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Division II
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NO. 51298-0-II

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

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOHN BROOKS,

Appellant.

RESPONDENT'S BRIEF

**JASON LAURINE/WSBA 36871
Deputy Prosecuting Attorney
Representing Respondent**

**HALL OF JUSTICE
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I. INTRODUCTION

On November 3, 2017, a jury convicted John Michael Brooks (Brooks), who has five prior convictions for first degree child rape, with two counts of first degree child rape (domestic violence). Brooks repeatedly raped his daughter, then-six-year-old¹ A.B., during the timeframe between May 20, 2015 and March 31, 2016. Clerk's Papers (CP) at 34-35, 110-13, 127, 130. In his appeal, Brooks argues his convictions for raping A.B. should be reversed because he contends (1) the trial court improperly allowed one out-of-state witness to testify via Skype during a preliminary evidentiary hearing on the admissibility of child hearsay statements; (2) the trial court gave an improper *Petrich*² instruction; and (3) he suffered ineffective assistance of counsel when his attorney did not object to the prosecutor's rebuttal closing argument referencing A.B.'s fear for her little sister's safety.

This Court should affirm. As discussed further below, the trial court did not abuse its discretion in allowing the preliminary Skype testimony. Trial courts are given great discretion in determining what evidence will be admitted trial. Here, the trial court accepted testimony of a single out-of-state witness via Skype during a preliminary hearing on the admissibility child hearsay statements under RCW 9A.44.120. These

¹ A.B. was born September 9, 2009. Verbatim Report of Proceedings (VRP) 6 at 126.

² *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

hearings are held outside the presence of the jury and prior to trial testimony. The trial court acknowledged the inherent financial concerns of requiring the out-of-state witness to appear in person on multiple occasions and opted to utilize technological advances that permitted her contemporaneous testimony, which is permissible and a proper exercise of its discretion in controlling matters of the court under Washington case law and the court rules. Furthermore, the trial court recognized that determining admissibility was only a preliminary matter. In order to admit any hearsay statements made by a child at trial, Washington law requires the child to testify and be questioned about those statements. And even though the out-of-state witness was permitted to testify via Skype, the trial court did not excuse the witness from testifying in-person at trial, thus preserving the defendant's right to confrontation.

Next, taken as a whole, the trial court's jury instructions were consistent with *Petrich* and proper—they informed the jury correctly that it was required to premise a conviction under Count II on an actus reus separate and distinct from Count I. Brooks' argument to the contrary cites only instruction number 11, conveniently leaving out instruction 10. *See* Br. of Appellant at 19-23.

Finally, Brooks' ineffective assistance of counsel argument is unavailing—he cannot demonstrate deficient performance because the

prosecutor's statements were merely a response and rebuttal to Brooks' attorney's own references to A.B.'s little sister, which had fit into defense counsel's argument and theory of the case. Even if Brooks' attorney should have timely objected, Brooks cannot demonstrate prejudice.

Accordingly, this Court should affirm.

II. ISSUES

1. Did the trial court abuse its discretion by allowing one witness to testify at a Pre-Trial evidentiary hearing via Skype?
2. Taken as a whole, were the trial court's jury instructions consistent with *Petrich* and therefore proper?
3. Did Brooks suffer ineffective assistance of counsel when his attorney did not object during the State's rebuttal closing argument?

III. STATEMENT OF THE CASE

On November 3, 2017, a jury convicted Brooks with two counts of first degree child rape (domestic violence), based on Brooks having repeatedly raped A.B. during the timeframe between May 20, 2015 and March 31, 2016. CP at 34-35, 110-13, 127, 130.

