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NO. 52505-4

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JERRY THOMPSON,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Judge Sorensen

No. 17-1-00171-8

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. RESTATEMENT OF THE ISSUES 2

 A. Does the defendant fail to establish deficient performance where his counsel strategically agreed to joinder to advance his defense?..... 2

 B. Has the defendant failed to establish prejudice where his crimes were properly joined under CrR 4.3 as cross-admissible evidence of his intent, opportunity, and common scheme or plan?..... 2

 C. Did counsel perform effectively by strategically approaching the defendant’s case and vigorously testing the State’s evidence at every stage of trial?..... 2

 D. Does the defendant fail to show the absence of strategy in his counsel’s decision to refrain from objections that would only have served to highlight the importance of the evidence? 2

 E. Has the defendant failed to establish cumulative error where the errors are few, his counsel acted strategically throughout the trial, and the evidence of his guilt was overwhelming? 2

III. STATEMENT OF THE CASE..... 2

 A. Facts 2

 1. The crimes against A.T..... 3

 2. The crimes against D.W. 9

 B. Procedural History 15

IV.	ARGUMENT	17
A.	Counsel performed effectively by strategically agreeing to joinder to establish a defense to D.W.'s account of sexual abuse.	18
B.	The court properly joined the charges under CrR 4.3 as the crimes were cross-admissible as evidence of the defendant's motive, opportunity, and common scheme or plan.	23
1.	Joinder was appropriate under CrR 4.3 because the crimes against A.T. and D.W. were of the same character and constituted a series of connected acts.	25
2.	There was strong and similar evidence that the defendant abused both A.T. and D.W.	26
3.	Joinder did not impede the defendant's ability to deny abusing both girls.	27
4.	The court could instruct the jury to consider each count separately.	28
5.	The crimes were cross admissible and the benefits of joinder were not outweighed by prejudice.	28
a.	Evidence of common scheme or plan.	29
b.	Evidence of opportunity.	32
c.	Evidence of sexual motive.	32
d.	The highly probative evidence was not outweighed by its prejudicial effect.	34

e.	The court adopted the State’s reasoning on joinder.....	35
C.	The record shows counsel vigorously and effectively tested the State’s evidence in defense of her client.....	35
D.	Counsel strategically refrained from objecting to avoid highlighting evidence beneficial to State and permit evidence advantageous to her client.....	39
1.	Counsel strategically refrained from objecting to avoid highlighting admissible information about the circumstances allowing the defendant to abuse both girls.....	41
2.	Counsel strategically refrained from objecting to the proper impeachment of Peggy to avoid highlighting issues with her credibility.	44
a.	Law and Argument.	44
b.	Specific Instances of Impeachment.	45
(1)	Filings for divorce.	45
(2)	Separate lives and lack of intimacy.....	48
(3)	The defendant taking A.T. out of her crib.....	48
(4)	Leaving A.T. with the defendant; the defendant making a stick.	49

	(5)	Peggy’s reaction to the involvement of Sigournia and Rachel.....	50
	(6)	Denial she told Bethany defendant was going to flee the state.....	51
	(7)	Sending photos of A.T. to the defendant.....	52
	(8)	Telling A.T. to not reveal contact with her grandfather.....	52
	c.	Counsel’s strategy.....	53
3.		Counsel tactically refrained from objecting to statements used to explain the sequence of events when the substance of those statements had already been admitted.....	53
	a.	Sigournia telling Shauna about A.T.’s disclosure.....	54
	b.	Sigournia’s testimony about Peggy’s knowledge of the allegations.....	55
4.		Counsel tactically refrained from objecting to information beneficial to the defendant’s theories.....	55
	a.	Stacia Adams’ testimony regarding D.W.’s forensic interviews.....	55
	b.	D.W.’s statement to her mother in 2015 that the defendant had hurt her.....	56

c.	D.W.’s comments to her mother that she had seen the defendant at the restaurant.....	57
d.	Sigournia’s testimony that she thought “he did it” after speaking with the defendant.....	57
5.	Counsel tactically refrained from objecting to the State’s proper questioning of witnesses, admissible corroborating evidence, and information inconsequential to the result of the trial.	59
a.	State’s use of leading questions with D.W.....	59
b.	State’s use of the term “rape.”	59
c.	State’s questioning of D.W. about emotional impact.....	60
d.	Defendant’s attraction to African-American women.....	61
e.	Soundproof walls.....	62
6.	Counsel’s chosen strategy was effective.	62
E.	The defendant cannot show that one or more evidentiary errors affected the outcome of trial.....	63
V.	CONCLUSION.....	65

TABLE OF AUTHORITIES

State Cases

<i>In Re Aqui</i> , 84 Wn. App. 88, 929 P.2d 436 (1996), <i>overruled on other grounds by In re Detention of Hendrickson</i> , 140 Wn.2d 686, 2 P.3d 473 (2000).....	33
<i>In re Caldellis</i> , 187 Wn.2d 127, 385 P.3d 135 (2016).....	19
<i>In re Davis</i> , 152 Wn.2d. 647, 101 P.3d 1 (2004).....	19, 40, 41, 44
<i>In re Detention of Stout</i> , 159 Wn.2d 357, 150 P.3d 86 (2007).....	60
<i>In re Elmore</i> , 162 Wn.2d 236, 172 P.3d 335 (2007)	18, 23, 39
<i>In re Pers. Restraint of Cross</i> , 180 Wn.2d 664, 327 P.3d 660 (2014), <i>abrogated on other grounds, State v. Gregory</i> , 192 Wn.2d 1, 427 P.3d 621 (2018).....	63
<i>In re Tortorelli</i> , 149 Wn.2d 82, 66 P.3d 606 (2003).....	40
<i>Jacqueline’s Washington, Inc. v. Mercantile Stores Co.</i> , 80 Wn.2d 784, 498 P.2d 870 (1972).....	45, 46
<i>Nichols v. Lackie</i> , 58 Wn. App. 904, 795 P.2d 722 (1990).....	28
<i>State v. Aguilar</i> , 176 Wn. App. 264, 308 P.3d 778 (2013)	42, 43, 48
<i>State v. Baker</i> , 162 Wn. App. 468, 259 P.3d 270 (2011).....	32, 34
<i>State v. Bluford</i> , 188 Wn.2d 298, 393 P.3d 1219 (2017) ..	23, 24, 25, 26, 27
<i>State v. Burkins</i> , 94 Wn. App. 677, 973 P.2d 15 (1999).....	33
<i>State v. Buttry</i> , 199 Wash. 228, 90 P.2d 1026 (1939).....	60
<i>State v. Bythrow</i> , 114 Wn.2d 713, 790 P.2d 1064 (1993).....	24, 28

<i>State v. Canedo-Astorga</i> , 79 Wn. App. 518, 903 P.2d 500 (1995).....	27
<i>State v. Carleton</i> , 82 Wn. App. 680, 919 P.2d 128 (1996)	30, 35
<i>State v. Carson</i> , 184 Wn.2d 207, 357 P.3d 1064 (2015).....	20
<i>State v. Claflin</i> , 38 Wn. App. 847, 690 P.2d 1186 (1984)	60
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002)	42
<i>State v. Demery</i> , 144 Wn.2d 753, 30 P.3d 1278 (2001).....	60
<i>State v. DeVincentis</i> , 150 Wn.2d 11, 74 P.3d 119 (2003).....	29, 30, 34
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	52, 57
<i>State v. Farrar-Breckenridge</i> , 188 Wn. App. 1058, 2015 WL 4399745 (2015)	22
<i>State v. Fisher</i> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	28
<i>State v. Fleetwood</i> , 75 Wn.2d 80, 448 P.2d 502 (1968)	60
<i>State v. Fleming</i> , 27 Wn. App. 952, 621 P.2d 779 (1980)	60
<i>State v. Fuller</i> , 169 Wn. App. 797, 282 P.3d 126 (2012)	28
<i>State v. Garrett</i> , 124 Wn.2d 504, 881 P.2d 185 (1994)	18, 62
<i>State v. Gatalski</i> , 40 Wn. App. 601, 699 P.2d 804 (1985), <i>overruling on other grounds recognized by State v. Baldwin</i> , 63 Wn. App. 536, 821 P.2d 496 (1991).....	25
<i>State v. Gogolin</i> , 45 Wn. App. 640, 727 P.2d 683 (1986)	35
<i>State v. Gresham</i> , 173 Wn.2d 405, 269 P.3d 207 (2012).....	29, 30, 32
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011)	17, 18, 20, 22, 23
<i>State v. Hall</i> , 10 Wn. App. 678, 519 P.2d 1305 (1974)	43, 45, 46

