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NO. 50424-3-II

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

STATE OF WASHINGTON, Respondent

v.

BRUCE LEE FRITZ, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-00389-4

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. Fritz had the benefit of effective counsel**
- II. The prosecutor did not commit misconduct**
- III. Defense counsel was not ineffective for failing to object to proper arguments**
- IV. The trial court properly admitted statements L.F. made to her therapist**
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STATEMENT OF THE CASE

The State accepts generally Fritz's statement of the case. Where the recitation of the facts are not agreed to, the State explains in the body of the argument below.

ARGUMENT

I. Fritz's attorney was not ineffective

Fritz argues his attorney was ineffective for failing to admit evidence that the victim's biological father was accused of abusing someone else. Fritz argues this evidence would have explained the victim's precocious knowledge. However, there was no evidence that the victim had been abused by her biological father and therefore was not

relevant to explaining the victim's precocious knowledge. Fritz's attorney would not have been able to properly admit this evidence and therefore his attorney was not ineffective.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); see also *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011)

(stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*,

153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Our courts have previously held that a victim’s prior sexual abuse may be admissible to rebut an inference that the victim gained sexual knowledge from the defendant. *See State v. Carver*, 37 Wn.App. 122, 124,

678 P.2d 842 (1984); *State v. Kilgore*, 107 Wn.App. 160, 180, 26 P.3d 308 (2001). However, this evidence is to be carefully considered before admission.

The admission of prior abuse affects the trial process because it can mislead the jury by focusing attention on the child. When a child has been abused in the past, the jury might infer that the child either willingly participated in the current abuse or provoked it, especially if the child is older. Conversely, despite that it is not uncommon for a child to be abused by more than one person, the jury may doubt that any child could be so unfortunate. The evidence can affect the victim by forcing the child to testify about two traumatizing events, rather than one. This could discourage the reporting of abuse. The evidence also invades the child's privacy. Courts should consider these factors and others the courts find relevant when determining whether the risk of the *Carver* inference makes a child's prior abuse more probative than prejudicial.

Kilgore, 107 Wn.App. at 180-81 (internal citations omitted). The Court in *Kilgore* suggested multiple scenarios in which prior abuse would be admissible, where the probative value outweighs any prejudicial effect: where the prosecutor argues the child's sexual knowledge is not age appropriate then evidence of prior abuse would show an alternate source for that knowledge; where there is a strong motive to lie and there is a connection between that motive and the prior abuse; where the child's testimony is particularly graphic and no alternative source exists for this knowledge and the prior abuse involved the same graphic details; where

there is evidence of penetration and the prior abuse involved penetration.
Id. at 181-82.

What the case law does not suggest is admission of speculative evidence that someone who knows the victim has been accused (not convicted) of sexual abuse against a third person, and there has been no allegation that this person ever abused the victim. This evidence would clearly be inadmissible as its potential for prejudice outweighs its scant probative value. Had there been evidence the victim had been sexually abused by her biological father, that would surely have been admissible to explain the victim's precocious sexual knowledge. But there was never any allegation that the victim had been sexually abused by anyone other than Fritz. To allow defense to make up a scenario wherein the victim was abused by her biological father, out of whole cloth, would have been unduly prejudicial and would have mislead the jury.

Additionally, the evidence was inadmissible to show that someone else (the victim's biological father) committed the sexual assault on her as there was no evidence to support that claim. *See State v. Rehak*, 67 Wn.App. 157, 162-63, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, 844 P.2d 1018, *cert. denied*, 508 U.S. 953, 113 S.Ct. 2449, 124 L.Ed.2d 665 (1993); *State v. Mak*, 105 Wn.2d 692, 716, 718, 718 P.2d

407, *cert denied*, 479 U.S. 955 (1986) (holding a foundation must be laid before defense may argue third party perpetrator theory).