Prior to trial, the State informed the trial court that a *Ryan*³ hearing would be necessary "to determine whether or not evidence itself [was] going to be admissible." VRP 1 at 4. The State requested that some witnesses testify via Skype due to financial impracticality. *See id.*

³ *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

Defense counsel at the time initially did not object. VRP 1 at 5. The trial court agreed to allow testimony via Skype, stating that “the issue is the admissibility of the evidence, so there are all sorts of evidentiary safeguards that don’t apply.” *Id.* Further, the trial court reasoned that “given the distances involved and the nature of the hearing, I think it would be appropriate.” *Id.*

Brooks’ next attorney did object to preliminary testimony via Skype. VRP 1 at 7. He contended that RCW 9A.44.150 applied to *Ryan* hearings and that the statute had specific requirements that had to be met for the trial court to allow Skype testimony. CP at 18-19. In response, the State highlighted the fact that the issue before the court was not allowing testimony via Skype at trial, but allowing Skype testimony to determine admissibility of statements at trial. CP at 23. The State contended that consistent with RCW 9A.44.120 (the statute related to *Ryan* hearings), the child victim witness in this case would still be required to testify at trial in front of the jury. *Id.* Further, the State cited *State v. Foster*, 135 Wn.2d 441, 469-70, 957 P.2d 712 (1998) as authority, contending that *Foster* held that the use of closed-circuit testimony in a *Ryan* hearing was permissible when it was used under the protections outlined in RCW 9A.44.150.

Ultimately, the Court permitted testimony at the *Ryan* hearing via Skype, reasoning that

Well, first of all, as to the witnesses other than the alleged victim, I think that case law and the change of the court rule it's pretty clear that the Court can make that call based on a number of factors, including convenience to the Court, to the parties, and to the witnesses. Given that these witnesses are located, as I recall, in the State of Nevada this is a relatively-short hearing that occurs well prior to trial and makes it rather difficult to – for everybody here for both of those. And because this is a hearing on a preliminary question of admissibility where our Evidence Rules don't apply, it seems to me that testimony by what amounts to closed circuit television, for those of less technically minded but has the same result, I think, is appropriate. The Defendant still has the full opportunity to question those individuals; everybody gets not only to hear what they have to say but to see them as they say it. The fact that it's done from some distance away I don't think changes the process for either party or for the fact finder.

Id. at 13-14. By “the change of the court rule,” the trial court was presumably relying on CR 43(a)(1), which was amended by the Washington Supreme Court in in 2010 to permit testimony by electronic means.

At trial, the State presented extensive evidence of multiple incidents of Brooks' ongoing sexual abuse of A.B. A.B. herself testified, describing incidents of sexual intercourse, fellatio, cunnilingus, and digital penetration. VRP 6 at 130-144.

Sherri Brooks, A.B.'s step-grandmother, testified that she personally observed A.B.'s private area as red and raw while bathing A.B.

VRP 6 at 149 (“—and one day she took a bath and she was really crying about how bad her crotch hurt and when I gave her the bath I [saw] that her crotch was red and raw.”). She also testified that A.B. reported the abuse to her, including that A.B. described sexual intercourse, fellatio, cunnilingus, and digital penetration. VRP 6 at 150-161. Sherri Brooks also testified that she surreptitiously observed A.B. talking to Brooks on Skype and heard him say, “Is our secret still safe?” VRP 6 at 154.

John Hancock, a male child forensic interviewer at the Children’s Justice and Advocacy Center, testified that A.B. originally did not disclose abuse when he interviewed her, but that she paused and hesitated when asked questions related to the abuse and did not pause or hesitate when asked other questions, and that when he asked A.B. about “the secret,” she said “Daddy said don’t say anything. Don’t tell anyone about the secret.” VRP 6 at 177; VRP 7 at 212-13, 220, 226.

Samantha Mitchell, a female forensic interviewer, subsequently interviewed A.B., and A.B. did disclose the sexual abuse discussed above to Ms. Mitchell. VRP 7 at 228, 244-45; VRP 8 at 13-14, 25-50. Although A.B. did disclose details of sexual abuse, Ms. Mitchell also testified that A.B. at times withheld some information related to the abuse and demonstrated behavior consistent with nervousness and avoidance. VRP 8 at 52-54.

