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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

NATASHIA BRITT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Grant Blinn

No. 16-1-03808-7

Brief of Respondent

MARY E. ROBNETT
Pierce County Prosecuting Attorney

JEREMY A. MORRIS
Special Deputy Prosecuting Attorney
Glisson & Morris, PS
623 Dwight Street
Port Orchard, WA 98366
PH: (360) 519-3500

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I. COUNTERSTATEMENT OF THE ISSUES.

A. Whether the Defendant's claim that the trial court should have sua sponte dismissed Juror 26 due to that juror's "cognitive inability" is without merit when the record does not show that the juror suffered such a disability or was otherwise unqualified to sit as a juror?

B. Whether the Defendant's claim that the trial court abused its discretion in limiting the Defendant's cross examination of several witnesses about the whereabouts of another potential witness is without merit when the record shows that the defense actually withdrew several of these questions and that the trial court did not abuse its discretion in finding that the other questions that were not withdrawn related to irrelevant evidence that was not material to any of the issues in the case below?

C. Whether the Defendant's claim that the trial court abused its discretion in allowing testimony from a witness that she had never desired to hit the victim is without merit when the trial court acted well within its broad discretion in admitting this statement and when any error in admitting this evidence was harmless beyond a reasonable doubt?

D. Whether the Defendant's claim of prosecutorial misconduct is without merit when the Defendant has shown neither improper conduct nor prejudice?

E. Whether the Defendant's claim of ineffective assistance of counsel is without merit when the Defendant has failed to show either deficient performance or prejudice?

F. Whether the Defendant's claim that the trial court erred in imposing the DNA collection fee is without merit when the Defendant has failed to show that the trial court erred in imposing this mandatory fee? The State concedes, however, that the \$200 filing fee should be stricken.

G. Whether the Defendant's claim that several provisions of the judgement and sentence relating to the prohibition on contact with minors and relating to the requirement of a psychosexual examination are moot as the trial court previously entered an agreed order striking those provisions?

II. STATEMENT OF THE CASE.

A. FACTS

The charges in the present case involved various forms of abuse inflicted by the Defendant on her two male children, J.B. (born August 9, 2005) and B.C. (June 29, 2007). RP 913, 1017-19; 1180-81. At the time of

the incidents at issue, J.B. was 10 or 11 years old, and B.C. was eight or nine years old, and their younger sister D.A. was two or three years old. RP 913, 1017-1019.

There was no dispute that B.C. had a number of behavioral issues and was a difficult child. The record shows that he suffers from Attention Deficit Hyper Activity Disorder (ADHD) and takes medication to treat this disorder, but that he has a long history of exhibiting behavioral problems at home and at school. RP 166, 168, 1024, 1042, 1118-19, 1184-85, 1301.

Prior to 2015, J.B., B.C., and their younger sister lived with the Defendant in Des Moines, Washington. RP 1022; Ex. 8, 9. During this period of time the Defendant whipped J.B. and B.C. "all over [their] bodies" with a belt. RP 1025, 1186-87; Ex. 8, 9. During these episodes J.B. and B.C. were required to remove their clothing before the Defendant whipped him. RP 1026, 1028. These whippings occurred on multiple occasions and they left bruises on the children which remained visible for over three days at a time. RP 1025-27, 1078. The Defendant whipped B.C. more often than she whipped J.B., and after one of these beatings, B.C. went to school with bruises on his body. RP 1027-29, 1078, 1186-87, 1189-90. Before he left for school that day, however, the Defendant told him to put on a hoodie, so no one would see the bruises. RP 1187, 1191. When B.C. went to the school nurse to take his pills, the school authorities notified the police and the

Children's Administration of the Department of Social and Health Services (CPS). RP 1029-1030, 1186-87.

CPS authorities removed the children from the Defendant's care and placed them with the Defendant's aunt, Linda Rogers, and her husband. RP 1301, 1041, 1187-1191, 1200. J.B. and his younger sister lived at that home for two years, but B.C. only lived in the home a year, as Ms. Rogers struggled to live with B.C. due to his significant behavioral problems. RP 118-20, 188, 202, 1041-1042, 1118-19, 1200, 1203, 1344-45. After a year, Ms. Rogers asked CPS to remove B.C., and he was placed with the defendant's friend Maso Kenard. RP 1303. While B.C. lived with Ms. Rogers, Ms. Rogers saw scars on his body, but she testified that she did not cause the scars and she did not physically discipline B.C. or any of the children. RP 1305-06, 1312, 1365-66.

J.B., B.C., and their sister were returned to the Defendant's care in 2016, and they moved into an apartment in Tacoma, Washington. RP 1042, 1047, 1183. The Defendant, however, resumed her abuse of the boys. RP 1044, 1188-89, 1203-05. She began whipping J.B. and B.C. with a cable cord which she kept hanging on a bedroom door. RP 1045, 1047, 1052, 1200, 1204-05, 1264. During some of the assaults, the Defendant would direct the boys to undress and get on the bed before she whipped them. RP 1045, 1056. She would then fold the cord in half, wrap it around her hand,

and whip the boys' backs and buttocks. RP 1046-1048. These whippings occurred on more than three separate occasions. RP 1048.

On one these occasions, the Defendant whipped J.B. because he lost a fight at school. RP 1045. On another occasion, the Defendant hit J.B. on his arm and the pain lasted longer than an hour, and he had a bruise on his arm for one week. RP 1048-1049. The Defendant told J.B. to wear a long sleeve shirt to cover the bruise so no one would see it. RP 1049. In addition to whippings with the cord, the Defendant beat J.B. on the back side of his body with a belt. RP 1078-1079.

The Defendant also inflicted beatings on B.C. during this time. RP 1050, 1079, 1189. On one such occasion, the Defendant believed B.C. had played with a lighter and burned part of the carpet at a family member's home. RP 1051. To punish him, she directed B.C. to strip naked and told J.B. to retrieve some packing tape from another room. RP 1050-51, 1053-1054, 1208. The Defendant then used the tape to tape B.C.'s mouth shut, tape his hands behind his back, and tape his legs together. RP 1050, 1053, 1205-08. She then whipped his naked body with the cord. RP 1050, 1054, 1205, 1209. B.C. cried during the beating and chewed the tape in an attempt to free his mouth. RP 1055, 1207. J.B. watched this whipping, which left bruises on B.C.'s back, buttocks, and hamstring. RP 1054, 1209-10. After

the beating, B.C. laid down on his bed and cried due to the pain. RP 1055, 1209, 1211.

If B.C. ever resisted the beatings, the Defendant would lay on B.C. and enlist J.B. to help her restrain him. RP 1056, 1060-61. J.B. had to help the Defendant in this manner on at least three or four occasions. RP 1056-1057. The beatings inflicted by the Defendant sometimes left scars on the boys' bodies. RP 1281-86.

