail in her descriptions of the pain she endured by having an adult male rape her at a very young age were so real and in and of themselves constitute overwhelming, untainted evidence. The transcript shows J.L. broke down into tears during her testimony. Her candid responses about how indescribable the pain of being anally raped was information no typical eleven-year-old would know about or understand, that they had the ring of truth to them. Her descriptions of the sexual positions her father would put her in is another precocious fact that a typical eleven-year-old would be ignorant of. This combined with Dr. Copeland's testimony about J.L.'s physical findings is overwhelming evidence. In addition, K.S.'s testimony corroborated J.L.'s, showing Liebich had a common scheme and plan in sexually abusing very young girls. Even if the trial court had not admitted the statements J.L. and K.S. made to Dr. Copeland describing their abuse, the jury still would have convicted Liebich of all the crimes charged. He was clearly guilty beyond a reasonable doubt and with or without the statements the girls made to Dr. Copeland, any jury would have convicted him. Liebich's claim that the trial court committed reversible error in admitting the statements fails.

III. The trial court properly excluded irrelevant character evidence of a non-witness

Liebich claims the trial court erred by failing to allow him to elicit testimony that J.L.'s mother abandoned her when she was five years old to "run off with a sex offender." J.L.'s mother was not a witness for either the state or the defense. J.L.'s mother's character was not pertinent to any fact necessary to prove the elements of the crimes. Essentially, Liebich sought to impugn J.L.'s credibility by using a bad act that her mother committed six years prior to J.L.'s testimony. This evidence was entirely irrelevant and was an improper attempt to show J.L. must be bad and lack credibility because her mother was a bad mother. The trial court properly excluded this evidence.

A defendant does not have the right to admit any evidence he wants to. A defendant may only elicit relevant testimony from witnesses. ER 402, 403. ER 404(a) provides for situations in which character evidence of a defendant, a victim, or a witness may be admissible. ER 404(a) has no provision that allows for character evidence of a non-witness relative of a testifying witness to be admitted. J.L.'s veracity is not dependent on her mother's acts. Liebich explained at trial that he wanted to show that J.L.'s mother ran off with a sex offender, thus abandoning J.L. when she was five years old to show that J.L. would now have a

motive to fabricate the abuse by her father. It's incomprehensible how Liebich believes J.L.'s mother's act six or more years prior to trial would have any bearing on J.L.'s credibility as a testifying witness. While Liebich wanted to argue that J.L. had a motive to lie because she wanted to live with her mother instead of her father, and he was allowed to do so. Liebich did successfully elicit testimony that J.L. wanted to live with her mother, that she had asked her father to let her move in with her mother, and that J.L. had recently stayed with her mother for spring break, and prior to that Christmas break, Thanksgiving, and the prior summer. Liebich made the point that J.L. no longer wanted to live with her father. Liebich argued that J.L. had a motive to make this entire thing up so that she could go live with her mother. That J.L.'s mother ran off with a sex offender six years prior to trial had no bearing on J.L.'s current motive to lie. Liebich failed to show how that fact was in any way relevant to showing J.L.'s credibility or in establishing a motive for J.L. to lie, or even a motive for J.L.'s mother to convince J.L. to fabricate the abuse. Liebich's argument was nonsensical at the trial court as evidenced by the court's statements indicating he failed to see how it was relevant in any way, and it continues to be nonsensical. J.L.'s mother's bad parenting and bad choices had nothing to do with J.L.'s testimony or her potential motive to lie. It's simply not relevant. Irrelevant evidence shall not be

admitted. The trial court properly found the evidence to be entirely irrelevant.

IV. Cumulative error did not deny Liebich of a fair trial

Liebich claims cumulative error denied him a fair trial. As no error occurred, multiple errors did not accumulate to deny him a fair trial. The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835 (1994). Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 794 P.2d 38 (1990). The cumulative error doctrine does not provide relief where the errors are few and had little to no effect on the outcome of the trial. *State v. Greiff*, 141 Wn.2d 910, 10 P.3d 390 (2000). As discussed above, Liebich failed to show error, or how each alleged error affected the outcome of his trial. Further, Liebich has not shown how the combined error affected the outcome of his trial. Accordingly, Liebich's cumulative error claim fails.

CONCLUSION

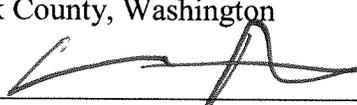
As discussed in the preceding sections, the trial court did not err in admitting the victim's statements to Dr. Copeland or in excluding evidence of J.L.'s mother's bad character. Furthermore, sufficient evidence supported the convictions. Liebich was properly convicted of raping his daughter and molesting his step-daughter. His convictions and sentence should be affirmed.

DATED this 15th day of June, 2018.

Respectfully submitted:

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