Randi Brooks, Brooks' estranged wife, testified that prior to A.B. living solely with Brooks for a period of time (the time period when the alleged abuse occurred), A.B. was consistently "happy" and "joyful," and that after A.B. returned from being with Brooks, she was "scared, shy, bashful, always hiding herself," and "crying." VRP 8 at 71-74. Randi had returned to Washington after learning about the abuse from CPS. VRP 8 at 74-75. After A.B. moved to Las Vegas with Randi, A.B. disclosed the sexual abuse discussed above to Randi. *See* VRP 8 at 76-80.

Courtney Each, a marriage and family therapist in Las Vegas, Nevada, testified⁴ that she was A.B.'s therapist and had been working with her since August 2016. VRP 8 at 98, 109. After A.B. and Ms. Each developed trust and a rapport, A.B. disclosed many instances of sexual abuse to Ms. Each over a period of sessions. VRP 8 at 111-13. A.B. discussed the abuse in some detail, including sexual intercourse (vaginal and anal), fellatio, cunnilingus, and digital penetration, and A.B. at times used dolls to better communicate with Ms. Each. VRP 8 at 118-158. For example, Ms. Each testified that "she disclosed that her father repeatedly performed oral sex on her and then she pointed to the doll's penis and then she would point to the doll's mouth." VRP 8 at 143.

⁴ This was live, in-person testimony at trial, where Brooks was present and cross examined her. *See* VRP 8 at 98, 158. Ms. Each was the sole witness who gave preliminary Skype testimony at the *Ryan* hearing. *See* VRP 2 at 8, 58, 90-91, 105.

Hillary Huges, an office assistant with the Longview Police Department (LPD), testified that Brooks called LPD's dispatch in May 2016, saying that "[Brooks] heard that he might be a suspect in a case and that he was just trying to get some more information and find out if there were any orders against him." VRP 9 at 203-205. She recalled Brooks stating, "They think I might have had sex with my daughter," and she said that Brooks volunteered that the abuse would have been alleged to have occurred at his apartment. VRP 9 at 205-206.

After the conclusion of testimony, among the trial court's original jury instructions, it gave a "to convict" jury instruction related to Count II's charged crime of first degree child rape in which it was not abundantly clear that the actus reus for Count II had to be separate and distinct from the actus reus for Count I's charged crime of first degree child rape. *See* CP at 89 ("That on, about, or between May 20, 2015 and March 31, 2016, the defendant had sexual intercourse with Arianna Brooks"). This presumably resulted in a question from the jury, in which it asked what the difference was between Count I and Count II. *See* CP at 87.

The trial court corrected that ambiguity by withdrawing and replacing that jury instruction⁵ with one that stated, in part, as follows:

⁵ The trial court noted it was supplementing its instructions after jury deliberations had begun pursuant to its authority under CrR 6.15(f)(2). *See* VRP 10 at 83.

I am withdrawing instruction number 10, which I gave you earlier. This means that you are not to consider that instruction for any reason. The bailiff will remove [all copies of] it from the jury room. If you have formed any opinion or conclusion based on the withdrawn instruction, you must reconsider the issues before you without regard to the withdrawn instruction. Instead of instruction number 10, I am giving you the following corrected instruction to replace it in your deliberations:

To convict the defendant of the crime of rape of a child in the first degree in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on, about, or between May 20, 2015 and March 31, 2016, *on an occasion separate and distinct from Count I*, the defendant had sexual intercourse with Arianna Brooks.

CP at 102 (emphasis added). The instruction went on to instruct the jury not to “attach special importance to the fact that this instruction was substituted for the previous one or that it was read separately to you.” *Id.*

Additionally, the trial court gave a *Petrich* instruction, which provided as follows:

The State alleges that the defendant committed acts of Rape of a Child in the First Degree on multiple occasions. To convict the defendant of Rape of a Child in the First Degree, as charged in count I, one particular act of Rape of a Child in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. To convict the defendant of Rape of a Child in the First Degree, as charged in count II, one particular act of Rape of a Child in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Rape of a Child in the First Degree.

CP at 103.