In order to be admissible, evidence of prior sexual abuse must be relevant. *State v. Carver*, 37 Wn.App. 122, 124-25, 678, 678 P.2d 842, *review denied*, 101 Wn.2d 1019 (1984); *State v. Peterson*, 35 Wn.App. 481, 484, 667 P.2d 645 (1983). Evidence of prior sexual abuse may be relevant to rebut the inference that the victim would not have knowledge of sexual acts and terminology unless the defendant were guilty. *Carver*, 37 Wn.App. at 124. In *Carver*, the Court found that the evidence was relevant and admissible to explain the victim's testimony. *Id.* at 124-25. However, this is not such a case as *Carver*, wherein the evidence would go to rebut the inference that the only way the victim had knowledge of sexual matters was because the defendant abused them. Here, the proffered evidence from Fritz was of little probative value – there was simply no evidence that the victim had been previously abused, there was no evidence that any of the acts she claimed were done by Fritz were done by a third person, and there was simply no evidence that she gained her precocious knowledge from her biological father. The trial court did not exclude relevant evidence of a victim's prior sexual abuse; the trial court only excluded evidence that the victim's biological father had been

accused by someone else – a fact wholly irrelevant to the case at hand and to explaining the victim’s precocious sexual knowledge.

This case is quite similar to that of *State v. Leppert*, 2019 WL 6716183 (Div. 3, 2019).¹ There, the defendant was charged with sexually abusing three children. One of the fathers of one of the victims had been convicted of Possessing Depictions of Minors Engaged in Sexually Explicit Conduct. The State moved to exclude this evidence as it was irrelevant. The trial court excluded the evidence. On appeal, Division 3 of this Court affirmed that decision finding there was no evidence that the victim was aware of the specifics of her father’s crime and the defense arguing she might have been was pure speculation. *Leppert*, slip. op. at 2. This is the same as in Fritz’s case: there was no evidence offered that the victim was aware of her father’s potential crimes, no evidence that her father had perpetrated any act against her, and any argument that he did and it would explain the victim’s sexual knowledge is purely speculative. The trial court properly excluded this evidence and it would not have been properly admissible had defense counsel followed up and asked again for it to be admitted.

The trial court properly excluded this evidence, and nothing trial counsel could have done would have made the evidence more relevant or

¹ GR 14.1 allows citation to unpublished opinions of the Court of Appeals. This opinion is not binding on this Court and can be given as much weight as this Court chooses.

more likely to be admitted. Fritz had the benefit of effective counsel. His claim fails.

II. The prosecutor did not commit misconduct

Fritz claims the prosecutor committed misconduct in closing argument. He also claims his attorney was ineffective for failing to object to certain arguments the prosecutor made during her closing. Fritz cannot show either that his attorney was deficient in failing to object to the prosecutor's arguments, or that the prosecutor's statements constituted misconduct which denied him a fair trial. This Court should reject Fritz's claims of prosecutorial misconduct and ineffective assistance of counsel.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn.App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error

unless the remark is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). When reviewing a claim of prosecutorial misconduct, the court should review the statements in the context of the entire case. *Id.*

In the context of closing arguments, a prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor’s comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial

was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

Davenport, 100 Wn.2d at 762-63.

A defendant's failure to object to potential misconduct at trial waives his challenge to the misconduct unless no curative instruction would have obviated the prejudicial effect on the jury and the misconduct caused prejudice that had a substantial likelihood of affecting the verdict. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012). The main focus of this Court's analysis on a prosecutorial misconduct claim when the defendant did not object at trial is whether the potential prejudice could have been cured by an instruction. *Id.* at 762.

Fritz argues the prosecutor committed misconduct during closing arguments by shifting the burden of proof, invoking the sympathies of the jury, bolstering the victim, and improperly arguing the victim's precocious sexual knowledge. The prosecutor's statements surrounding all of these subjects were proper and do not constitute misconduct. And they certainly do not rise to the level of flagrant and ill-intentioned misconduct for which no jury instruction could have cured the error.

Near the beginning of the prosecutor's closing argument she told the jury, "I have the burden of proof in this case and I have to prove my case to you beyond a reasonable doubt." RP 1605. She then said,

I have to prove my case to you beyond a reasonable doubt. It's a burden that I embrace. Jury instruction number 3 tells you what beyond a reasonable doubt is. It says, a reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt that exists in the mind of a reasonable person after fully, fairly and carefully considering all the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are convinced beyond a reasonable doubt.