<i>State v. Halstien</i> , 65 Wn. App. 845, 829 P.2d 1146 (1992), <i>affirmed</i> , 122 Wn.2d 109 (1993).....	33
<i>State v. Haq</i> , 166 Wn. App. 221, 268 P.3d 997 (20012).....	47, 57
<i>State v. Harstad</i> , 153 Wn. App. 10, 218 P.3d 624 (2009).....	40, 55, 56, 57, 58
<i>State v. Hentz</i> , 32 Wn. App. 186, 647 P.2d 39 (1982), <i>reversed on other grounds by State v. Hentz</i> , 99 Wn.2d 538, 663 P.2d 476 (1983).....	25
<i>State v. Hernandez</i> , 6 Wn. App.2d 422, 431, P.3d 126 (2018)	19
<i>State v. Ish</i> , 170 Wn.2d 189, 241 P.3d 389 (2010)	59
<i>State v. Israel</i> , 113 Wn. App. 243, 54 P.3d 1218 (2002)	23
<i>State v. Jackson</i> , 145 Wn. App. 814, 187 P.3d 321 (2008).....	42
<i>State v. Johnson</i> , 113 Wn. App. 482, 54 P.3d 155 (2002)	19
<i>State v. Johnston</i> , 143 Wn. App. 1, 438 P.3d 541 (2007)	40, 41, 44
<i>State v. Jones</i> , 71 Wn. App. 798, 863 P.2d 85 (1993)	60
<i>State v. Kennealy</i> , 151 Wn. App. 861, 214 P.3d 200 (2009).....	29, 30, 31, 34, 59
<i>State v. Kilgore</i> , 147 Wn.2d 288, 295, 53 P.3d 974 (2002)	33
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007) ..	40, 41, 44, 53, 63
<i>State v. Kloeppe</i> r, 179 Wn. App. 343, 317 P.3d 1088 (2014).....	40, 52, 58
<i>State v. Krause</i> , 92 Wn. App. 688, 919 P.2d 123 (1996).....	34
<i>State v. Kylo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	18
<i>State v. Lane</i> , 125 Wn.2d 825, 889 P.2d 929 (1995)	54

<i>State v. Lough</i> , 125 Wn.2d 847, 889 P.2d 487 (1995)	29
<i>State v. Lynn</i> , 67 Wn. App. 339, 835 P.2d 251 (1992)	41
<i>State v. Madison</i> , 53 Wn. App. 754, 770 P.2d 662 (1989).....	39, 40, 47
<i>State v. Markle</i> , 118 Wn.2d 424, 823 P.2d 1101 (1992).....	24, 25
<i>State v. McDaniel</i> , 155 Wn. App. 829, 230 P.3d 245 (2010).....	24
<i>State v. McDaniel</i> , 37 Wn. App. 768, 683 P.2d 231 (1984).....	45, 46, 50, 51, 52
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	18, 36
<i>State v. O’Connell</i> , 137 Wn. App. 81, 152 P.3d 349 (2007).....	19
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995).....	35
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995)	32, 33, 34
<i>State v. Priest</i> , 132 Wn. 580, 232 P. 353 (1925)	52, 57
<i>State v. Pryor</i> , 74 Wn. 121, 132 P. 874 (1913)	45
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	17, 18
<i>State v. Rice</i> , 48 Wn. App. 7, 737 P.2d 726 (1987).....	42, 43, 48, 61
<i>State v. Ridley</i> , 61 Wn.2d 457, 378 P.2d 700 (1963).....	59
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	24, 26, 27, 28
<i>State v. Saunders</i> , 91 Wn. App. 575, 958 P.2d 364 (1998).....	40
<i>State v. Schaffer</i> , 63 Wn. App. 761, 822 P.2d 292 (1991)	54
<i>State v. Sexsmith</i> , 138 Wn. App. 497, 157 P.3d 901 (2007)	32, 34
<i>State v. Shimmelpfennig</i> , 92 Wn.2d 95, 594 P.2d 442 (1979).....	33

<i>State v. Smith</i> , 74 Wn.2d 744, 446 P.2d 571 (1968), <i>vacated in part by Smith v. Washington</i> , 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972)	24
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997)	54
<i>State v. Stevens</i> , 127 Wn. App. 269, 110 P.3d 1179 (2005), <i>affirmed</i> , 158 Wn.2d 304, 143 P.3d 817 (2006)	33
<i>State v. Tharp</i> , 27 Wn. App. 198, 616 P.2d 693 (1980), <i>aff'd</i> , 96 Wn.2d 591, 637 P.2d 961 (1981)	54
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	17
<i>State v. Weber</i> , 159 Wn.2d 252, 149 P.3d 646 (2006).....	63, 64
<i>State v. Williams</i> , 136 Wn. App. 486, 150 P.3d 111 (2007)	23
<i>State v. Williams</i> , 156 Wn. App. 782, 234 P.3d 1174 (2010).....	32
<i>State v. Yarbrough</i> , 151 Wn. App. 66, 210 P.3d 1029 (2009)	41, 63
 Federal and Other Jurisdictions	
<i>Kimmelman v. Morrison</i> , 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)	18
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	17, 19, 22, 39
<i>U.S. v. Cronin</i> , 466 U.S. 648, 104 S.Ct. 2039 80 L.Ed.2s 657 (1984).....	18, 35, 39
 Constitutional Provision	
Sixth Amendment	35

Statutes

RCW 9A.44.010(2)..... 33
RCW 9A.44.040(2)..... 25
RCW 9A.44.050(2)..... 25
RCW 9A.44.073(2)..... 25
RCW 9A.44.076(2)..... 25
RCW 9A.44.083(1)..... 33
RCW 9A.44.083(2)..... 25

Rules

CrR 4.3 2, 23, 25
CrR 4.3(a)..... 23
ER 401.....42, 48, 50
ER 403.....28, 34, 54
ER 404(b) 28, 29, 32, 34
ER 602..... 55
ER 607..... 45, 48, 50, 51, 52
ER 613.....45, 48, 50, 51
ER 801(c) 51, 53, 54, 56
ER 803(a)(2)..... 57
GR 14.1(a) 22

RAP 2.5(a)(3) 57

Other Authorities

WPIC 3.01.....28

WPIC 5.01 42

I. INTRODUCTION

The defendant Jerry Thompson was convicted of nine aggravated sex offenses for repeatedly abusing his two minor granddaughters from 2011 to 2016. He abused each in a similar manner by isolating them while his wife was asleep or away from the house. He forced the same acts upon each. He threatened each girl with harm to ensure compliance and discourage disclosure. Accordingly, his abuse of each was cross-admissible to show intent, opportunity, and common scheme or plan.

The defendant now alleges his counsel was deficient for the sound strategic choices she made at trial. The first strategic choice was refraining from opposing joinder to argue that one of the girls fabricated abuse for attention after speaking to the other. The second strategic choice was refraining from objection to avoid highlighting detrimental evidence and then addressing it through her own questioning of witnesses and argument.

Counsel mounted a vigorous defense throughout the trial process. But the evidence against the defendant was overwhelming. Any evidentiary error could not alter the effect of the compelling and thorough statements of both girls, the corroborating testimony of their mothers and other witnesses, and the supporting evidence. This Court should affirm the defendant's convictions.

II. RESTATEMENT OF THE ISSUES

- A. Does the defendant fail to establish deficient performance where his counsel strategically agreed to joinder to advance his defense?
- B. Has the defendant failed to establish prejudice where his crimes were properly joined under CrR 4.3 as cross-admissible evidence of his intent, opportunity, and common scheme or plan?
- C. Did counsel perform effectively by strategically approaching the defendant's case and vigorously testing the State's evidence at every stage of trial?
- D. Does the defendant fail to show the absence of strategy in his counsel's decision to refrain from objections that would only have served to highlight the importance of the evidence?
- E. Has the defendant failed to establish cumulative error where the errors are few, his counsel acted strategically throughout the trial, and the evidence of his guilt was overwhelming?