The parties agreed to use the above *Petrich* instruction. VRP 10 at 7-9. The jury had no further questions and the parties proceeded to closing argument. VRP 10 at 32.

During the prosecutor's initial closing argument, he did not mention the fact that A.B. feared for her little sister's safety because of Brooks. *See generally* VRP 10 at 32-50. However, during Brooks' closing argument, his attorney referenced A.B.'s fear that Brooks would kill her little sister if Brooks was found not guilty. *See* VRP 10 at 52 ("... and she's afraid will kill her little sister if her dad is found not guilty at this trial"); *see also* VRP 10 at 63 ("... it really ups the ante for the child to the point where – she gets to this point where she thinks if her dad is found not guilty, potentially he's going to kill her little sister. . . . Back in counseling: I don't want my little sister to be killed."). Brooks' attorney also referenced the fact that A.B.'s little sister had a speech impediment. *See* VRP 10 at 54 ("His youngest is in Broadway school, she's got a speech impediment, she has made a lot of progress over the past year and he keeps her there for that reason."). Brooks' attorney's references to A.B.'s little sister implied that A.B.'s fears were part of coached testimony, with an overall argument that A.B. was not telling the truth. *See generally* VRP 10 at 52, 54, 63.

In response to Brooks' attorney's references and argument, the prosecutor stated as follows as part of his rebuttal closing argument:

When you've been telling your child this is our secret, don't tell anyone, for a long time and you can just reach through the airwaves, through the computer and say remember about your secret don't tell anyone. That's a lot of power, a lot of control.

And let's think about then why it is that over a period of time after she's finally processed her feelings about this man who repeatedly raped her over a year, why it is that she's scared for her little sister? This is a little girl who finally found her voice when she spoke with her grandmother after a couple of weeks of living there with her. This is a little girl who is finally processing and becoming able to talk to you about it, about her feelings and about what happened to her. This is a little girl who has known her sister all her life, she has known that her sister has absolutely no voice, is incapable of talking.

So you ask why it is that she might be scared that the Defendant could do this to her little sister? Her sister can't talk to you about what happened to her, that is why. She doesn't want it to happen to her little sister because no one can defend her little sister. She is defending herself. She told you people what happened. She was terrified of doing so, and she still was able to tell you that she sucked his penis; that his penis went inside her vagina like this.

VRP 10 at 73-74.

Defense counsel did not contemporaneously object to the prosecutor's rebuttal. Instead, after the argument was over and the jury exited the courtroom for deliberations, defense counsel raised an objection regarding that argument and moved for a mistrial. Defense counsel stated as follows to the trial court judge:

Before you leave I – didn't – didn't want to interrupt counsel during argument. There was a portion of his rebuttal I was

concerned about regarding her little sister could not tell what happened to her. This little girl who can't talk and I'm concerned that that's pretty inflammatory. I understand the context, but I still think it's too much so I'm going to object and ask for a mistrial. I'm not really sure what kind of curative instruction could cure that. Thank you.

VRP 10 at 78-79. The trial court denied the motion for a mistrial. VRP 10 at 81.

The jury found Brooks guilty of first degree child rape in both Counts I and II. CP at 110, 111. The jury also found by special verdict that Brooks and A.B. were members of the same family or household, and that the crime was part of an ongoing pattern of sexual abuse of the same victim under age 18 manifested by multiple incidents over a prolonged period of time. CP at 112, 113.

Brooks timely appealed. CP at 127, 145; RAP 5.2(a).