RP 1605. Before the prosecutor began arguing the evidence, she reminded the jury that she alone carried the burden of proof and read, verbatim, the jury instruction the court had given on reasonable doubt. She again reminded the jury in the middle of her closing argument that she bore the burden of proof. In talking about the defendant, she commented, "he is presumed innocent, I have the burden of proof here. The presumption of innocence carries through the trial." RP 1646. In her rebuttal argument, the prosecutor argued to the jury,

The standard is beyond a reasonable doubt. And that word reasonable is incredibly important. Because when you look at this case, ladies and gentlemen, common sense shows us that [L.F.] is telling the truth. The facts show us that [L.F.] is telling the truth.

RP 1696. The prosecutor went on to later explain that if the jury had “an abiding belief in the truth of this charge, then you are convinced.” RP

1697. The prosecutor went on to discuss corroboration, and how there is no requirement of corroboration in order for the jury to be convinced

beyond a reasonable doubt. RP 1704. The prosecutor stated,

So, the law says in Washington the law does not require corroboration, but we do have some in this case. When you look at what [L.F.] described – and again, in order to accept the premise that she’s making this up, I mean, that is essentially what we would have to believe to believe – to disbelieve her story because she has been given so much detail that she could not have accounted for it, have to believe that she’s making this up (sic).

Look at all the detail she gave that were corroborated. As far as the robe, and I know Defense counsel talked quite a bit about this robe, I’ll keep it short, but she talked about this striped robe that he had. And she said that he wore it every morning and at night, said he wore it when he went to the garage. And it’s important to remember, and again rely on your notes, but Gina never said he wasn’t wearing it that afternoon. She said she didn’t remember what he was wearing because it was seven years ago. He told us though that he wore it when he went out to the garage, which we know he was out there smoking, pacing as Gina said, after he saw her talking to [L.F.].

...

The information that is – that [L.F.] gave is corroborated as far as the specifics to her house. And additionally, what she described is consistent with those sexual acts. So this is an eight year old girl who has had no other access to sexual materials. Defense mentioned a paper that came home from school. I submit to you it’s certainly not reasonable that a paper from school would describe the acts that [L.F.] described. A paper about a

child molester in the neighborhood certainly does not describe ejaculation, and what it feels like when someone licks someone's vagina or puts a penis in their mouth. What she is describing is what those acts feel like. What she is describing is consistent.

Now there are things that are different from her testimony now than from back then. And wouldn't it be weird if there weren't. I mean, if this was really something she made up back when she was eight, and she just now is so – for some reason, seven years later feels so compelled by it (inaudible) that she feels like she has to keep it up, wouldn't she have given you the exact same information that she gave back then, wouldn't it be verbatim?

I submit to you it's certainly much, much more credible that she doesn't remember every detail of every time and that in the years since this happened her memory has faded. (Coughing in the courtroom, inaudible) – use your common sense. Adults cannot remember things exactly as they happened seven years ago, how can we expect a child to.

If we expect [L.F.] to remember every single time that the defendant violated her, every single detail of it, what standard would we be holding her to.

RP 1704-07.

Fritz argues that from these statements, the prosecutor shifted the burden of proof and argued that to acquit the jury must find the victim was lying. The prosecutor's statements included herein, when evaluated in their totality, make no such argument and do not shift the burden. The prosecutor very clearly repeated to the jury, multiple times, that she carried the burden, that the burden was beyond a reasonable doubt, and quoted the jury instruction on reasonable doubt multiple times. This in no

way diminishes the State's burden, nor did the prosecutor make an improper argument.