III. STATEMENT OF THE CASE

A. Facts

The defendant Jerry Thompson was convicted of nine sex offenses involving minor victims A.T. and D.W. in a single trial. CP 311-329. His crimes took place between 2011 and 2016. CP 40-45. Most of them took place in his home. CP 40-45; 12RP 1484-86. A.T. is the defendant's granddaughter and D.W. is his step-granddaughter. 6RP 801; 7RP 1014-15. Both minor victims, their mothers, and other witnesses testified for the State. CP 431-32. The defendant and three other witnesses testified for the defense. CP 432. The facts presented at trial included the following:

1. The crimes against A.T.

Four-year old A.T. was taking a bath when she told her mother Shauna Thompson that “papa touches my foo-foo.” 6RP 803, 812-13. A.T.’s “papa” was her grandfather, the defendant. 6RP 801. “Foo-foo” was A.T.’s word for her vagina. 6RP 813. A.T. explained the defendant touched her foo-foo when he made her take a bath. 6RP 814. She said he told her not to tell anyone or she would be in trouble. *Id.* Shauna became hysterical at A.T.’s revelation, not wanting to believe her father was sexually abusing her daughter.¹ 6RP 814-15.

The defendant and his wife Peggy Thompson had been very involved in A.T.’s care since her birth. 6RP 795-98; 8RP 1130-33. Shauna was 19 years-old and single when A.T. was born. 6RP 787, 795-96. She relied on her parents to take care of A.T. several days a week. 6RP 787, 795-96. A.T. had her own room at her grandparents’ large Puyallup home where she frequently spent the night. 6RP 795-98, 806, 810; 8RP 1130-34. A.T. had a loving and affectionate relationship with both Peggy and the defendant. 6RP 750-53, 799-801; 8RP 1130-33; 9RP 1203, 10RP 1364.

Peggy and the defendant grew apart over their long marriage and by the time of A.T.’s birth were living separately within the home. 6RP 802;

¹ Many of the witnesses called at trial share the same last name. The State refers to all civilian witnesses by their first name. The defendant Jerry Thompson is referred to as the defendant. No disrespect is intended.

8RP 1125-26. Peggy slept upstairs in a bedroom in the same hallway as A.T.'s bedroom, while the defendant slept in the master bedroom downstairs. 6RP 806-07; 8RP 1133. Each grandparent spent considerable time with A.T. despite living apart in the home. 8RP 1130-33.

Shauna was devastated by A.T.'s bath time disclosure. 6RP 815-18. She immediately called her friends Sigournia Hamilton and Rachel Hamilton for support. 6RP 815-18; 9RP 1204-06, 1367. Rachel arrived to see A.T. telling her crying mother that she wasn't lying. 10RP 1368, 1378. When Sigournia arrived, Shauna was speaking to her mother about what A.T. had said. 9RP 1208; 10RP 1386.

Shauna, Sigournia, and Rachel moved into an apartment together around A.T.'s fifth birthday in May 2013 so Shauna could stop relying on her parents for childcare. 6RP 820; 9RP 1208, 1210. A.T. missed her grandmother and started telling Shauna, "It didn't happen" always in conjunction with, "I want to see my grandma." 6RP 819-20. Shauna allowed A.T. to see Peggy but limited her contact with the defendant. 6RP 818-19; 9RP 1208; 10RP 1386-88. A.T. developed issues with bedwetting, urination, and defecation that continued for several years. 6RP 764-65, 821, 838; 7RP 889-91; 9RP 1211, 1356. Medical personnel testified these problems can stem from sexual abuse. 8RP 1080; 9RP 1347.

One day A.T. approached Sigournia after coming home from visiting Peggy. 9RP 1211-12. A.T. told her she didn't like that her grandfather touched her. 9RP 1211-16. She said the defendant took baths and showers with her and it hurt when he touched her vagina. 9RP 1213-14. She described how they played games involving touching private parts when they took naps and slept together at night. 9RP 1213-15. A.T. said the defendant put his tongue in her mouth and she put her mouth on his private part. 9RP 1212-15. She said she loved the defendant and had fun at his house but wished she didn't have to do those "yucky" things. 9RP 1215-16.

Shocked, Sigournia told Shauna what A.T. had described. 6RP 824; 9RP 1214, 1217. Shauna was again overwhelmed. 9RP 1217-19. She asked Sigournia and Rachel to talk to the defendant about what A.T. had said. 6RP 822-25; 9RP 1218-19. They agreed and spoke with him at his home. 9RP 1218-19; 10RP 1370. The defendant laughed and smirked when Sigournia told him A.T. had described him touching her inappropriately. 9RP 1219-20, 1240; 10RP 1371. He said he was like a father to A.T. and "so what that he kissed her in her mouth or [took] baths with her." 9RP 1220.

The defendant said A.T. was a beautiful young girl. 9R 1220. He described how "she was biracial and how developed she was as a young lady, as a little girl, and that he had always had an attraction to black women." 9RP 1220. He said A.T. "would have a beautiful body, he could

see her developing, and that she would be very nicely developed.” 9RP 1221; 10RP 1372.

Sigournia asked the defendant about sleeping and bathing with A.T. 9RP 1220-22. “He just said that it was okay. He didn’t see anything wrong, that he would kiss her and that he would give her a bath, and he said that sometimes she would ask him to bathe her, and he just [couldn’t] help himself to just hop right in with her.” 9RP 1221. When Sigournia asked specifically about oral sex the defendant “just like shooed [her] off, like just get out of here kind of thing.” 9RP 1222. The defendant gave the impression “it was kind of funny to him, and he just – he just said, you know, he loves his granddaughter, and that was it, really.” 9RP 1220-22, 1238; 10RP 1372.

The defendant tried to steer the conversation away from the topic of sexual abuse. 9RP 1220; 10RP 1373. He began acting flirtatiously, telling Sigournia and Rachel he wished Shauna had more friends that were beautiful black women like the two of them. 9RP 1220-22, 1240; 10RP 1373. Sigournia and Rachel quickly left the house after he offered them something to drink. 9RP 1220-22; 10RP 1374. Sigournia, Rachel, and Shauna spoke with Peggy later that day. 9RP 1224. Peggy became upset at Shauna for involving her friends in something “that should have been kept internal with the family.” 9RP 1224; 10RP 1374.

Shauna contacted the police. 6RP 826-27. A.T. was forensically interviewed in October 2013 when she was five years old. 6RP 826, 829. A.T. told the interviewer the defendant stole her out of her room at night and took her to his bedroom. Ex. 87. She said the defendant kissed her on the lips, sucked her “boobs” and her “cha-cha,” told her to suck his weeny, and “hurted” her cha-cha with his finger. Ex. 87. She demonstrated how she sat on the defendant’s face. Ex. 87. She explained how the defendant told her babies are made when a weeny goes in a cha-cha. Ex. 87. A.T. made similar disclosures during her medical examination. 8RP 1082-83.

Shauna reduced contact with her parents following the forensic interview. 6RP 828; 10RP 1375, 1389. A.T. missed her grandmother. 6RP 832; 10RP 1376. Shauna allowed her to see Peggy. 6RP 828; 10RP 1375, 1389. The defendant said he hadn’t abused A.T. and Shauna was happy when her relationship with him began to improve. 6RP 818, 835, 849. She let A.T. go to her grandparents’ home again in late 2015. 6RP 832-35, 844; 10RP 1390. Overnight visits resumed in 2016. *Id.* Shauna asked Peggy to watch A.T. when she was with the defendant given her prior disclosures. 6RP 835; 8RP 1164-65; 10RP 1390. She later learned Peggy often left A.T. alone with the defendant. 6RP 835-36, 847; 8RP 1167.