IV. ARGUMENT

I. *The Trial Court Did Not Abuse its Discretion in Allowing Therapist Courtney Each to Testify Via Skype at a Pre-Trial Ryan Hearing*

The trial court did not abuse its discretion in allowing Therapist Courtney Each to testify at a pre-trial *Ryan* hearing via Skype, particularly given the fact that Ms. Each still testified at trial in person. Brooks' main argument is that CR 43(a)(1) and RCW 9A.44.150 did not authorize the trial court to permit Skype testimony at the pre-trial *Ryan* hearing because

CR 43(a)(1) is a civil rule and RCW 9A.44.150 is limited to testimony at trial from a child under age 14. *See* Br. of Appellant at 15-17. As discussed further below, that argument is misguided. Under Washington law, civil rules may be instructive in matters of criminal procedure where criminal rules are silent, and the trial court generally has broad discretion to make trial management decisions, including decisions related to admissibility of evidence and the order of the courtroom. The trial court properly relied on CR 43(a)(1), RCW 9A.44.150, and its inherent trial management authority in allowing Ms. Each to testify via Skype at the pre-trial *Ryan* hearing. Thus, the trial court did not abuse its discretion.

There is no criminal procedural rule that provides a process for witness testimony via Skype during a preliminary evidentiary hearing such as a *Ryan* hearing. However, CR 43 combined with RCW 9A.44.150 and the trial court's broad discretion in managing its own proceedings gives the trial court such discretion. CR 43(a)(1) provides as follows:

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise directed by the court or provided by rule or statute. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

Although civil rules by their terms apply only to civil cases, "the civil rules can be instructive in matters of procedure for which the criminal rules are silent." *State v. Gonzalez*, 110 Wn.2d 738, 744, 757 P.2d 925

(1988). In the criminal context, the criminal rules are silent regarding Skype testimony, whether it is for a pre-trial hearing or at trial. However, RCW 9A.44.150 permits testimony at trial through closed-circuit television upon a prosecutor's showing that forcing a child victim in a sex case in the presence of the defendant would cause the child to suffer serious emotional or mental distress that would prevent reasonable communication during trial. Finally, trial courts have broad authority in general to structure their own proceedings in the pre-trial context and during trial itself. *State v. Dye*, 178 Wn.2d 541, 547-48, 309 P.3d 1192 (2013). As the Washington Supreme Court stated in *Dye*:

The trial court is generally in the best position to perceive and structure its own proceedings. Accordingly, a trial court has broad discretion to make a variety of trial management decisions, ranging from the mode and order of interrogating witnesses and presenting evidence, to the admissibility of evidence, to provisions for the order and security of the courtroom. In order to effectuate the trial court's discretion, we grant the trial court broad discretion: even if we disagree with the trial court, we will not reverse its decision unless that decision is manifestly unreasonable or based on untenable grounds or untenable reasons.

Id. (internal quotations and citations omitted).

Here, CR 43 combined with RCW 9A.44.150 and the trial court's broad discretion in managing its own proceedings authorized the trial court to permit Ms. Each to testify via Skype during the pre-trial *Ryan* hearing. Because there is no criminal procedural rule discussing a

witness's ability to testify via Skype, it was reasonable for the trial court to look to CR 43 as persuasive authority. *See Gonzalez*, 110 Wn.2d at 744. Moreover, the fact that RCW 9A.44.150 authorizes closed-circuit testimony for testimony at trials, together with the trial court's broad inherent authority to structure its own proceedings, further bolsters the conclusion that the trial court had such authority. Using the underlying standards of CR 43, the trial court recognized good cause in compelling circumstances with appropriate safeguards to permit this pre-trial Skype testimony. The trial court considered the evidentiary nature of the hearing (it was a pre-trial hearing to determine the admissibility of statements at trial—not the trial itself), the location of the witnesses, the fact that the defendant could still cross examine any witnesses testifying via Skype at the hearing, and that the hearing would be virtually identical to in-person testimony. *See VRP 1* at 13-14.