In addition to beating B.C., the Defendant strangled him on one occasion. RP 1057-1059, 1188-89, 1226-30. During that episode the Defendant directed B.C. to come to her in a bedroom and to hold his breath. RP 1226-30. She then strangled him until he lost consciousness. RP 1057-1059, 1188-89, 1226-30. J.B. was present and explained that he thought that B.C. had died. RP 1060. The Defendant and J.B. shook B.C. to wake him, and the Defendant yelled, "Get up, get up, get up," but B.C. remained unconscious. RP 1059-1060. The Defendant ordered J.B. to retrieve a glass of water and bring it to her. RP 1057, 1059-1060, 1228-30. J.B. complied, and the defendant poured the water on B.C.'s face. RP 1057, 1059-1060, 1228. B.C. then woke up crying. RP 1057, 1059-1060, 1228.

In addition to the physical abuse, the evidence also showed that in the summer of 2015 or 2016 the Defendant showed sexually explicit materials to the young boys, including a video called "Two Girls, One Cup."

RP 1061-1063, 1803-04. This video was, among other things, sexually explicit, and a lengthy and graphic description of the video can be found in the record. See, RP 1062, 1804-06. During his forensic interviews B.C. also described that the Defendant had shown him a picture on her phone of the Defendant performing oral sex on a male. See Ex 43; App.'s Br. at 44. A photo consistent with this description was found on the Defendant's phone. RP 947-49, 956. At trial, however, B.C. did not testify about this picture.

During this time frame, two different social workers were assigned to the boys and occasionally came by the house. RP 1084-85, 1235, 1397. J.B. did not tell the social worker about the beatings because the Defendant had previously told the boys not to report the beatings to the social worker. RP 1085. B.C. was similarly afraid to report the abuse. RP 1236. A new social worker named Shannon Woodard was later assigned to the case, but the victims continued to hide the beatings while they lived with the Defendant. RP 1044, 1093, 1235-37.

In July 2016, CPS removed J.B. and B.C. from the Defendant's care for an unrelated matter and placed them with Regina and Norman Golden, the Defendant's mother and stepfather. RP 914, 1043, 1067, 1084, 1121, 1248, 1183. Ms. Golden would not participate in a background check, however, so CPS explained that she would have to move out of the home.

RP 278-79, 1248. Mr. Golden remained in his home and cared for the children, while Ms. Golden would visit on occasion. RP 1306, 1443-60.

J. B. eventually disclosed the abuse to Ms. Golden and showed her the video the Defendant had played and explained that he was frightened of her. RP 1064, 1080, 1093-94. Ms. Golden reported the abuse to Ms. Woodard, who then interviewed the boys and learned of the abuse from the boys directly. RP 1093, 1096-97, 1238.

Tacoma Police Detective William Muse was then assigned to the case beginning on September 2, 2016, and he worked with the CPS investigator to coordinate forensic interviews of the boys. RP 906, 910, 914, 1101, 1195. The forensic interviews were held September 7, 2016. RP 912, 1080-1081. In October 2016, CPS received a new referral regarding J.B. and B.C. which was forwarded to Detective Muse. RP 931, 933. A second round of forensic interviews were then conducted on October 25, 2016. RP 936.

Detective Muse interviewed the Defendant on September 15, 2016. RP 920, 922. The Defendant was advised of her rights and agreed to speak with the Detective. RP 922-23. The Detective asked the Defendant if she had ever physically hit the children and the Defendant initially denied doing so, but she then admitted that she would "Pop the

children on their legs.” RP 924-25. The Defendant described that a “pop” was an open-handed strike. RP 925.

B. PROCEDURAL HISTORY

The Defendant was ultimately charged with Assault of a Child in the First Degree (Count I), Assault of a Child in the Second Degree (Count II), Communicating with a Minor for Immoral Purposes (Count III), Assault of a Child in the Second Degree (Count IV), Communicating with a Minor for Immoral Purposes (Count V), Sexual Exploitation of a Minor (Count VI), and Child Molestation in the First Degree (Count VII). RP 1950; CP 63-66. The defense informed the State that it would pursue a defense of Reasonable Parental Discipline. RP 822.

The matter was called for trial on September 11, 2017. RP 9-10. Jurors completed questionnaires before the beginning of jury selection. Juror 26 filled out one of these questionnaires, indicating she had been employed at Boeing for the last six years and was also employed previously to that. CP (TBD – Juror 26’s Jury Questionnaire), *See* State’s Supplemental Designation of Clerk’s Papers, filed simultaneously with this brief. The second question of the questionnaire asked whether this juror had any physical or mental condition for which she would like to be excused from the jury, and Juror 26 indicated that she did not have any such

condition. She further indicated that she did not have any other kind of hardship for which she would like to be excused from the jury. CP (TBD-Juror 26's Jury Questionnaire).

During general questioning, the following exchange with Juror 26 took place:

[THE STATE:] Now, in cases where it's heavy with witness testimony, I anticipate you'll be told that you'll rarely, if ever, get to hear testimony twice. If you're allowed to take notes, is there anyone here who says, you know what, even if I take notes, I'm not going to be able to retain this evidence over the course of three weeks? Anyone here feel that? It's okay, we just need to know that. Juror No. 26.

JUROR 26: I'm not really good at taking notes and whatever I write down usually is not –

[THE STATE]: So what if you're able to afterwards talk with other jurors and you can all compare what you recall, maybe be refreshed? Would you -- do you feel that you could, with those assistances, be able to recall testimony that occurred maybe two, three weeks ago?

JUROR 26: I don't think so.

RP 734.

Juror 26 later answered questions about something defense counsel called the "telephone game." RP 768. This game was described as "someone

comes up with a phrase, and they whisper it to the next person and the next person, and it goes all the way around and by the end, it's totally different and you have a lot of fun.” RP 768. Juror 26 stated that she had played the game and the beginning phrase, “doesn’t really end the way it started.” RP 768.

At various points after the jury was seated, the parties and court noted that a different juror, Juror 10, was falling asleep. RP 995-96, 1318-26, 1537-38, 2133, 2191. The court and parties watched to ensure the juror was actually sleeping and questioned the juror to see if he was paying attention to the case. RP 1318-22. At the conclusion of closing arguments, the parties moved to excuse Juror 10 because he was unable to pay attention. RP 2191. The court granted the motion and excused Juror 10. RP 2191-93.

The record also shows that during trial both the State and the defense made attempts to secure the presence of Regina Golden as a witness. RP 9-10, 884. Ms. Golden, however, claimed to be outside the State of Washington. RP 1249. Defense counsel noted that the parties had attempted to arrange an interview of Ms. Golden but they had been unsuccessful. RP 9-10. The defense, however, noted that a defense investigator had managed to serve Ms. Golden with a subpoena on September 8, 2017. RP 9-10. The defense suggested that it may seek a material witness warrant to compel Ms.

Golden's appearance, and the State indicated that it would be joining in the motion for a material witness warrant if Ms. Golden was not responsive to her subpoena. RP 10-11.

Although Ms. Golden made several representations to counsel throughout trial that indicated she would be available to testify, she never appeared to testify at trial. RP 131, 151-52, 155, 1002, 1542; CP 303-04. Detectives were dispatched to attempt to locate her, and a bench warrant was issued for her arrest, but to no avail. RP 953, 1000-01, 1011-12, 1016, 1262; CP 280-283.