A.T. told her school counselor in November 2016 that she felt “really yucky” because the defendant was touching her with his hands and

his private part when she spent the night at his house. 10RP 1422-26. A.T. reported she had “tried to tell her [mother] before, but she just cries. It’s upsetting.” 10RP 1426-28. A.T. said she loved the defendant. 10RP 1426-28. She stated repeatedly that the defendant “tells me he loves me.” 10RP 1426-28. The counselor contacted CPS. 10RP 1428.

A.T. was eight years old when she forensically interviewed for the second time in November 2016. 6RP 12; Ex. 85. She described in the interview how the defendant touched her breast area and vagina, made her perform oral sex, and hurt her private part with his private part. Ex. 85. She explained how he had done this to her a long time ago, stopped for a while, and then started doing it again. Ex. 85. She said the most recent event was a few weeks prior when Peggy was gone and she and the defendant were alone together. Ex. 85. A.T. described feeling uncomfortable when the defendant touched her “boobs.” Ex. 85. She described the “nasty” taste from his private part. Ex. 85. A.T. said she was afraid of the defendant. Ex. 85. She talked about a stick he made to whoop her with and how he would get it when she disobeyed.² Ex. 85. She also said the defendant told her to keep the abuse a secret or he would smack her. Ex. 85.

² The defendant testified he “made a stick” for A.T. to use as a bat; he denied it was for discipline. IRP 51.

A.T. was nine years old when she testified at trial. 6RP 745. A.T. said she loved her papa before the stuff that happened. 6RP 753. She said the “bad stuff” happened when she was younger, stopped for a while, and then started again. 6RP 743-68. She described how the defendant would get her out of her room at night, bring her down to his room, and the bad stuff would happen on his bed. 6RP 751-52. She said this happened a lot. 6RP 752. She described him putting his tongue in her mouth and touching her private part under the underwear. 6RP 753-58, 761. She said he made her mouth touch his private area by grabbing her hair. 6RP 757-58.

A.T. testified she was scared of the defendant, who talked about how he would hurt people if she told anyone about the abuse. 6RP 759. She said the “bad stuff” also scared her. *Id.* A.T. said that Peggy was the second person she told about the abuse. 6RP 760, 771; 8RP 1169. A.T. said talking about the abuse made her feel bad. 6RP 760; 8RP 1171.

2. The crimes against D.W.

D.W. was eleven years old when her mother Bethany Orr married Jason Orr in November 2014. 7RP 907, 913-14, 1018-19. Jason was Peggy’s oldest son and the defendant’s stepson. 7RP 1014-15. Peggy had agreed to watch D.W. at Bethany’s apartment the night of the wedding while Bethany and Jason stayed at a hotel. 7RP 913-15, 1019-21. Bethany was unaware the defendant had previously been accused of sexually abusing

A.T. 8RP 1056. Peggy took D.W. home with her instead of staying at Bethany's apartment. 7RP 914-15, 1019-21.

D.W. slept by herself in an upstairs guestroom at the defendant's home. 7RP 918. The defendant checked on her before she went to sleep. *Id.* The next day, Peggy left D.W. with the defendant while she ran errands. 8RP 1145, 1149. D.W. and the defendant spent some time doing yardwork. 8RP 1149. She described how the defendant came up behind her as she was putting yard waste into a bin. 7RP 921. He lingered behind her with his body nearly touching hers for an uncomfortable length of time. 7RP 920-22. She thought this was strange but brushed it off. 7RP 922.

Later that evening, the defendant was watching TV in the main living area of the home. *Id.* D.W. asked Peggy if there was another TV she could watch. *Id.* Peggy took her to the defendant's bedroom where D.W. watched TV until falling asleep on the bed. *Id.*

D.W. woke up in the darkness to the sound of the door opening. 7RP 922, 925. She realized the defendant was in the room. 7RP 925. D.W. assumed the defendant was checking on her but became confused as she felt his weight on the bed. 7RP 927. Before she could make sense of what was

happening, the defendant pulled out a knife, held it to her neck and told her, “If you make a sound, I’ll cut out your fucking vocal cords.”³ 7RP 925-27.

Scared and bewildered, D.W. froze as the defendant began to fondle her legs and chest over her clothes. 7RP 928-29. He took off her shirt and bra and rubbed her chest. 7RP 929. She heard the sound of a zipper. 7RP 930. The defendant took off her pants, pushed her underwear to the side, and penetrated her vagina with his penis. 7RP 930. It was very painful. 7RP 931. The rape continued until he ejaculated on her thigh. 7RP 931-32. He put his pants back on, walked away from the bed, and before leaving the room turned and told D.W. “you’re my whore.” 7RP 933. D.W. remained frozen on the bed in disbelief about what had happened. 7RP 932-33.

D.W. felt disgusted. 7RP 933. She blamed herself for not doing anything to stop the defendant and for falling asleep in his room. 7RP 933-34. She went upstairs to the guestroom where anxiety prevented her from sleeping. 7RP 933-34. The next morning, Peggy told D.W. the defendant would drive her to church to meet her mother. 7RP 934-35. She felt panicked but powerless to change what the adults decided. 7RP 934, 939. She didn’t have a cell phone to call her mother and felt unable to tell Peggy, the defendant’s wife, what the defendant had done. 7RP 934, 939.

³ Shauna testified the defendant carried a small pocket knife with him that was 6 inches long when unfolded. 6RP 830. The defendant provided a different description, saying he carried a smaller knife with his keys. 1RP 100-01.

D.W. got into the car with the defendant. 7RP 939. The drive was uneventful until they stopped at a red light. 7RP 939. The defendant smirked at her and unzipped his pants to expose his penis. 7RP 939-41. He pushed her head toward his crotch, forcing her to put his penis in her mouth. 7RP 939-41. D.W. felt like she was suffocating as the defendant made her continue as he drove. 7RP 941-42. The assault stopped when he let go of her neck and ejaculated on the steering wheel. 7RP 941. When they arrived at the church, the defendant said, "I enjoyed that. Remember last night, you're my whore." 7RP 942.

Bethany noticed an immediate change in D.W.'s demeanor, affect, and behavior that worsened with time. 7RP 1025-30. D.W. felt guilt, anxiety, disgust, and denial. 7RP 943, 1024-26. She tried to pretend the rapes never happened. 7RP 943, 1024-26. She transformed from a happy, talkative, and affectionate girl to an emotional, angry, and withdrawn child. 7RP 1026-29; 10RP 1452-53.

D.W. attended a Christmas celebration at the Thompson home later that year. 7RP 945, 1032. The defendant approached her as she was getting ready to leave and spanked her on the backside, letting his hand linger on her buttocks. 7RP 945. Bethany was shocked when she saw him "cupping" D.W.'s behind. 7RP 1031-32. She rushed the children out of the house and spoke with her husband about the incident. 7RP 1032; 10RP 1454.

Bethany began asking D.W. questions about whether something had happened to her. 7RP 947. Fear and a belief that she would cause problems in her mother's new marriage stopped D.W. from saying anything. 7RP 952. D.W. started counseling where she struggled for years with feelings of responsibility for the abuse. 7RP 955; 10RP 1408-09. She was treated for post-traumatic stress disorder, major depressive disorder, and generalized anxiety disorder stemming from sexual abuse. 10RP 1405-07.

D.W. gradually began making vague statements to her mother and counselor about how the defendant had hurt her. 7RP 956-58, 1034-37; 8RP 1057. She was forensically interviewed in September 2015 but only mentioned the yard-waste incident during the interview. 7RP 961; 9RP 1301; 9RP 1320. D.W. knew the defendant was involved with her stepfather's property and remembered how he had threatened her. 7RP 961.

In August 2016, D.W. went to an Outback restaurant in Puyallup with the family of her 7th-grade boyfriend Pierce Tate. 7RP 962; 9RP 1244-45, 1251. D.W. panicked when she saw the defendant outside the restaurant. 7RP 966. Pierce also noticed a man outside the restaurant who glared at them as they arrived. 9RP 1248. D.W. assumed the defendant was leaving and went to the bathroom to calm herself down. 7RP 967.

D.W. did not realize that the defendant had followed her. 7RP 967. She froze when she turned around and realized he was there in her stall. 7RP

968. The defendant groped her chest, undid her jeans, and vaginally raped her.⁴ 7RP 968-74. When it was over, the defendant smirked at her and walked out of the bathroom. 7RP 973.