Finally, it is important to highlight that Ms. Each did testify in person at trial subject to cross examination by Brooks, which should allay any concern that Brooks was somehow prejudiced by Skype testimony at a pre-trial evidentiary hearing. Her testimony was admitted only after the victim testified. *See State v. Clark*, 139 Wn.2d 152, 159, 985 P.2d 377 (1999) (holding that “the admission of hearsay statements will not violate the confrontation clause if the hearsay declarant is a witness at trial, is

asked about the event and the hearsay statement, and the defendant is provided an opportunity for full cross-examination); *see also State v. Kilgore*, 107 Wn. App. 160, 173-75, 26 P.3d 308 (2001) (holding that for purposes of RCW 9A.44.120, the confrontation clause is satisfied when a child victim witness either testifies at trial about abuse or is asked about statements and the defendant is given an opportunity to cross-examine the child). Here, both Ms. Each and A.B. testified in person at trial, and Brooks was able to cross examine both witnesses. VRP 6 at 125-144; VRP 8 at 98-186; VRP 9 at 191-202. Thus, the idea that Brooks somehow suffered prejudice by the pre-trial Skype testimony is implausible.⁶

2. *The Trial Court's Instructions Taken As a Whole Were Consistent with Petrich and Proper.*

Brooks next argues that the trial court failed to instruct the jury that in order to convict him of first degree child rape in Count II, the conviction had to be based on an actus reus separate and distinct from the actus reus of Count I. Br. of Appellant at 22. Brooks contends that because the trial court failed to do this, his right to a unanimous jury verdict under the Washington Constitution was violated and his conviction must be reversed. *Id.* at 19, 20. Brooks' argument misrepresents the trial court's jury instructions. Taken as a whole, the trial court instructed the

⁶ Furthermore, Brooks' argument that he suffered prejudice from the preliminary pre-trial Skype testimony is unavailing for the same reasons Brooks cannot demonstrate prejudice in his ineffective assistance of counsel claim. *See infra* pages 24-25.

jury correctly that it was required to premise a conviction under Count II on an actus reus separate and distinct from Count I.

“In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed.” *Petrich*, 101 Wn.2d at 569. *Petrich* recognized that in sex offense cases involving children, “[m]ultiple instances of criminal conduct with the same child victim is a frequent, if not the usual, pattern.” *Id.* at 572. Because of that pattern, “[w]hen the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected.” *Id.* Thus, in those cases, the State is required to either elect which act it is relying on for a conviction, or the trial court must instruct the jury that all jurors “must agree that the same underlying criminal act has been proved beyond a reasonable doubt[.]” *Id.* at 570, 572.

“Jury instructions should be read as a whole to determine their sufficiency.” *Peterson v. State*, 100 Wn.2d 421, 440, 671 P.2d 230 (1983); *State v. Foster*, 91 Wn.2d 466, 480, 589 P.2d 789 (1979). “Taken together, jury instructions are sufficient if they are readily understood and not misleading to the ordinary mind and permit a party to satisfactorily argue his or her theory of the case to the jury.” *Peterson*, 100 Wn.2d at 440.

Moreover, “the trial court has discretion whether to give further instructions to a jury after it has begun deliberations.” *State v. Ng*, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). CrR 6.15(f) expressly contemplates that a trial court may provide additional instructions after deliberations begin, so long as the instructions do not “suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.”

Here, taken as a whole, the trial court’s instructions correctly informed the jury that it was required to premise a conviction under Count II on an actus reus separate and distinct from Count I. Consistent with *Petrich*, the trial court instructed the jury that it must unanimously agree which act of rape of a child has been proved for each count, and that Count II would have to be “on an occasion separate and distinct from Count I.” CP at 102-103. Brooks’ argument cites only instruction number 11, conveniently leaving out instruction 10. However, “[j]ury instructions should be read as a whole,” and taken as a whole, the trial court’s instructions are sufficient. *Peterson*, 100 Wn.2d at 440. The fact that the trial court needed to give a supplemental instruction after the jury began deliberating in order to give a sufficient *Petrich* instruction is of no moment—it was well within the trial court’s discretion to supplement its

instructions. *Ng*, 110 Wn.2d at 42. Thus, the trial court properly instructed the jury and Brooks' argument fails.