At trial, the defense elicited various kinds of testimony attacking the victims' credibility in this case. The court permitted the defense to inquire about whether B.C. told the truth when he had made a prior claim that the Defendant's friend Renita McCane had held a gun to his head. RP 1889-1903. The defense was also permitted to elicit testimony, over the State's objection, that B.C. had a reputation for untruthfulness. RP 1932-35.

At trial the State also called Deputy Torvald Pearson, a corrections officer and a record custodian for the Pierce County jail. RP 1557. Deputy Pearson testified that the Defendant had made a number of calls from the jail and that he had placed recordings of these calls onto three compact discs which were marked as Exhibits 40, 41, and 42. RP 1557-59, 1561-62.

Deputy Pearson testified that Exhibit 40 contained 382 calls and that there were 3,641 minutes or 60.68 hours of recordings on the disc. RP 1557. No objection was made to this testimony. Deputy Pearson similarly explained that there 300 calls on Exhibit 41, and when the State asked what the total length of the records were, Deputy Pearson stated that there were 3,048 minutes of recordings on Exhibit 41. RP 1559-60. No objection was made. The State then asked how long that was in hours, and the defense objected to the relevance of converting minutes into hours. RP 1560. The court overruled the objection because the number of minutes was already on the record, and simply converting the minutes into hours was appropriate in the mind of the court. RP 1560, 1583-84.

Deputy Pearson similarly explained that there were 320 calls on Exhibit 42. RP 1561. The State inquired as to the total length of the recordings on Exhibit 42, and the defense objected. The trial court sustained this objection and noted that the issue could be addressed outside the presence of the jury. RP 1561, 1583-84.

Exhibits 40, 41, and 42 were not offered as evidence. CP 253-56. Rather, the State offered Exhibit 48, a disc containing very limited recordings taken from Exhibits 40, 41, and 42. RP 1557-84; Ex. 48. The parties stipulated that Ex. 48 would be admitted and played for the jury. RP

1745-46, 1789, 1802. During the jail call played for the jury, the Defendant admitted she had shown J.B. and B.C. a video called Two Girls, One Cup and that she never should have done so. RP 1783-86; Ex. 48 (Audio file 09.15.16-1100, part 1). The parties stipulated that the call contained in Exhibit 48 was identical to excerpts from Exhibits 40, 41, and 42. RP 1789; Ex. 52. The parties further stipulated that the prior to playing exhibit 48, the court would read the following to the jury:

You are about to hear recordings of calls contained on Exhibit 48. These calls are excerpts of the calls that are contained on Exhibits 40, 41 and 42. All calls were made using the personal identification number of Natasha Britt. The names of the files on Exhibit 48 contain the date and time on which the call was made. The parties have agreed that these times and dates are accurate. For example, a file name containing 09.15.16-1100 was made at 11:00 a.m. on September 15, 2016. The State will now publish these files as part of the presentation of this case and the parties will announce which file they are playing before they play it for you.

RP 1789, 1802; Ex. 52. The stipulation was admitted into evidence. CP 253-56; Ex. 52.

The jury ultimately delivered its verdict on October 17, 2017, finding the defendant guilty of Assault of a Child in the First Degree (Count I), Assault of a Child in the Second Degree (Count II), Communicating with

a Minor for Immoral Purposes (Count III), Assault of a Child in the Second Degree (Count IV), and Communicating with a Minor for Immoral Purposes (Count V). RP 2202-05; CP 162-171, 157-172. The jury found the defendant not guilty of Sexual Exploitation of a Minor (Count VI) and Child Molestation in the First Degree (Count VII). RP 2205; CP 162-171, 157-172.

The Defendant was sentenced to a standard range sentence. CP 210-226, 231-235. This appeal followed. CP 239.

III. ARGUMENT.

- A. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT SHOULD HAVE SUA SPONTE DISMISSED JUROR 26 DUE TO THAT JUROR'S "COGNITIVE INABILITY" IS WITHOUT MERIT BECAUSE THE RECORD DOES NOT SHOW THAT THE JUROR SUFFERED SUCH A DISABILITY OR WAS OTHERWISE UNQUALIFIED TO SIT AS A JUROR.

The Defendant first argues that Juror 26's had a "cognitive disability" that rendered her unable to serve as a competent juror and that the trial court thus erred in failing to dismiss this juror even though the Defendant failed to request such a dismissal at trial. App.'s Br. at 14. This claim, however, is without merit because the record does not demonstrate that Juror 26 was unqualified to serve as a juror, and thus the trial court did not err, especially when the Defendant did not raise this issue below.

RCW 2.36.070 provides that a person shall be competent to serve as a juror unless the person is less than 18 years old, is not a citizen of the United States, is not a resident of the county in which she has been summoned to serve, is unable to communicate in English or has been convicted of a felony and does not have their civil rights restored. In addition, RCW 2.36.100(1) provides that no person that meets these qualifications may be excused from jury service by the court except upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court for a period of time the court deems necessary.

A judge must, however, excuse a juror “who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.” RCW 2.36.110.

Because the trial judge is in the best position to determine a juror's ability to serve impartially, this Court is to review a trial court's decision whether to excuse a juror for an abuse of discretion. *State v. Elmore*, 155 Wn.2d 758, 768–69, 123 P.3d 72 (2005); *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210 (1987). “The trial judge is able to observe the juror's demeanor and, in light of that observation, to interpret and evaluate the

juror's answers to determine whether the juror would be fair and impartial.” *Rupe*, 108 Wn.2d at 749. A trial court abuses its discretion when it issues an order that is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009) (quoting *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008)).

In the present case the Defendant claims that because Juror 26 admitted that she didn't think she could recall testimony that occurred two or three weeks earlier, that the juror demonstrated that “she was unfit by reason of inattention or physical or mental defect that made her incompatible with proper and efficient jury service.” App.'s Br. at 16.

Juror 26's honest response regarding the ability to remember testimony after several weeks, however, does not demonstrate that she was unqualified to be a juror. Rather, her response does little more than show an honest and perfectly normal response to the question. It is not surprising that a juror might express some doubt about their ability to recall specific testimony several weeks after the fact, as recalling the exact details of testimony given weeks earlier can be difficult even for judges or attorneys to recall with exact precision. Thus, Juror 26's response represents little more than an honest assessment of the difficulties any reasonable and honest juror has in a trial, and it falls far short of the type of mental defect that would render her unqualified to be a juror.

Furthermore, Juror 26's comments in other portions of the voir dire revealed no mental defect or difficulties with understanding the proceedings. See, RP 706-07, 739, 768-69. For instance, Juror 26 engaged meaningfully and intelligently with voir dire questions about the "telephone game" hypothetical proposed by defense counsel. RP 768.

In addition, Juror 26 expressed no reservations when the trial court asked the jurors whether they would be unable to assure the court that they would follow the law or whether there was any reason that they would not be able to try the case impartially. RP 697-98.

Finally, Juror 26's answers on her juror questionnaire indicated that she did not have a physical or mental condition that she thought justified her being excused as a juror, and further explained that she had graduated from high school, had attended some college, had been employed for the last six years at Boeing, and had previously served on a jury. CP (TBD – see State's Supplemental Designation of Clerk's Papers – Juror Questionnaire of Juror 26).