Pierce and his parents became concerned about D.W.'s long absence from the table. 9RP 1255, 1278, 1286. Pierce could tell she was upset when she returned. 9RP 1256. She was still visibly distressed when she arrived home. 8RP 1055; 10RP 1454-55. She told Bethany and Jason she had seen "him" at the restaurant. 8RP 1055; 10RP 1454-55. She later told Pierce some of what happened to her at the restaurant. 7RP 1009-10; 9RP 1258.

D.W. decided to disclose the defendant's abuse after a conversation with A.T. 7RP 979. D.W. and A.T. were not close but had seen each other occasionally at family events. 7RP 912, 1058. At a family Christmas gathering, A.T. confided in D.W. about being touched when she was staying with Peggy and the defendant, pointing to her hip and chest area. 7RP 979-80, 988. D.W. knew A.T. must be referring to the defendant. 7RP 988.

A.T.'s comments helped D.W. feel less alone, but they also made her feel guilty for not coming forward sooner and perhaps preventing A.T.'s abuse. 7RP 980. She realized she could no longer hide what happened and needed to "stop this." *Id.* She wrote an account of what she experienced and

⁴ The jury did not reach a unanimous verdict on Count X and XI, the charges based on these allegations. CP 284, 286; 12RP 1484-86.

was forensically interviewed a second time in January 2017. 7RP 980-81, 1054; 9RP 1324. This time she told the interviewer about the events of the weekend her mother and Jason were married. 9RP 1303.

D.W. remained embarrassed and afraid to talk about what the defendant had done to her. 7RP 982-83. Her counselor testified victims of sexual assault may have trouble talking about the details of the abuse. 10RP 1398-99. Other witnesses testified that delayed and gradual disclosure of sexual abuse is a common with children. 6RP 865; 9RP 1298-99.

B. Procedural History

The State charged the defendant in January 2017 with rape of a child and child molestation in the first degree as to A.T. CP 3-5. A month later he was charged with the same offenses as to D.W. under a separate Superior Court cause number. CP 15. The State later added unlawful possession of a firearm to the case involving A.T. CP 6-8.

Counsel did not oppose the State's motion to join the separate cases involving A.T. and D.W. CP 15; RP(3/20/18) 2. The strategy underlying this decision was revealed when she argued that A.T.'s disclosures stemmed from Shauna's desire for money and D.W. disclosed for attention after speaking with A.T. 12RP 1527-28. Following joinder, the defendant's charges were consolidated in the third amended information. CP 40-45. The State differentiated them as follows:

- Count I: Rape of a Child in the First Degree
(A.T. – 2011 to 2013 rapes)
- Count II: Child Molestation in the First Degree
(A.T. – 2011 to 2013 molestations)
- Count III: Rape of a Child in the First Degree.
(A.T. – 2015 to 2016 rapes)
- Count IV: Child Molestation in the First Degree - A.T.
(A.T. – 2015 to 2016 molestations)
- Count V: Rape in the First Degree
(D.W. – 2014 rape in the defendant’s bedroom)
- Count VI: Rape of a Child in the First Degree
(D.W. – 2014 rape in the defendant’s bedroom)
- Count VII: Rape in the Second Degree
(D.W. – 2014 rape in the defendant’s vehicle)
- Count VIII: Rape of a Child in the First Degree
(D.W. – 2014 rape in the defendant’s vehicle)
- Count IX: Child Molestation in the First Degree
(D.W. – 2014 molestation at Christmas)
- Count X: Rape in the Second Degree - D.W.
(D.W. – 2016 rape at restaurant)
- Count XI: Rape of a Child in the Second Degree - D.W.
(D.W. – 2016 rape at restaurant)
- Count XII: Unlawful Possession of a Firearm, Second Degree.
(January 13, 2017)

CP 15, 40-45; 12RP 1484-86. The defendant strategically pleaded guilty to unlawful possession of a firearm prior to trial to prevent the jury from learning he had a prior conviction for domestic violence assault. CP 65-78.

The defendant was convicted as charged of Counts I – IX.⁵ The jury found the presence of aggravating factors on all of these counts and a special allegation D.W. was under 15 when she was raped by the defendant.⁶ The jury was unable to reach a verdict on Counts X and XI.⁷ The defendant was sentenced to an exceptional sentence of 600 months to life in the Department of Corrections after the court found substantial and compelling reasons to depart from the standard sentencing range. CP 311-329; RP 1603. He timely appealed. CP 337-57.

IV. ARGUMENT

A reviewing court starts with the strong presumption that trial counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). To rebut that presumption and establish ineffective assistance of counsel, a defendant must demonstrate: (1) that counsel's conduct was deficient; and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Absence of either requirement defeats a claim that counsel was ineffective. *Strickland*, 466 U.S. at 697.

⁵ CP 263, 265, 268, 270, 281, 275, 275, 277, 279, 281.

⁶ CP 264, 267, 269, 272, 274, 276, 278, 280, 283.

⁷ CP 284, 330-32; 13RP.

Deficient performance is only established when the defendant shows counsel's performance fell below an objective standard of reasonableness considering the entirety of the record. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Legitimate trial strategy and tactics do not constitute deficient performance. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994); *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Prejudice is only established when there is a reasonable probability the result of the trial would have been different but for counsel's deficient performance. *Grier*, 171 Wn.2d at 42; *Reichenbach*, 153 Wn.2d at 130.

“The essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). When counsel's performance is such that a true adversarial proceeding has been conducted, the testing envisioned by the Sixth Amendment has occurred even if counsel has made demonstrable errors in judgment or tactics. *U.S. v. Cronin*, 466 U.S. 648, 656, 104 S.Ct. 2039 80 L.Ed.2s 657 (1984).

A. Counsel performed effectively by strategically agreeing to joinder to establish a defense to D.W.'s account of sexual abuse.

Exceptional deference must be given to counsel's tactical and strategic decisions. *In re Elmore*, 162 Wn.2d 236, 257, 172 P.3d 335 (2007)

(citing *Strickland*, 466 U.S. at 689). “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client the same way.” *Strickland*, 466 U.S. at 689. The decision of what to argue is a strategic decision to be afforded such deference. *In re Davis*, 152 Wn.2d. 647, 745, 101 P.3d 1 (2004). “Generally, choosing a particular defense is a strategic decision for which there is no correct answer, but only second guesses.” *Id.*; see also *State v. O’Connell*, 137 Wn. App. 81, 93, 152 P.3d 349 (2007); *State v. Johnson*, 113 Wn. App. 482, 493, 54 P.3d 155 (2002); *In re Caldellis*, 187 Wn.2d 127, 142, 385 P.3d 135 (2016).

A conviction does not mean counsel’s strategic choices were deficient. “The hindsight and misgivings that accompany a criminal conviction are not sufficient reasons to revisit a strategic decision made during the court of a trial.” *State v. Hernandez*, 6 Wn. App.2d 422, 428, 431, P.3d 126 (2018). Judicial scrutiny of an attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690.

Deference to strategic decisions means a defendant must show the “absence of any conceivable legitimate tactic explaining counsel’s

performance” to establish deficient performance. *Grier*, 171 Wn.2d at 42. The reviewing court may not substitute its own judgment about its belief of “an ideal strategy and then declare an attorney’s performance deficient” for pursuing a different strategy. *State v. Carson*, 184 Wn.2d 207, 220, 357 P.3d 1064 (2015).

The defendant cannot show the absence of a legitimate strategy underlying counsel’s agreement to joinder. *Grier*, 171 Wn.2d at 42. Counsel strategically agreed to joinder to argue that D.W. disclosed for attention after A.T. told her about her own sexual abuse. 12RP 1527-28. If D.W.’s case were tried alone there would be no apparent motive for her to accuse the defendant of sexual abuse given her limited relationship with him. 7RP 909-911. D.W.’s awareness that A.T. accused the defendant gives D.W. a reason to specifically target him herself. In the event limited information about A.T.’s disclosure were admitted at a separate trial for D.W., counsel could not ensure she was able to undermine those allegations. She did so in the joint trial by arguing that A.T.’s allegations arose from Shauna’s vindictiveness and desire for money, and A.T.’s dislike of her grandfather. 1RP⁸ 25-26; 12RP 1524-28.