It is misconduct for a prosecutor to argue that in order to acquit a defendant the jury must find that the State's witnesses are either lying or mistaken. *State v. Casteneda-Perez*, 61 Wn.App. 354, 362-63, 810 P.2d 74, *review denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991); *State v. Wright*, 76 Wn.App. 811, 826, 888 P.2d 1214, *review denied*, 127 Wn.2d 1010, 902 P.2d 163 (1995); *State v. Barrow*, 60 Wn.App. 869, 874-75, 809 P.2d 209, *review denied*, 118 Wn.2d 1007, 822 P.2d 288 (1991). In *State v. Fleming*, 82 Wn.App. 209, 921 P.2d 1076 (1996), the prosecutor told the jury that "for you to find the defendants [], not guilty of the crime of rape in the second degree ... you would have to find either that [D.S.] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom. *Fleming*, 82 Wn.App. at 213. This argument misstated the law on the burden of proof and misrepresented the role of the jury. *Id.* This is not what occurred in Fritz's case. In Fritz's case, the prosecutor repeatedly appropriately and properly stated the burden of proof and argued the evidence with that burden and the law of the case in mind. She did not argue that the jury should hold the victim to a lesser standard than beyond a reasonable doubt, but pointed out that for witness credibility, it would be

inappropriate to hold a child to a different standard than we'd expect from adults, and from what they did see from adults in the trial. The prosecutor was properly arguing witness credibility and did not lessen or shift the burden of proof, nor did the prosecutor tell the jury that in order to acquit they had to find that [L.F.] was lying.

This case is akin to *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011). There, the Supreme Court found the prosecutor did not improperly shift the burden of proof in a child molestation case by arguing that if they believed the victim they had to find the defendant guilty unless there was a reason to doubt the victim based on the evidence in the case. *Thorgerson*, 172 Wn.2d at 454. This shows that the prosecutor's arguments in Fritz's case were not improper and did not shift the burden of proof to the defendant. The prosecutor's arguments in this respect were proper and did not constitute misconduct.

Fritz also argues the prosecutor committed misconduct by bolstering the victim's credibility. A prosecutor may commit misconduct if he or she vouches for a witness's credibility. *State v. Robinson*, 189 Wn.App. 877, 892, 359 P.3d 874 (2015). This occurs when the prosecution places the prestige of the government behind the witness, or tells the jury that information they don't know about supports the witness's testimony. *Id.* at 892-93. The prosecutor never spoke of or

eluded to evidence not before the jury, and the prosecutor never put the prestige of the government behind a witness. Telling the jury that a witness has “no motive to fabricate” what they said does not “vouch” for the witness. *See id.* at 893-94. A prosecutor may properly draw inferences from the evidence at trial. *Id.* This does not constitute vouching or bolstering. The prosecutor in Fritz’s case did not impermissibly vouch for or bolster the victim’s credibility; she simply argued the facts of the case and the credibility of the witnesses in permissible ways.

Fritz further argues the prosecutor committed misconduct when she argued the victim had precocious sexual knowledge. Fritz argues that as the prosecutor knew there was an alternate source for the victim’s sexual knowledge that her arguing it came from Fritz’s abuse was misconduct. As discussed in the previous section, there was no evidence, none, to suggest that the victim had previously been abused by any other person. Speculation that another potential child molester in her midst had given her sexual knowledge is inadmissible and inappropriate conjecture. The prosecutor properly argued that Fritz was the source of the victim’s precocious sexual knowledge because the evidence showed he was the only source; speculation that another person may have abused her when there was no concrete evidence to support that idea does not mean the prosecutor could not argue the evidence that was properly admitted at trial.

Arguing a victim's precocious sexual knowledge is an appropriate subject for closing argument. The prosecutor did not commit misconduct.

Even if this court finds the prosecutor's arguments were improper, Fritz must still demonstrate prejudice – he must show there is a substantial likelihood that the prosecutor's argument affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). When reviewing the prosecutor's closing argument as a whole, and the evidence presented at trial, this Court should find there was no substantial likelihood that the prosecutor's statements affected the verdict. Additionally, the prosecutor referred to instructions given by the judge, and juries are presumed to follow the instructions. The court's proper instructions and the presumption of innocence instruction "minimized any negative impact" any improper statements may have had. *See State v. Anderson*, 153 Wn.App. 417, 432, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002, 245 P.3d 226 (2010). The prosecutor's statements were not so flagrant and ill-intentioned that so as to cause an enduring prejudice incurable by a jury instruction. Accordingly, Fritz has failed to establish reversible prejudice and his claim of prosecutorial misconduct fails.