In short, the Defendant has failed to show that the trial court abused its discretion or that Juror 26 had a "mental defect" that disqualified her from serving on the jury below. Rather, Juror 26's statements in voir dire were indicative of a juror honestly and sincerely reflecting on her ability to

participate in the case. This kind of self-reflection is precisely the kind of reflection that an ideal juror would demonstrate during voir dire.

Furthermore, as the Defendant failed to raise a for-cause challenge regarding Juror 26 below, the Defendant arguably failed to properly preserve this issue and this Court may decline to review this claim pursuant to RAP 2.5(a). The only exception that would allow review would be the exception in RAP 2.5(a) regarding manifest constitutional error, but Juror 26's brief comments about her memory fall far short of an actual manifest error.¹

Finally, Washington appellate courts have further explained that a trial court should exercise caution before injecting itself into the jury selection process because the decision on whether to keep a prospective juror on the jury panel or whether to dismiss a juror "often is based on the trial counsel's experience, intuition, strategy, and discretion." *State v.*

¹ Manifest constitutional error regarding jury selection usually involves something much more obvious than the issues raised in the present appeal regarding Juror 26. In *State v. Irby*, 187 Wn.App. 183, 347 P.3d 1103 (2015), for instance, a juror indicated that she had worked for the government and was "more inclined towards the prosecution." *Irby*, 187 Wn.App. at 190. When the trial court followed up and asked if the juror if she could be fair and impartial and listen to both sides, the juror responded, "I would like to say he's guilty." *Id.* On appeal the court found that it was unable to "imagine how the sentence 'I would like to say he's guilty' could be uttered in a tone of voice that would excuse the complete lack of follow up questions," and that the juror had demonstrated actual bias and that the seating of this juror thus constituted a manifest constitutional error which allowed the defendant to raise the issue for the first time on appeal. *Id.* at 196-97. The State respectfully submits that Juror 26's responses in the present case fall far short of the juror's demonstrable bias demonstrated in *Irby*, and thus do not constitute manifest constitutional error.

Lawler, 194 Wn. App. 275, 287, 374 P.3d 278 (2016). Similarly, in *State v. Phillips*, 6 Wn.App. 2d 651, 431 P.3d 1056 (2018) the court explained that while a trial court may have a duty to sua sponte intercede where actual bias is evident or where the defendant is not represented by counsel, “this duty must also be balanced with the defendant’s right to be represented by competent counsel.” *Phillips*, 6 Wn.App.2d at 667. Thus the *Phillips* court explained that where the defendant is represented by competent counsel, the “trial court should weigh whether counsel’s failure to object may be a legitimate trial strategy before sua sponte interceding” regarding challenges for cause. *Id* at 667; *See also; Lawler*, 194 Wn.App. at 282-83, 288 (Noting that “Trial counsel may have legitimate, tactical reasons not to challenge a juror” and that a trial court must therefore be careful not to interfere with a defendant’s strategic decisions regarding jury selection); and *State v. Johnston*, 143 Wn.App. 1, 17, 177 P.3d 1127 (2007) (stating that defense counsel’s decision not to challenge a juror for cause despite some evidence that the juror was biased could be a legitimate trial strategy).²

² It is also worth noting that the record further shows that the trial court and the attorneys below were all keenly cognizant of potential issues with a juror’s ability to serve, as there were numerous instances where issues regarding another juror (Juror 10) and his apparent issue with staying awake during trial were discussed. *See, e.g.*, RP 995-96, 1318-26, 1537-38, 2133, 2191. The trial court ultimately excused Juror 10 due to these issues. RP 2191-93.

In light of the record in this case and the caselaw cited above, Defendant has failed to show that the trial court in the present case abused its discretion in not sua sponte striking Juror 26 for cause when the record failed to firmly establish that Juror 26 was somehow unable to meet the necessary requirements of a juror and when, due to the defendant's failure to challenge Juror 26, the trial court could have concluded that raising a sua sponte challenge to the juror could have interfered with trial counsel's jury selection strategy. For all of these reasons the Defendant has failed to prove that the trial court abused its discretion.

B. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN LIMITING THE DEFENDANT'S CROSS EXAMINATION OF SEVERAL WITNESSES ABOUT THE WHEREABOUTS OF ANOTHER POTENTIAL WITNESS IS WITHOUT MERIT BECAUSE THE RECORD SHOWS THAT THE DEFENSE ACTUALLY WITHDREW SEVERAL OF THESE QUESTIONS AND THAT THE TRIAL COURT DID NOT ABUSED ITS DISCRETION IN FINDING THAT THE OTHER QUESTIONS THAT WERE NOT WITTHDRAWN RELATED TO IRRELEVANT EVIDENCE THAT WAS NOT MATERIAL TO ANY OF THE ISSUES IN THE CASE BELOW.

The Defendant next argues that trial court erred in limiting her ability to cross examine several witnesses about the whereabouts of another potential witness (Regina Golden) who did not appear at trial. App.'s Br. at 19. This claim is without merit because the Defendant has failed to show

that the trial court abused its discretion. Furthermore, even if one were to assume for the sake of argument that there had been an error, any error in this regard was clearly harmless.

A trial court's decision to admit or deny evidence is reviewed for an abuse of discretion. *State v. Scherner*, 153 Wn. App. 621, 656, 225 P.3d 248 (2009). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

In the present appeal the Defendant specifically argues that there were four instances where the trial court restricted the defense's ability to cross examine witnesses about Ms. Golden's whereabouts. App.'s Br. at 23. The first such instance was during the cross examination of Detective Muse, and the Defendant notes that in this instance the trial court indicated that because Ms. Golden had not yet testified, any statements she might have made to Detective Golden were not relevant to impeach Ms. Golden. App.'s Br. at 23, citing RP 1001-02. The Defendant claims that this ruling

shows that the trial court “did not fully understand” how this evidence was relevant and that the trial court erroneously believed that the evidence was only relevant to impeach Ms. Golden. App.’s Br. at 23-24. Yet, when the trial court asked defense counsel how the evidence was relevant, defense counsel simply said, “Bias. Your Honor.” RP 1001. The trial court then ruled that relevance had not been established because any bias that would be used to impeach Ms. Golden was not yet relevant because Ms. Golden had not testified. RP 1001-02. Defense counsel never explained that it was seeking to introduce the evidence to show someone *else’s* bias (other than Ms. Golden), so the trial court can hardly be faulted for failing to “understand” the defense theory at this point. RP 1002.

The Defendant next points out the trial court’s ruling regarding defense questioning of Christine Kilpatrick, Ms. Golden’s mother. App.’s Br. at 24. Here the Defendant’s claim appears to be that the defense should have been allowed to question Ms. Kilpatrick about the fact that Ms. Golden had a daughter who lived with Ms. Kilpatrick, and that Ms. Golden’s parentage of this other child was somehow relevant because it was unlikely that Ms. Golden would have left her child in her stepfather’s care for three months. App.’s Br. at 24-25, citing RP 1386-87. It thus appears that the defense argument was that Ms. Golden had a daughter and it would be unlikely that she would have left this daughter in someone else’s care for

three months, which arguably supports a conclusion that Ms. Golden was not actually out of state for three months, and that the other witnesses' statements that Ms. Golden was out of state were not truthful and somehow showed bias, which made their other statements less credible. See, RP 1386-87. The State objected to the evidence regarding the child's parentage because this was "quite a stretch of relevance" and that any minimal relevance was outweighed by the danger of unfair prejudice, and that there was no need for the testimony since the defense investigator could testify that she had recently seen Ms. Golden in the state. RP 1387-88. The trial court ultimately held that the proposed evidence was "a bit far removed" and would lead to confusion of the issues, and thus sustained the objection. RP 1389. The court further explained that the defense was not precluded from bringing out evidence that Ms. Kilpatrick was possibly secreting Ms. Golden, and that the trial court's ruling was based on the "confusion of the issues." RP 1391.