⁸ There are two transcripts labeled Volume 1 in the record of proceedings. The transcript for April 23, 2018, covers the child hearsay hearing and is labeled 1RP(4/23/18). The transcript for May 10, 2018, covers part of the defense case and is labeled 1RP.

Counsel elicited facts at trial about what D.W. knew about A.T.'s statements and how the families were connected. 7RP 990; 8RP 1060, 1065-66. Then in closing, counsel argued:

Subsequent to these things happening with [A.T.], [D.W.] and [A.T.] have a conversation where [D.W.] says that she finds out that [A.T.]'s been abused and [D.W.] doesn't want that to happen to anybody else, because guess what, it also happened to her. Now, let's think about what [D.W.]'s situation was around this point in time. In the end of 2014, her mom gets married to Jason Orr, who [D.W.] didn't really know. We didn't hear testimony that there was a lot of bonding or getting to know each other prior to this wedding, so she's got this new adult male in her life, he's moving into her home, he's marrying her mom, and Bethany testified that, other than [D.W.]'s father, there hadn't really ever been a male in their life that Bethany was dating to this extent, that was involved to this extent, and [D.W.] testified that while this is happening, Bethany's paying a lot of attention to Jason Orr, a lot of attention to Jason Orr, which means not so much attention to [D.W.]. [D.W.] finds out that [A.T.]'s disclosed this, or [A.T.] discloses it to [D.W.] directly. [A.T.]'s the subject of much attention at this point, and so [D.W.] says that something happened to her, too. And guess what? When she does that, she gets attention. And she continues to get attention over a period of time, as her story continues to snowball, and with every new disclosure, there's new attention and someone else to talk to.

12RP 1527-28. Counsel used D.W.'s knowledge of A.T.'s abuse to create a motive for D.W. to falsely disclose sexual abuse. 12RP 1427-28. This was a valuable defense while also ensuring the ability to undermine A.T., the reason D.W. finally came forward. 7RP 909-911; 12RP 1427-28.

The Court addressed a similar scenario in the unpublished case *State v. Farrar-Breckenridge*, 188 Wn. App. 1058, 2015 WL 4399745 (2015).⁹ The defendant in *Farrar-Breckenridge* alleged his counsel was ineffective for failing to move to sever charges involving two victims. *Farrar-Breckenridge*, 188 Wn. App. at 2. The Court found that his counsel's strategy of arguing the two victims colluded to manufacture sex abuse allegations against the defendant was a reasonable trial strategy. *Id.* Counsel's strategy in the present case was to pursue a similar theory based on the existence of two victims, one of whom learned the allegations of the other. Like in *Farrar-Breckenridge*, counsel's strategy was reasonable.

There are additional reasons beyond counsel's specific theory to agree to joinder. Combining the cases allowed any doubt as to either girl's account to taint the jury's view of the claims made by the other. Trying the cases together allowed for a total acquittal instead of giving the State two chances to convict the defendant of Class A sex offenses. *See, e.g. Grier*, 171 Wn.2d at 31 (all or nothing strategy affirmed).

Furthermore, counsel's strategic decision may have been based on the express choices and preferences of the defendant. *Strickland*, 466 U.S. at 691. The defendant's ineffective assistance claim fails because he cannot

⁹ Unpublished cases have no precedential value and are not binding on any court. An unpublished case filed after March 1, 2013 may be cited as non-binding authority and may be accorded such persuasive value as this Court deems appropriate. GR 14.1(a).

show the absence of a conceivable strategic reason his counsel would withhold objection to joinder. *Grier*, 171 Wn.2d at 42. This Court should defer to counsel's strategic decisions and deny the defendant's claim. *Elmore*, 162 Wn.2d at 257.

B. The court properly joined the charges under CrR 4.3 as the crimes were cross-admissible as evidence of the defendant's motive, opportunity, and common scheme or plan.

The defendant cannot demonstrate prejudice even if this Court incorrectly characterizes his counsel's strategic choice as deficient since joinder was the highly probable outcome of the State's motion based on the law, facts, and the trial court's record. Joinder under Criminal Rule (CrR) 4.3(a) should be liberally allowed where the charged offenses are of the same or similar character, based on the same conduct, or are parts of a single scheme or plan. *State v. Bluford*, 188 Wn.2d 298, 310, 393 P.3d 1219 (2017). A trial court's decision to join charges is reviewed for abuse of discretion. *Id.* at 310. A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Williams*, 136 Wn. App. 486, 499, 150 P.3d 111 (2007).

As a general rule, joint trials are favored over separate trials. *State v. Israel*, 113 Wn. App. 243, 290, 54 P.3d 1218 (2002). Joinder of qualifying charges under CrR 4.3 is impermissible only when doing so would result in clear and undue prejudice to the defendant. *Bluford*, 188 Wn.2d at 311. To

determine whether joinder would cause undue prejudice, the court considers four factors: (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) the court's instructions to the jury to consider each count separately; and (4) the admissibility of the evidence of the other charges even if not joined for trial." *State v. Russell*, 125 Wn.2d 24, 62, 882 P.2d 747 (1994). None of these factors is dispositive. *State v. McDaniel*, 155 Wn. App. 829, 860, 230 P.3d 245 (2010). Joinder may even be permissible when separate crimes are not cross-admissible. *State v. Markle*, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992); *State v. Bythrow*, 114 Wn.2d 713, 723, 790 P.2d 1064 (1993); *Bluford*, 188 Wn.2d at 315.

The defendant bears the burden of showing that a joint trial is "so manifestly prejudicial as to outweigh the concern for judicial economy." *Bythrow*, 114 Wn.2d at 718; *Bluford*, 188 Wn.2d at 315. So long as joinder of separate offenses does not result in undue embarrassment, prejudice, or denial of the right to a fair trial, the trial court's joinder of charges is not an abuse of discretion. *State v. Smith*, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968), *vacated in part by Smith v. Washington*, 408 U.S. 934, 92 S. Ct. 2852, 33 L. Ed. 2d 747 (1972); *Bluford*, 188 Wn.2d at 311.

Joinder under Washington's liberal-joinder rule was the inevitable outcome of the State's motion given the cross-admissibility of the cases and the absence of disqualifying prejudice to the defendant. Even if this Court

wrongly finds counsel did not strategically agree to joinder, the defendant fails to show he was prejudiced by her performance.

1. **Joinder was appropriate under CrR 4.3 because the crimes against A.T. and D.W. were of the same character and constituted a series of connected acts.**

Joinder was appropriate under CrR 4.3 because the crimes were of the same character and a series of connected acts. CrR 4.3: *Bluford*, 18 Wn.2d at 310. That charges are of similar character may be shown by similarity in the class of crime, victims, the nature of the acts, or the method of committing the crimes. *State v. Markle*, 118 Wn.2d at 439; *State v. Hentz*, 32 Wn. App. 186, 189-90, 647 P.2d 39 (1982), *reversed on other grounds by State v. Hentz*, 99 Wn.2d 538, 663 P.2d 476 (1983); *State v. Gataliski*, 40 Wn. App. 601, 605, 699 P.2d 804 (1985), *overruling on other grounds recognized by State v. Baldwin*, 63 Wn. App. 536, 540-41, 821 P.2d 496 (1991). That crimes are a series of acts connected together requires some evidence of common or connecting threads. *Gataliski*, 40 Wn. App. at 605; *Markle*, 118 Wn.2d at 429.

The crimes involving A.T. and D.W. are indisputably of the same character. All are Class A sex offenses. RCW 9A.44.073(2); 9A.44.076(2); 9A.44.083(2); 9A.44.040(2); 9A.44.050(2). All involved prepubescent children 11 years of age or younger that were known to the defendant. CP

18-19.¹⁰ Both children were abused when placed in his or his wife's care. CP 9-14, 19. The defendant used similar methods including threats to gain compliance and discourage disclosure, and abuse in isolated locations under his control. CP 9-14, 19. The acts forced upon each victim were similar – fondling, oral intercourse, and vaginal intercourse. CP 9-14, 19.