III. Defense counsel was not ineffective for failing to object to proper arguments

Fritz argues his attorney was ineffective for failing to object to the prosecutor's closing argument. However, as discussed above, the prosecutor's closing argument was proper and there was nothing for Fritz's attorney to object to.

Additionally, whether to object or not object is a matter of discretion and trial strategy reserved for the defense attorney. To prove that failure to object rendered counsel ineffective, Fritz must show that not objecting fell below prevailing professional norms, that the proposed objection would have likely been sustained, and that the result of the trial would have been different. *In re Personal Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1, (2004). Fritz has to rebut the presumption that a failure to object "can be characterized as legitimate trial strategy or tactics." *Id.* (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). Additionally, "exceptional deference must be given when evaluating counsel's strategic choices." *Id.* (quoting *McNeal*, 145 Wn.2d at 362).

Fritz has not established that the prosecutor made objectionable statements during closing argument. But furthermore, even if it was objectionable, Fritz cannot show that his attorney's decision not to object

was not a legitimate trial strategy or tactic. Objecting can risk emphasizing the argument or making it look like there is something to hide. *See id.* Furthermore, counsel objected several times already during closing argument and risked looking poorly before the jury if he continued to object to unobjectionable arguments. Fritz has not rebutted the presumption that a tactical reason existed for defense counsel not to object. His claim of ineffective assistance of counsel fails.

IV. The trial court properly admitted statements L.F. made to her therapist

Fritz argues the trial court erred in admitting statements L.F. made to her counselor as they were not made for the purpose of medical treatment or diagnosis. Fritz never objected to the statements on this grounds and cannot raise it for the first time on appeal.

This Court generally does not address issues raised for the first time on appeal unless they involve a manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Contreras*, 92 Wn.App. 307, 311, 966 P.2d 915 (1998). Fritz indicates in his brief that he objected to the admission of the statements and argued they were not admissible as statements made for “medical treatment or diagnosis” and refers to RP 1370-81. *See* Br. of Appellant, pp. 40-41. However, Fritz never made the argument that the statements were hearsay and should not be admitted

under the medical treatment or diagnosis exception. Instead, Fritz argued about the scope of the statements that would be admitted and argued for more statements to be admitted than fewer. RP 1370-84. Fritz cannot now argue an error he helped create at trial.

But even if this Court reaches the issue Fritz now raises for the first time on appeal, the trial court did not improperly admit the statements. These were statements that the victim made to her counselor about the abuse that she suffered. Statements made to a therapist for therapy for sexual abuse do not differ materially from other statements made for the purpose of medical treatment. *In re Dependency of M.P.*, 76 Wn.App. 87, 92-93, 882 P.2d 1180 (1994). The statements must be consistent with the purposes of promoting treatment and the content of the statement must be of the kind reasonably relied upon by the person providing the treatment or diagnosis. *Id.* at 93.

Dr. Preston was a licensed psychologist who saw L.F. RP 1410. Dr. Preston obtains information from a child patient about why they're there to see him in order to set treatment goals and to be clear about them. RP 1411. And the information Dr. Preston obtains both before and during treatment of a patient is for the purpose of treating the patient. RP 1411. Under ER 803(a)(4) statements made for the purposes of medical treatment or diagnosis are admissible in court.

Fritz claims that Dr. Preston testified that the identity of who the perpetrator is is not important to treatment, referencing RP 1413-14. *See* Br. of Appellant, pp. 42-43. However this is not at all what Dr. Preston testified to. Dr. Preston said that it isn't necessary in order to develop the treatment plan to know the identity of the perpetrator, but that is over time helpful for the person; in essence, helpful to the patient whom the doctor is treating for psychological issues relating to sexual abuse. Therefore the identity of the perpetrator is a statement made with the purpose of medical treatment and falls under the purview of ER 803(a)(4). And for L.F. specifically, discussing the actual abuse and the person who abused her was a part of her treatment plan. RP 1414.