Given the tenuous connection between the parentage of Ms. Golden's daughter and any issues in the case, the trial court clearly acted well within its broad discretion in excluding the proposed questioning since the evidence was far removed from any issue in the case and was based on speculation that it would somehow be unlikely for Ms. Golden to leave her biological daughter in the care of someone else for three months while Ms.

Golden worked out of state: a conclusion of questionable validity. Additionally, even assuming the evidence would have somehow made it more likely that Ms. Golden was in Washington, that fact (even if true) did not clearly demonstrate that any witnesses were biased against the *Defendant*. Furthermore, the trial specifically clarified that defense counsel could continue to bring out evidence regarding whether Ms. Kilpatrick was hiding Ms. Golden, it was just that attempting to do so through evidence regarding the parentage of Ms. Golden's daughter was too attenuated and ran the risk of confusing the issues. RP 1391. Given this, the Defendant cannot show an abuse of discretion.

The Defendant next turns to her attempt to elicit testimony from Norman Golden, Ms. Golden's husband, that Ms. Golden could not pass a background check with CPS and thus could not be a legal caretaker of the Defendant's children. App.'s Br. at 27. The state objected to this question, and outside the presence of the jury the trial court asked defense counsel how the question was not hearsay and, even if the question was not calling for hearsay, for what purpose the evidence was being offered? RP 1468. Defense counsel said the evidence was being offered for "bias" and the court asked, "Bias for or against who?" RP 1469. Defense counsel then responded that it was regarding "bias against my client" and that,

It's something that we're going to establish through other witnesses. We have not – we clearly haven't put on our case yet. And then our other option is to simply recall these witnesses.

RP 1469. The trial court then stated,

All right. Here are my thoughts on this issue. The defense is absolutely free to explore bias -- always, with any evidence -- subject to a 403 weighing of probative versus prejudice, but I think, as just a general matter, the right to confrontation requires fairly wide latitude to explore bias and that, obviously, will be upheld in this courtroom, but having said that, there is -- I'm not sure how it's relevant to show bias yet, and I'm not asking you to lay your cards out on the table at this time, Mr. Evans. If you want to do so, and you can articulate exactly how it's going to be relevant down the road and the other pieces that you expect to fall into place, I'll give you that opportunity now.

...

Before we do that, I also wanted to say, I'm not forcing you to do that at this time either, and if you would, you know, rather maintain some aspect of your trial strategy confidential at this point, understanding that that means that the witness will be recalled, I'll give you that opportunity too. It's entirely up to you.

RP 1471-72. In response to this invitation to explain the purpose of this line of questioning, defense counsel simply withdrew the question by stating as follows:

Your Honor, you know what we're going to do, we'll withdraw the question, and we'll let the Court deal with it that way. I'll establish it later.

RP 1472.

As the defense withdrew the question, it simply cannot be said that the trial court abused its discretion in light of the fact that the defense chose not to explain the purpose for the evidence and instead chose to address the issue later. In short, the Defendant cannot show any error with respect to this line of questioning since the defense withdrew the question completely.

The Defendant next complains that the defense was unable to elicit evidence from Ms. Woodard about the process of background checks required by CPS for long term placement of children. App.'s Br at 28; RP 1640-41. RP 1640-41. The State objected to the relevance of such testimony, and when the court asked for a response the defense stated that, “[W]ell, it comes up partly about this witness that we don’t have before us, Your Honor.” RP 1641. The defense then explained that the defense theory was that the evidence related to Ms. Golden, stating,

Sorry. You've heard our argument about this subject before, Your Honor. It is in relation to the witness we don't have yet, intended to be the same sort of evidence, but she's coming at some point in the future potentially. I guess I would ask that I be provided, provisionally, through this witness, if I don't know if she's going to come or not.

RP 1641. The State then argued that this was an “entirely collateral matter” and that the defense argument was based on a chain on inferences or speculation and essentially amounted to an claim that Ms. Golden, was deceptive with CPS, was therefore a bad person who therefore must have

coached the victims in the present case, and therefore the victims' testimony was not credible. RP 1645.

The trial court then stated that it agreed with much of the State's argument and that "to the extent that the ultimate point is an inference that she's coached the children, it really is inference heaped upon inference heaped upon inference, and it just becomes so remote, so attenuated as to become excludable under 403." RP 1646. The trial court also asked defense to address whether this was truly a collateral issue, and whether this was an issue that needed to be explored through the testimony of the current witness (Ms. Woodard). RP 1647.

Defense counsel responded by stating that the issue did not need to be explored through this witness, essentially withdrawing the question. RP 1648-49. Specifically, the exchange at issue was as follows:

THE COURT: I mean, I -- do we need to explore this any further with this witness?

MR. CURRIE: No, Your Honor.

THE COURT: Is anyone making any argument, as it relates to this witness, whether Ms. Golden lived there is not collateral but is instead material, as it relates to the testimony of -- well, doesn't matter if it relates to the testimony of this witness or another witness, if it's an issue that is material to the trial?

MR. CURRIE: I don't think it would be through this witness anyway, Your Honor, now that I'm considering --

THE COURT: All right. So with that understanding, unless there's something else that you want the Court to evaluate, the objection is sustained as it relates to this witness.

MR. CURRIE: I will move on.

THE COURT: All right.

RP 1647-48. As with the previous witness discussed above, defense counsel ultimately withdrew the question once the trial court explained its questions regarding the admissibility of the proposed evidence. In the Defendant's brief to this Court she characterizes this exchange as one in which the trial "court indicated that the State's objection would be sustained as it related to Ms. Woodard's testimony," but the Defendant fails to mention that the question was withdrawn. See App.'s Br. at 30. The record, however, clearly shows that defense withdrew and abandoned its argument, at least as to the questioning of this witness. Given this fact the Defendant cannot show that the trial court abused its discretion since the question was withdrawn and defense counsel indicated that he would simply "move on." RP 1648.

Thus with respect to the four specific instances regarding proposed testimony, two of the instances involve situations where the defense withdrew the questions. The other two instances involve: (1) the tenuous issue regarding the parentage of Ms. Golden's daughter; and (2) the attempt to introduce out of court statements made by Ms. Golden to the detective. With respect to the statements made to the Detective, however, the defense

stated these were intended to show “bias,” yet when the trial court ruled that Ms. Golden’s bias was not at issue (since she had not yet testified) the defense failed to argue or explain at that time that its theory of “bias” applied to anyone other than Ms. Golden. Given these facts, the Defendant has fallen far short of demonstrating that the trial court abused its discretion regarding these four events from trial.