The defendant's abuse of A.T. and D.W. also constituted a series of acts. A.T. was abused in his care from approximately 2011 to 2013. CP 9-14, 40-45. D.W. was abused in his care in 2014 when he did not have access to A.T. CP 9-32, 40-45. A.T. was abused again in 2015 and 2016 when she became accessible to him again. CP 9-32, 40-45. The charges pertaining to both A.T. and D.W. were indisputably of the same character and constituted a connected series of acts.

2. There was strong and similar evidence that the defendant abused both A.T. and D.W.

Joinder is appropriate unless the strength of different counts is so dissimilar as to create undue prejudice. *Russell*, 125 Wn.2d at 64; *Bluford*, 188 Wn.2d at 311. There was no significant difference in the strength of A.T. and D.W.'s cases. *Id.* In both cases, there was compelling, descriptive, and thorough information from each girl about what she endured. CP 9-14.

¹⁰ The State in this section relates the facts as available to the court at the time of the joinder motion. *Bluford*, 188 Wn.2d at 310 (the reviewing court considers the facts known to the court at the time of the joinder motion).

There was no reason to expect A.T.'s forensic interviews would provide a greater level of detail than D.W.'s testimony at trial. Peggy the girls' mothers provided corroborating information about the circumstances surrounding the abuse. CP 9-14. There was a similar lack of motive for either girl to fabricate abuse. CP 9-14. There was no physical evidence and each case rested primarily on the statements of A.T. and D.W. CP 9-14.

Neither A.T.'s nor D.W.'s case was so strong as compared to the other there was a risk the jury would convict on both based on one of the allegations alone. *Russell*, 125 Wn.2d at 64; *Bluford*, 188 Wn.2d at 311. This factor supported joinder of the cases.

3. Joinder did not impede the defendant's ability to deny abusing both girls.

Joinder is appropriate unless undue prejudice is created by circumstances such as mutually antagonistic defenses or the impossibility of compartmentalizing massive or complex evidence. *See State v. Canedo-Astorga*, 79 Wn. App. 518, 528, 903 P.2d 500 (1995). No such circumstances existed in this case. The defendant's general denial defense for each victim was not antagonistic. CP 21. Furthermore the evidence consisted of each girl's account and supporting information and was not overly complex or cumbersome. CP 9-14. This factor supported joinder.

4. The court could instruct the jury to consider each count separately.

Joinder is appropriate unless the jury cannot be instructed to consider the counts separately. *Russell*, 125 Wn.2d at 62. A jury is presumed to follow the court's instructions. *Nichols v. Lackie*, 58 Wn. App. 904, 907, 795 P.2d 722, 723 (1990). WPIC 3.01 states:

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

The trial court correctly presumed the jurors would follow this instruction to consider the charges involving A.T. and D.W. separately. *Lackie*, 58 Wn. App. at 907. This factor supported joinder of the charges.

5. The crimes were cross admissible and the benefits of joinder were not outweighed by prejudice.

Joinder is appropriate when separate charges are cross-admissible unless the prejudicial effect of joinder substantially outweighs its benefits. *Bythrow*, 114 Wn.2d at 722; *State v. Fuller*, 169 Wn. App. 797, 829-30, 282 P.3d 126 (2012). Evidence of other acts or misconduct is admissible under ER 404(b) to show proof of a common scheme or plan, opportunity, or proof of motive and intent. Qualifying evidence under ER 404(b) is analyzed pursuant to ER 403 and admissible when its probative value is not substantially outweighed by its prejudicial effect. *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). Evidence of the crimes against A.T.

and D.W. were cross-admissible and highly probative evidence of the defendant's common scheme or plan, motive, and opportunity.

a. Evidence of common scheme or plan.

One manner of common scheme or plan under ER 404(b) exists when a perpetrator devises a plan and uses it repeatedly to perpetrate separate but similar crimes. *State v. Gresham*, 173 Wn.2d 405, 421-22, 269 P.3d 207 (2012). Evidence shows that multiple crimes are repeated instances of a single plan when there are common features and substantial similarities among the acts. *State v. Kennealy*, 151 Wn. App. 861, 887, 214 P.3d 200 (2009). In determining whether different acts are repeated similar crimes, “the focus is on the *similarity* between the [separate crimes], rather than the *uniqueness* of the individual acts.” *State v. DeVincentis*, 150 Wn.2d 11, 14, 74 P.3d 119 (2003) (emphasis in original).

Sufficient similarity to constitute a common scheme or plan is reached when the court determines the “various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.” *DeVincentis*, 150 Wn.2d at 14; *State v. Lough*, 125 Wn.2d 847, 856, 889 P.2d 487 (1995). Evidence that indicates the defendant's conduct was “directed by design” rather than “merely coincidental” satisfies the requisite degree of similarity. *Kennealy*, 151 Wn. App. at 887 (quoting *Lough*, 125 Wn.2d at 860). The evidence is admissible if it is sufficient for

a fact-finder to conclude there was a common scheme or plan. *State v. Carleton*, 82 Wn. App. 680, 683, 919 P.2d 128 (1996).

The evidence in this case shows the defendant had a common scheme or plan that was enacted repeatedly to molest A.T. and D.W. *Gresham*, 173 Wn.2d at 421-22. There were substantial similarities in his abuse of each child. *DeVincentis*, 150 Wn.2d at 14. Those similarities included: (1) targeting prepubescent children; (2) targeting relatives; (3) targeting children in his wife's care; (4) abusing children in private spaces under his control such as his bedroom and vehicle; (5) waiting until his spouse Peggy was away or asleep to perpetrate the abuse; (6) abusing each child by fondling of the chest, instances of forced oral sex, and instances of forced vaginal penetration; and (7) using threats to overcome the children's resistance and discourage them from telling others about the abuse. CP 9-14. The similarities between the abuse of A.T. and the abuse of D.W. demonstrates that the defendant's conduct was directed by design to isolate a child, abuse them in a particular manner, and keep them quiet through fear. *Kennealy*, 151 Wn. App. at 887; CP 9-14.

The factual scenario in *State v. Kennealy* was similar to this case. There, the defendant's abuse of multiple children was admitted as evidence of a common scheme or plan even though his conduct was not identical in each case. *Kennealy*, 151 Wn. App. at 888. The similarities the court

considered in its determination included: telling the children not to tell anyone about the abuse, committing the abuse in a manner that would be unnoticed by others, committing the acts against children who were related or lived close to him, committing the acts after the children knew and trusted him, abusing children between 5 and 12 years old, touching the girls on their vaginas, and committing sexual acts more than once with most of his victims. *Id.*

The defendant's abuse of A.T. and D.W. demonstrates a level of similarity comparable to the facts in *Kennealy* and in fact his abuse meets every factor used by the court in *Kennealy* apart from waiting until the girls knew and trusted him. The defendant's abuse of each girl demonstrated even more specificity than the general facts comprising a common scheme or plan in *Kennealy* given how the defendant used the exact same method of abusing each girl in his room at night after his wife was asleep elsewhere in the house. CP 9-14. The difference in the level of violence the defendant used with D.W. accounted for his lack of a long-standing relationship with her. The similarities in her victim profile, the specific acts she suffered, and the use of threats to keep her quiet demonstrated D.W. was a manifestation of the same plan the defendant enacted upon A.T.

Washington courts have repeatedly found evidence of a common scheme or plan even when there are some factual differences among the

victims. *Gresham*, 173 Wn.2d at 421; *State v. Williams*, 156 Wn. App. 782, 491-92, 234 P.3d 1174 (2010); *State v. Sexsmith*, 138 Wn. App. 497, 504, 157 P.3d 901 (2007). This Court should find the defendant's abuse of both girls was evidence of a common scheme or plan.

b. Evidence of opportunity.

The defendant's abuse of A.T. and D.W. was relevant to show opportunity. ER 404(b). "Evidence is relevant to show opportunity when it demonstrates the ability of a defendant to do a wrong because of a favorable combination of circumstances, time and place that serves to identify the defendant." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The defendant in this case unquestionably took advantage of a "favorable combination of circumstances, time and place" to sexually abuse A.T. and D.W. *Powell*, 126 Wn.2d at 258. The defendant had unrestricted access to children when they were placed in Peggy's care and she left the home or went to sleep in her separate bedroom on a different floor of the house. CP 9-14. He used this opportunity to molest A.T. repeatedly and used it immediately the first time D.W. was at his home. The crimes against A.T. and D.W. identified the defendant through evidence of opportunity.

c. Evidence of sexual motive.