This Court reviews a trial court's decision on the admission of evidence for an abuse of discretion. *State v. Blair*, 3 Wn.App.2d 343, 355, 415 P.3d 1232 (2018) (citing *State v. Clark*, 187 Wn.2d 641, 648, 389 P.3d 462 (2017)). A court abuses its discretion when its evidentiary ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). The burden is on Fritz to prove an abuse of discretion. *State v. Hentz*, 32 Wn.App. 186, 190, 647 P.2d 39 (1982), *reversed on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983). Fritz has not shown that the

trial court made a decision no other trial judge would have made in admitting the statements that a child victim of sexual abuse made to her therapist about her abuse and the abuser. The evidence was properly admitted.

V. The trial court properly allowed the State to re-open its case

Fritz argues the trial court improperly allowed the State to re-open its case to present additional testimony. The trial court did not abuse its discretion in allowing the State to re-open its case. Fritz's claim fails.

Generally, the issue of whether to allow a party to re-open its case to present further evidence is a matter within the discretion of the trial court. *State v. Brinkley*, 66 Wn.App. 844, 848, 837 P.2d 20 (1992) (citing *State v. Sanchez*, 60 Wn.App. 687, 696, 806 P.2d 782 (1991)). "A trial court's actions in regard to reopening of a case will be upheld except upon a showing of manifest abuse of discretion and prejudice resulting to the complaining party." *Id.* (citing *Sanchez*, 60 Wn.App. at 696; *State v. Vickers*, 18 Wn.App. 111, 113, 567 P.2d 675 (1977); *Seattle v. Heath*, 10 Wn.App. 949, 520 P.2d 1392 (1973)). Many times, our courts have upheld the decision to allow the State to re-open its case to resolve deficiencies in its case, even when those deficiencies have been pointed out by the defense. *See e.g., In re Estes v. Hopp*, 73 Wn.2d 263, 264-65, 438 P.2d

205 (1968) (allowing the State to re-open its case to present proof of ownership of stolen vehicle); *Vickers*, 18 Wn.App. at 113 (allowing State to re-open its case to prove the jurisdiction where the crime occurred); and *Heath*, 10 Wn.App. at 953 (allowing prosecution to re-open its case to present proof of driving records in traffic charges). Our courts have even held it is not an abuse of discretion to allow the State to re-open its case after Defense has rested to answer a jury question. *See Brinkley*, 66 Wn.App. at 850. Accordingly, the court here did not abuse its discretion in allowing the State to re-open its case to re-call a witness.

Fritz also argues the “advocate-witness” rule was violated by having a prosecutor testify in a case. In this scenario, the prosecutor called was not the prosecutor trying the case before the jury, and therefore was not acting as an “advocate” in this case. In *State v. Bland*, 90 Wn.App. 677, 953 P.2d 126, *review denied*, 136 Wn.2d 1028 (1998), the Court concluded that a prosecutor whose role was that of a social worker in a case could testify because the dual role did not “artificially bolster the witness’s credibility or make it difficult for the jury to weight the testimony.” *Bland*, 90 Wn.App. at 680. The same is true here. What Fritz complains of is proper fodder for cross-examination – the idea that the witness, Ms. Klein, was not impartial is great ammunition for cross-

examination. This is simply not a circumstance where the witness-advocate rule was violated. Fritz's claim fails.

VI. Cumulative Error did not Deny Fritz a Fair Trial

Fritz 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, 332, 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, 498, 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, 929, 10 P.3d 390 (2000). As discussed above, Fritz failed to show error, or how each alleged error affected the outcome of his trial. Further, Fritz has not shown how the combined error affected the outcome of his trial. Accordingly, Fritz's cumulative error claim fails.

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CONCLUSION

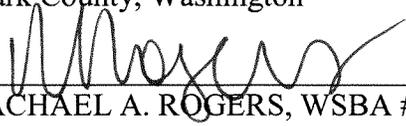
Fritz has failed to show there is any reversible error. The trial court should be affirmed in all respects.

DATED this 6th day of March, 2020.

Respectfully submitted:

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