In addition, even if one were to assume error for the sake of argument, any error regarding the minimally relevant issue of Ms. Golden and her whereabouts (and its tenuous connection to any bias by other witnesses against the *Defendant*) was clearly harmless.

An evidentiary error that resulted from a violation of an evidentiary rule, not a constitutional mandate is not grounds for reversal if there is no prejudice to the defendant; that is it is not reversible unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Bourgeoise*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980). Furthermore, even under the more stringent constitutional standard, an error is harmless if the State can show that the error was harmless beyond a reasonable doubt. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

In the present case, the Defendant acknowledges that he was permitted to elicit testimony through the defense investigator that Ms. Golden lived in the State of Washington through its investigator. Br. of App. at 31. Specifically, the defense investigator testified that she located Ms. Golden on September 8, 2017 in Tacoma and served her with a subpoena, and that the person she served answered to the name of Regina Golden and matched a Facebook photo the investigator had of Ms. Golden. RP 1881-86.

Given this testimony, even if the trial court could be said to have somehow erred with respect to the earlier exclusion of evidence, any error was harmless as the defense was allowed to introduce direct evidence that Ms. Golden was in Washington shortly before trial. The earlier proposed evidence, therefore, would have been merely cumulative and thus any error was clearly harmless.³

For all of these reasons the Defendant's claims regarding the exclusion of evidence regarding the whereabouts of Ms. Golden must fail.

³ Furthermore, as the issue of Ms. Golden's whereabouts was only minimally (if at all) relevant to any of the actual issues before the jury, any error regarding this evidence was harmless beyond a reasonable doubt.

C. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING TESTIMONY FROM A WITNESS THAT SHE HAD NEVER DESIRED TO HIT THE VICTIM IS WITHOUT MERIT BECAUSE THE TRIAL COURT ACTED WELL WITHIN ITS BROAD DISCRETION IN ADMITTING THIS STATEMENT AND BECAUSE ANY ERROR IN ADMITTING THIS EVIDENCE WAS HARMLESS BEYOND A REASONABLE DOUBT.

The Defendant next claims that the trial court erred in admitting evidence from B.C.'s aunt that she never became so frustrated with B.C. that she wanted to hit him. App.'s Br .at 32. The Defendant's claim is without merit because the brief passage was relevant and because even if the evidence was improperly admitted, the one word answer at issue paled in comparison to the overwhelming evidence regarding the Defendant's assaults, and was thus harmless error.

A trial court's decision on the admissibility of evidence is reviewed for abuse of discretion. *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014). A trial court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *Dobbs*, 180 Wn.2d at 10, 320 P.3d 705, quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

One of the defenses to the assault charges in the present case was that the force used by the Defendant was reasonable parental discipline. See

e.g., CP 131, RP 822, 2173. Under this defense the issue before the jury was whether the force used, when viewed objectively, was reasonable and moderate. CP 131.

In addition, another of the issues in the present case was the timing of the assaults, since the children had been in the care of the Defendant at various times and also in the care of others (such as Ms. Rogers). In order to establish the timing of the assaults and injuries, the State elicited brief testimony about whether Ms. Rogers hit B.C. to establish that the scars on B.C.'s body were not caused by her and to establish a rough timeline of events. RP 1305-06, 1312, 1365-66. Given the fact that B.C. was assaulted by the defendant at multiple points in his life and had moved from one place to another, establishing such a timeline was essential to show the jury which pieces of evidence applied to which of the defendant's criminal incidents.

Specifically, the State asked Ms. Rogers if B.C. had sustained any injuries while he was in her care. RP 1365. The State also asked Ms. Rogers if she had ever hit B.C., and Ms. Rogers responded, "No." RP 1366. The prosecutor then asked if she had ever become so frustrated in dealing with B.C. that she wanted to hit him. RP 1366. The defense objected on the basis of relevance, and the trial court overruled the objection. RP 1366. Ms. Rogers then responded with a simple, "No." RP 1366-67. Nothing more was made of this point.

Although the State concedes that this statement was not critical evidence, the brief testimony nevertheless was relevant as it related to the severity of B.C.'s behavioral problems and how Ms. Rogers coped with those, and was relevant to fleshing out Ms. Roger's claim that she had never hit the child.

Furthermore, as stated previously an evidentiary error that resulted from a violation of an evidentiary rule, not a constitutional mandate, is not grounds for reversal if there is no prejudice to the defendant; that is it is not reversible unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *Bourgeoise*, 133 Wn.2d at 403. Furthermore, even under the more stringent constitutional standard, an error is harmless if the State can show that the error was harmless beyond a reasonable doubt. *Guloy*, 104 Wn.2d at 425.

In the present case the fact that Ms. Rogers stated she never felt the desire to hit B.C. was mentioned only once. Even if the trial court erred in allowing Ms. Rogers to answer this brief question, any error was clearly harmless since the statement did not implicate the Defendant and because of the vast evidence regarding the violent assaults on B.C. that went well beyond anything that could conceivably be considered reasonable parental discipline. For this reason, any error in regard to Ms. Roger's brief

statement was harmless, even under the more stringent constitutional standard.

D. THE DEFENDANT'S CLAIM OF PROSECUTORIAL MISCONDUCT IS WITHOUT MERIT BECAUSE THE DEFENDANT HAS SHOWN NEITHER IMPROPER CONDUCT NOR PREJUDICE.

The Defendant next claims that the prosecutor below committed prosecutorial misconduct by asking a witness to state the total length of the redacted jail calls. App.'s Br. at 34. This claim is without merit because the Defendant has failed to show that the prosecutor's action were improper or that there was any prejudice.

To establish prosecutorial misconduct, an appellant must prove that the prosecutor's conduct was improper and that this improper conduct prejudiced his right to a fair trial. "Prejudice on the part of the prosecutor is established only where 'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)).

The burden rests on the defendant to show the prosecuting attorney's conduct was both improper and prejudicial. *State v. Gregory*, 158 Wn.2d 759, 858, 147 P.3d 1201 (2006). Once proved, prosecutorial misconduct is grounds for reversal only where there is a substantial likelihood the

improper conduct affected the jury. *Id.* at 841; *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Defense counsel's failure to object to the misconduct at trial constitutes waiver on appeal unless the misconduct is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice" incurable by a jury instruction. *Gregory*, 158 Wash.2d at 841, (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)). Even where defense has properly preserved an objection, "the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); *State v. Thorgerson*, 172 Wn.2d 438, 442-443, 258 P.3d 43 (2011).

In the trial below the State admitted redacted portions of jail calls made by the Defendant. RP 1802; Ex 48. In the present appeal the Defendant's claim of prosecutorial misconduct is based on his claim that it was improper for the State to ask Deputy Pearson about the total length of the jail call recordings. App.'s Br. at 36-37.

With respect to the recordings, Deputy Pearson testified that he created three discs containing recordings of phone calls the Defendant made from the jail. RP 1556. Regarding the first disc, Exhibit 40, the State asked Deputy Pearson "what calls are contained on that disk?" RP 1557. The deputy responded that the disc contained 382 calls and that there were

3,641.38 minutes or 60.68 hours of recordings on the disc. RP 1557. No objection was made to this testimony.