3. ***Brooks Did Not Suffer Ineffective Assistance of Counsel.***

Finally, Brooks argues he suffered ineffective assistance "based upon trial counsel's failure to object when the state argued in rebuttal that the defendant had molested his younger daughter who was unable to communicate that crime to anyone." Br. of Appellant at 24-25. Brooks contends that "the state was arguing that the jury should convict based upon something other than the evidence or the law." *Id.* at 25. Brooks' argument distorts the prosecutor's statements and the context in which the prosecutor made them. As discussed further below, the prosecutor neither stated nor implied that Brooks molested A.B.'s younger sister; rather, his statements were merely a rebuttal to Brooks' trial attorney's own references to A.B.'s younger sister in his closing argument. The prosecutor's statements were proper for purposes of rebuttal and not objectionable. Even if they were objectionable, Brooks' trial attorney made a strategic choice in not objecting. Thus, Brooks cannot demonstrate that his attorney's performance fell below that required of a reasonably competent defense attorney. Even if he could make that showing, Brooks cannot show prejudice—he cannot demonstrate that but for his trial attorney's error, the result of the trial would have been

different. Accordingly, Brooks' ineffective assistance of counsel argument fails.

“Ineffective assistance of counsel is a fact-based determination,” and an appellate court “review[s] the entire record in determining whether a defendant received effective representation at trial.” *State v. Carson*, 184 Wn.2d 207, 215-16, 357 P.3d 1064 (2015). “The defendant bears the burden of establishing both ‘that counsel's performance was deficient’ and that ‘the deficient performance prejudiced the defense.’” *Id.* at 216 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). “Reviewing courts must be highly deferential to counsel's performance and ‘should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” *Id.* (quoting *Strickland*, 466 U.S. at 690). “‘When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.’” *Id.* at 218 (quoting *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)). “‘This presumption can be overcome if the defendant can establish that ‘there is no conceivable legitimate tactic explaining counsel's performance.’” *Id.* at 218 (quoting *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011)) (internal citations omitted). “The presumption of effective representation imposes on the defendant the burden on appeal

to ‘show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.’” *Id.* (quoting *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)).

When a defendant makes an ineffective assistance of counsel argument premised on trial counsel failing to object to alleged prosecutorial misconduct, reviewing courts look at the prosecutor’s comments “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Reviewing courts specifically consider whether a prosecutor makes a statement in rebuttal closing argument to rebut a defense attorney’s argument or case theme. *See id.* at 54-55.

For example, in *McKenzie*, the prosecutor referred to McKenzie as “guilty” four different times in rebuttal closing argument, and McKenzie contended his trial attorney should have objected to those statements because they evidenced the prosecutor improperly expressing her opinion as to McKenzie’s guilt. *Id.* at 52-53. The Supreme Court examined the totality of closing argument and the evidence presented at trial and determined that “the four instances in which the deputy prosecutor used the word ‘guilty’ in rebuttal closing argument were not expressions of the

deputy prosecutor's personal, independent opinion as to McKenzie's guilt. Rather, in each instance, the deputy prosecutor was responding to defense counsel's closing argument and interpreting the evidence." *Id.* at 54.

Here, similarly, Brooks cannot demonstrate deficient performance because the prosecutor's statements were not objectionable—they were a proper response to Brooks' attorney's argument and case theory. As discussed above, during Brooks' closing argument, Brooks' attorney referenced A.B.'s fear that Brooks would kill her little sister if Brooks was found not guilty. *See* VRP 10 at 52 (“... and she's afraid will kill her little sister if her dad is found not guilty at this trial”); *see also* VRP 10 at 63 (“... it really ups the ante for the child to the point where – she gets to this point where she thinks if her dad is found not guilty, potentially he's going to kill her little sister. . . . Back in counseling: I don't want my little sister to be killed.”). Brooks' attorney also referenced the fact that A.B.'s little sister had a speech impediment. *See* VRP 10 at 54 (“His youngest is in Broadway school, she's got a speech impediment, she has made a lot of progress over the past year and he keeps her there for that reason.”). Brooks' attorney's references to A.B.'s little sister implied that A.B.'s fears were part of coached testimony, with an overall argument that A.B. was not telling the truth. *See generally* VRP 10 at 52, 54, 63.