With respect to the other two disks (Exhibits 41 and 42), the Deputy testified that the second disc contained 300 calls and the third contained 320 calls. RP 1559-60. The state asked what the total length of the recordings were on Exhibit 41, and the Deputy responded that it was 3,048 minutes. RP 1560. No objection was raised. The state then asked if the deputy converted that total to hours, and the defense objected. RP 1560. The trial court overruled the objection. RP 1560. With respect to Exhibit 42, the Deputy testified that there were 320 calls on that disk and when the State asked for the total length of those recordings, the defense objected. RP 1561. The trial court then asked the State to explain the relevance of the question, and the State responded,

“Your Honor, by way of offer of proof, I intend to – it’s a way of getting at the fact that these will be redacted, not presented in their entirety and explaining why that is.”

RP 1561. The trial court sustained the objection and noted that the issue could be addressed later outside the presence of the jury. RP 1561. When the matter was next raised, the following exchange took place,

THE COURT: The jury is out of the room. Before we go off the record for our morning break, I just wanted to make a brief record of a previous exchange that occurred in front of the jury where Mr. Cummings had asked Officer Pearson to convert minutes into a number of hours. There was an

objection. That objection was overruled. It was overruled because the number of minutes was already out there, a simple conversion didn't seem to be inappropriate. Thereafter, with respect to another exhibit, there was a question regarding the total number of minutes of phone calls. There was an objection there. Mr. Cummings had indicated he just wanted to be making -- he wanted the ability to make a record of the fact that certain elements were redacted, and I think it's appropriate to make a record of that; however, to the extent that evidence has been redacted, I think it's appropriate to make a record of it outside the presence of the jury, and that's why that objection was sustained, so I would invite you to make a record regarding redactions. I would ask you that it be made outside the presence of the jury. Having said that, if there's nothing else to put on the record at this point, we'll be at recess for 15 minutes.

MR. CURRIE: I expect that we'll be offering some record along with the stipulation outside the presence of the jury when we proffer that, Your Honor.

MR. CUMMINGS: I agree, Your Honor.

THE COURT: All right. Thank you. Court is at recess.

RP 1583-84. Later, the parties drafted an agreed stipulation and the Court then admitted Exhibit 48 and read the following stipulation to the jury:

THE COURT: You are about to hear recordings of calls contained on Exhibit 48. These calls are excerpts of the calls that are contained on Exhibits 40, 41 and 42. All calls were made using the personal identification number of Natashia Britt. The names of the files on Exhibit 48 contain the date and time on which the call was made. The parties have agreed that these times and dates are accurate. For example, a file name containing 09.15.16-1100 was made at 11:00 a.m. on September 15, 2016. The State will now publish these files as part of the presentation of this case and the parties will announce which file they are playing before they play it for you.

RP 1789, 1802. As the stipulation explains, the recordings admitted as Exhibit 48 were “excerpts” from the calls contained on the three discs prepared by Deputy Pearson. RP 1802, Exhibit 52.

On appeal, the Defendant complains that it was misconduct for the State to elicit testimony that the recordings had been redacted, and that “the fact of redaction made it seem Britt and her lawyers intended to hide damaging evidence,” and also suggested that there was “significant additional inculpatory evidence that further implicated Britt in the crimes” and that “no other explanation conceivably exists for the introduction of testimony that hours of jail calls would not be shared with the factfinder.” App.’s Br. at 40.

The Defendant’s contentions are without merit. First, it is clear from the record that the State inquired about the total length merely to point out that the total length of calls was so vast that it would be impractical to play them all at trial. See, e.g., RP 1563. In addition, there was never any suggestion by the State whatsoever that the redactions were made at the request of the defense or that there was anything relevant whatsoever in the other phone calls. If anything, the record shows that the disks were made at the request of the State. RP 1564.

In addition, there was no objection to the testimony regarding the length of the calls initially, and when the defense did object the trial court

sustained the objection and noted merely that the record of the fact that there was a redaction should be made off the record. RP 1583-84. The parties then agreed to a stipulation that specifically informed the jury that Exhibit 48 contained “excerpts” of the jail calls. RP 1789, 1802; Exhibit 52. The defense raised no objection with this information going to the jury; in fact it was an agreed stipulation, RP 1789; Exhibit 52.

Given these facts, the Defendant cannot show that the prosecutor acted improperly in eliciting evidence that explained that the recordings were redacted. To the contrary, the Defendant agreed that the jury should be, and was, informed that Exhibit 48 was “excerpts” of recordings taken from the three disks made by Deputy Pearson. Furthermore, the Defendant never objected to the fact that the jury was informed of the redaction; rather, the only defense objection was to the testimony regarding the total length of the recordings. The Defendant’s suggestion that the State acted improperly in introducing the fact of redaction is inaccurate as this fact was introduced by agreement. Furthermore, the suggestion that the State’s mention of the length of the recording was “inflammatory” or misconduct is absolutely inconsistent with the record below which clearly demonstrates that the parties agreed to inform the jury that the recordings that were played at trial were “excerpts” taken from the disks created by Deputy Pearson.

The Defendant's claim of prosecutorial misconduct, therefore, is without merit because he can show neither that the prosecutor's action were improper or that there was any prejudice.

E. THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IS WITHOUT MERIT BECAUSE THE DEFENDANT HAS FAILED TO SHOW EITHER DEFICIENT PERFORMANCE OR PREJUDICE.

The Defendant next claims that he received ineffective assistance of counsel because his trial counsel failed to object to hearsay evidence contained on the redacted forensic interview videos that were admitted at trial. App.'s Br. at 41. This claim is without merit because the Defendant cannot show either deficient representation or prejudice.

To prevail on an ineffective assistance claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32–33, 246 P.3d 1260 (2011). Representation is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id* at 33. Prejudice exists if there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have been different. *Id* at 34.

Furthermore, trial counsel's decisions are afforded great deference. App.'s Br. at 26, citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d

1251 (1998). In addition, “[b]ecause the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *McFarland*, 127 Wn.2d at 336.

In the present case the Defendant is correct that there are certain portions of the redacted video of the forensic child interviews, Exhibits 43 and 47, that defense counsel could have chosen to object to as hearsay that fell outside the scope of RCW 9A.44.120. Defense counsel, however, had valid tactical and strategic reasons for doing so. Namely, that admission of the various statements in the videos showed B.C. making several statements that defense counsel argued were inconsistent, which counsel in turn argued rendered B.C.’s testimony unreliable.

In fact this was the central theme of the defense attorney’s argument with respect to B.C. In closing argument, defense counsel repeatedly argued that the jury should closely examine B.C.’s testimony from the witness stand and his statements on the two videos. RP 2131. Specifically, defense counsel noted in closing that he was “going to be talking about comparing a lot of things between those” and that the various statements “show that [B.C.] is not consistent between any of them.” RP 2131. When defense counsel specifically addressed B.C.’s statements, defense counsel repeatedly emphasized specific instances where defense counsel argued that

B.C.'s statements were inconsistent. For instance, defense counsel noted that in the video B.C. claimed that Renita McCane pointed a gun at him, a fact which he essentially denied at trial. See, e.g., RP 2157. Defense counsel also noted that B.C.'s never mentioned the breastfeeding incident in the first video interview, but only mentioned it in the second interview, and that his description of when this event occurred changed dramatically. RP 2162-65; see also, RP 2166 (defense counsel arguing that B.C.'s testimony was different than in the two interviews and that the two interviews themselves differed as well).

Furthermore, with respect to B.C.'s statements regarding the photo of the Defendant performing oral sex on someone (the primary instance raised by the Defendant in this appeal of a statement that should not qualify as child hearsay), defense counsel specifically argued in closing that at trial B.C. only mentioned a photo regarding a "pickle jar." RP 2175-76. Defense counsel then argued,

Did the evidence show beyond a reasonable doubt that, in fact, he was shown that—those photos of the blow job photos or not? Listen to what – his notes on [what] his testimony is and then what his other recorded testimony is about that. Okay?

RP 2178.

These passages from defense counsel's closing argument demonstrate that defense counsel clearly had a tactical or strategic reason

for allowing some of B.C.'s statements that were not technically child hearsay to be admitted: namely, to demonstrate that B.C.'s various statements were inconsistent.

This strategic decision was also a reasonable one because if the jury agreed that B.C. gave inconsistent statements about the events underlying the communication with a minor charge (a gross misdemeanor) then the jury might conclude that this inconsistency cast doubt on B.C.'s statements regarding the much more serious charges. In short, by allowing in some inconsistent statements about the gross misdemeanor, defense counsel opened an avenue to attack the greater charges. This potential benefit greatly outweighed any potential danger because the communicating with a minor charge was only a gross misdemeanor and because the jury had already heard the Defendant's admission on the jail call recording that she had shown the "Two girls, one cup" video to the boys. Thus, the State's evidence regarding the communication charge was already strong and any potential danger from admitting B.C.'s statements from the forensic interviews was minimal.

For all of these reasons the Defendant has failed to show that defense counsel lacked a strategic or tactical reason for allowing some additional portions of the child interviews to be admitted. In addition, the Defendant cannot show prejudice because the jury had already heard the defendant

admitting to showing the boys the pornographic video, and thus there was no danger in admitting the other statements about the photo.

For all of these reasons the Defendant's claim of ineffective assistance of counsel must fail.

F. THE DEFENDANT CLAIM THAT THE TRIAL COURT ERRED IN IMPOSING THE DNA COLLECTION FEE IS WITHOUT MERIT BECAUSE THE DEFENDANT HAS FAILED TO SHOW THAT THE TRIAL COURT ERRED IN IMPOSING THIS MANDATORY FEE. THE STATE CONCEDES, HOWEVER, THAT THE \$200 FILING FEE SHOULD BE STRICKEN.

The Defendant next argues that DNA collection fee and Criminal Filing Fee must be stricken. App.'s Br. at 50. The State conceded that the \$200 filing fee should be stricken. The Defendant's claim regarding the DNA collection fee, however, is without merit as the Defendant has failed to show that the trial court erred in imposing this mandatory fee.

With respect to the DNA fee, RCW 43.43.7541 provides that the DNA fee is *mandatory* unless the state has previously collected the offender's DNA. The Defendant, however, argues that the State must have already collected her DNA because she has a prior conviction for "domestic violence fourth degree assault," and that the RCW 43.43.754(1)(a)(i) requires the collection of a DNA sample in assault in the fourth degree cases where domestic violence is plead and proven. App.'s Br. at 51, citing CP 211. Page 211 of the Clerk's Papers, however, does not address the

Defendant's prior convictions. Pages 208 and 213 of the Clerk's Papers do show the Defendant's prior convictions and show an "Assault 4th Deg" conviction from 2015, but there is no notation showing that domestic violence was plead and proven for this offense. Thus, because the existing record does not establish that the State has already collected the Defendant's DNA, she has not demonstrated that it was impermissible to impose the collection fee. See, *State v. Thibodeaux*, 6 Wn.App.2d 223, 230, 430 P.3d 700 (2018).

With respect to the filing fee, the State concedes that this fee should be stricken pursuant to *State v. Ramirez*, 191 Wn.2d 732, 747-50, 426 P.3d 714 (2018).

G. THE DEFENDANT'S CLAIM THAT SEVERAL PROVISIONS OF THE JUDGMENT AND SENTENCE RELATING TO THE PROHIBITION ON CONTACT WITH MINORS AND RELATING TO THE REQUIREMENT OF A PSYCHOSEXUAL EXAMINATION ARE MOOT AS THE TRIAL COURT PREVIOUSLY ENTERED AN AGREED ORDER STRIKING THOSE PROVISIONS.

Finally, the Defendant argues that the provision of her sentence regarding no contact with minors and the provision requiring a psychosexual examination should be stricken. App.'s Br. at 52. This argument is moot because the trial court already entered an agreed order striking these provisions. CP 258-62.

The Defendant acknowledges the existence of the Order to Amend the Judgment and Sentence, but claims the order is invalid because the Department of Corrections was not involved in the amendment. App.'s Br. at 57-59, *citing In re Gossett*, ___ Wn.App.2d ___, 435 P.3d 314 (2019). *Gossett*, however, is irrelevant to the present case.

In *Gossett*, the court held that a Superior Court's order amending a judgment and sentence was invalid because it specifically required the Department to allow the defendant to have supervised visitation with his children "at any DOC facility in which the Defendant is housed." *Gossett*, 435 P.3d at 317. The court held that this order was not binding on the Department because the Department had not been not made a party to the proceedings. The court in *Gossett* further explained that the facts before it were different than a typical case because the order pertained to "the routine management of one of its prisoners." *Id* at 321. *Gossett*, therefore, clearly involved a unique set of facts and has no bearing on this case, as the order in the present case does not mandate or direct how the Department is to operate its facilities.

The Defendant also points out that the order in the present case was entered after review was accepted, and that this Court did not give permission for the entry of the order as required by RAP 7.2(a). While the Defendant is technically correct, it would be a waste of judicial resources to

nullify the agreed order (which gave the Defendant the relief she requested) and remand this case for entry of an identical order. The State, therefore, respectfully suggests that this Court simply ratify the agreed order along with instructions that in future cases the parties should seek permission from this Court prior to the entry of similar orders.

IV. CONCLUSION.

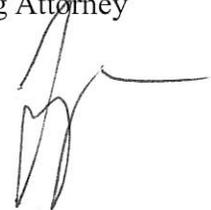
For all of the reasons stated above, this Court should affirm the defendant's convictions and sentence, except for the \$200 filing fee, which the State concedes should be stricken.

DATED: June 6, 2019

Respectfully submitted,

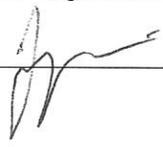
MARY E. ROBNETT
Pierce County Prosecuting Attorney

JEREMY A. MORRIS
WSBA No. 28722
Special Deputy Prosecuting Attorney
Glisson & Morris, PS
623 Dwight Street
Port Orchard, WA 98366
PH: (360) 519-3500



Certificate of Service:

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

6/6/19 _____
Date Signature 

GLISSON & MORRIS

June 06, 2019 - 2:31 PM

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