The prosecutor's rebuttal closing argument referencing A.B.'s little sister and why A.B. was afraid for her was a proper response, designed to combat Brooks' argument and case theme. In essence, the prosecutor rebutted defense counsel's argument that A.B.'s fear for her little sister's welfare was part of coached testimony and fabricated allegations. Rather, A.B. genuinely feared for her little sister's safety because A.B. had been raped over a long period of time by Brooks, and A.B. worried that Brooks would similarly harm her little sister. It took A.B. a long time to be able to report and speak about the rape, even without having the speech impediment or communication barrier that A.B.'s little sister had. Thus, the prosecutor's arguments properly responded to Brooks' attorney's argument and case theory.

Even if the prosecutor's statements were improper and warranted an objection, Brooks' attorney made a strategic choice in not objecting contemporaneously, instead waiting until the jury had exited the courtroom for deliberations. After the jury exited, Defense counsel stated as follows to the trial court judge:

Before you leave I – didn't – didn't want to interrupt counsel during argument. There was a portion of his rebuttal I was concerned about regarding her little sister could not tell what happened to her. This little girl who can't talk and I'm concerned that that's pretty inflammatory. I understand the context, but I still think it's too much so I'm going to object and ask for a mistrial.

I'm not really sure what kind of curative instruction could cure that. Thank you.

VRP 10 at 78-79. Based on those words, it is evident that defense counsel carefully considered whether to timely object and decided against it. Defense counsel may have thought that the jury would react negatively or unfavorably to Brooks if he objected to argument regarding A.B.'s little sister—A.B.'s sister would likely evoke sympathy from the jury. Or, defense counsel may have thought that objecting to that argument would have focused the jury even more on that argument, and he did not want to highlight the argument for the jury. Regardless, because defense counsel's conduct can be characterized as legitimate trial strategy, his performance was not deficient—Brooks does not demonstrate that “there is no conceivable legitimate tactic explaining counsel's performance.” *Carson*, 184 Wn.2d at 218 (quoting *Grier*, 171 Wn.2d at 33 (internal citations omitted)).

Even if the Court finds that Brooks' attorney's performance was deficient, Brooks does not demonstrate prejudice—he does not demonstrate that but for his trial attorney's error, the result of the trial would have been different. Brooks contends that because “this case turned solely upon A.B.'s credibility” with “no physical evidence nor (sic) medical evidence presented,” defense counsel's “failure to make a timely

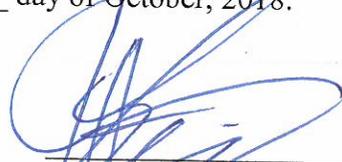
objection to the state's improper rebuttal argument undermines confidence in the jury's verdicts." Br. of Appellant at 27. However, Brooks ignores evidence beyond A.B.'s testimony that supports his convictions. In addition to A.B.'s testimony, for example, Sherri Brooks testified that she personally observed A.B.'s private area as red and raw while bathing A.B. *See* VRP 6 at 149 ("—and one day she took a bath and she was really crying about how bad her crotch hurt and when I gave her the bath I [saw] that her crotch was red and raw."). Admissions from Brooks himself also support his convictions. Sherri Brooks also testified that she surreptitiously observed A.B. talking to Brooks on Skype and heard Brooks say, "Is our secret still safe?" VRP 6 at 154. Hillary Huges testified that when Brooks called LPD's dispatch to inquire about a potential case against him, he volunteered that the abuse would have been alleged to have occurred at his apartment. VRP 9 at 205-206. Brooks does not acknowledge that independent evidence and does not demonstrate that absent his trial attorney failing to object at closing, the outcome of the trial would have been different. Thus, Brooks does not demonstrate prejudice.

Accordingly, Brooks' ineffective assistance of counsel argument fails.

V. CONCLUSION

For the reasons stated above, this Court should affirm Brooks' convictions.

Respectfully submitted this 10 day of October, 2018.



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CERTIFICATE OF SERVICE

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

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

Signed at Kelso, Washington, on the 11th day of October, 2018.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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