Evidence of other acts may be admissible to show motive and intent. ER 404(b); *State v. Baker*, 162 Wn. App. 468, 473-74, 259 P.3d 270 (2011).

Motive is the “impulse, desire, or any other moving power, which causes an individual to act.” *Powell*, 126 Wn.2d at 259. Washington courts have repeatedly upheld the admission of acts relevant to sexual motive and intent. *In Re Aqui*, 84 Wn. App. 88, 99, 929 P.2d 436 (1996), *overruled on other grounds by In re Detention of Hendrickson*, 140 Wn.2d 686, 2 P.3d 473 (2000); *State v. Shimmelpfennig*, 92 Wn.2d 95, 98, 594 P.2d 442 (1979); *State v. Halstien*, 65 Wn. App. 845, 850, 829 P.2d 1146 (1992), *affirmed*, 122 Wn.2d 109 (1993); *State v. Burkins*, 94 Wn. App. 677, 688, 973 P.2d 15 (1999); *State v. Kilgore*, 147 Wn.2d 288, 291, 295, 53 P.3d 974 (2002).

The crime of child molestation requires proof of “sexual contact,” defined as “any touching for the purpose of gratifying sexual desire.” RCW 9A.44.083(1); RCW 9A.44.010(2). Intent is relevant to proving the crime of child molestation because it is necessary to prove “sexual contact.” *State v. Stevens*, 127 Wn. App. 269, 277, 110 P.3d 1179 (2005), *affirmed*, 158 Wn.2d 304, 143 P.3d 817 (2006). The defendant’s crimes against A.T. and D.W. were cross-admissible to show his sexual intent for the child molestation charges. This was especially pertinent to Count IX, the defendant’s molestation of D.W. by grabbing her buttocks at a Christmas gathering. The sexual meaning behind this act is only revealed by evidence of his other sexual crimes against A.T. and D.W. This Court should find the crimes as to A.T. and D.W. cross-admissible as evidence of intent.

- d. The highly probative evidence was not outweighed by its prejudicial effect.

Other acts that constitute evidence of a common scheme or plan, opportunity, or motive are admissible unless their probative value is substantially outweighed by the danger of unfair prejudice. ER 403; ER 404(b); *Kennealy*, 151 Wn. App. at 890. Evidence of other acts of sexual abuse is “strongly probative because of the secrecy surrounding child sex abuse, victim vulnerability, the frequent absence of physical evidence of sexual abuse, the public opprobrium connected to such an accusation, a victim’s unwillingness to testify, and a lack of confidence in a jury’s ability to determine a child witness’s credibility.” *Kennealy*, 151 Wn. App. at 890 (citing *State v. Krause*, 92 Wn. App. 688, 696, 919 P.2d 123 (1996)). The evidence is especially probative when the primary evidence is a child’s testimony and the jury’s decision rests upon a credibility assessment. *Sexsmith*, 138 Wn. App. at 506.

The defendant denied raping and molesting A.T. and D.W. Evidence of his common scheme or plan, opportunity, and motive was highly probative he committed the crimes against both girls. *DeVincentis*, 150 Wn.2d at 17-18; *Powell*, 126 Wn.2d at 258; *Baker*, 162 Wn. App. at 473-74. The probative value of the evidence was increased because there was no physical evidence and the jury’s determination rested primarily on the credibility of a child’s testimony. *Sexsmith*, 138 Wn. App. at 506; *Kennealy*,

151 Wn. App. at 890. This Court should find the highly probative nature of the cross-admissible evidence was not outweighed by its prejudicial effect.

e. The court adopted the State's reasoning on joinder.

The trial court did not make a detailed record of its reasoning given counsel's agreement to joinder. RP(3/20/18) 12-13. It is clear nevertheless that the court adopted the reasoning of the State. *See, e.g., State v. Pirtle*, 127 Wn.2d 628, 650-51, 904 P.2d 245 (1995). The court stated:

...I'm going to grant the motion to join the cases, both. I did read quite carefully your briefing, which is well done. Thank you very much. I've read those cases before that you've cited, and I don't think you missed a point at all. I think they're right on, really well done. I do appreciate a good brief. And I can understand why defense probably didn't think it was necessary to respond to that. It was going to be granted in any event.

RP(3/20/18) 12-13. These comments make clear the cases would have been joined based on the law and facts. *See, e.g., Carleton*, 82 Wn. App. at 686; *State v. Gogolin*, 45 Wn. App. 640, 645, 727 P.2d 683 (1986). This Court should find the defendant was not prejudiced by his counsel's agreement to joinder because it was the inevitable outcome of the State's motion.

C. The record shows counsel vigorously and effectively tested the State's evidence in defense of her client.

Proof of demonstrable tactical errors will not support reversal so long as the adversarial testing envisioned by the Sixth Amendment occurred. *Cronic*, 466 U.S. at 656. The entirety of the record shows that

counsel strategically and thoroughly attacked the evidence against the defendant at every stage of trial. *McFarland*, 127 Wn.2d at 334-35.

After filing her notice of appearance, counsel investigated the facts underlying each victim's case through witness interviews, a subpoena for records, and the work of an investigator.¹¹ Her efforts identified five defense witnesses. CP 421-23.

Counsel worked to shape the evidence to the defendant's benefit through three extensive pre-trial briefs. CP 79-123, 127-131, 163-208. The first framed the facts from the defense perspective and presented 15 motions in limine; the second opposed the State's attempt to introduce expert testimony on child abuse; and the third challenged A.T.'s competency and the introduction of her statements as child hearsay. *Id.* Favorable rulings permitted her to inquire into Shauna's financial motive and limited character evidence of the State's witnesses. 5RP 696, 700-02. At the child hearsay hearing, she cross-examined the State's witnesses and argued against the admission of A.T.'s prior statements.¹²

Counsel was engaged throughout the jury selection process in both individual and group questioning. 3RP; 4RP; 5RP 611. She gave an opening statement and immediately told the jury the defendant was innocent. 6RP

¹¹ CP 411-13, 418-20, 424-30; RP(3/20/18) 3-5, 10; 5RP 698, 705; 6RP 783.

¹² 1RP(4/23/18) 76-80, 105-111; 2RP 145-46, 182-84, 195-96, 216, 234-36, 238, 246-49.

729. She introduced the themes she would pursue throughout trial, telling the jurors: (1) the allegations were suspect because of inconsistencies and delayed disclosure; (2) D.W.'s statements were implausible and contradicted by other evidence; (3) there was no physical evidence; (4) the girls' mothers acted inconsistently with belief in their daughter's statements; (5) Peggy didn't see any abuse; and (6) Shauna was motivated by money. 6RP 729-36. She developed these theories through cross-examination of the State's witnesses.¹³

Counsel called four witnesses in the defense case. The defendant testified and denied sexually abusing A.T. and D.W. 1RP 52. He claimed he and Shauna had a bad relationship and she reacted vindictively when he and Peggy withdrew financial support. 1RP 25-26. Jason Orr testified about his knowledge of D.W.'s allegations. 10RP 1446-69; 1455-56. The defense investigator introduced photographs of the defendant's bedroom to contradict D.W.'s description. 1RP 6-11.

Peggy testified for both the State and the defendant. 8RP 1119; 10RP 1432. Her continued love for the defendant was emphasized in the defense opening statement to suggest she would not still love him if he had done anything wrong. 6RP 735; 8RP 1189; 12RP 1537-38. Peggy told the

¹³ 1RP 6-11, 15-52, 124; 6RP 769-81, 841-47; 7RP 881-903, 990-1009; 8RP 1059-68, 1108-1113, 1173-1190; 9RP 1232-1238, 1261-68; 10RP 1359-60, 1376-83, 1409-11', 10RP 1432-1439, 1443, 1446-1449, 1455-56.

jury the defendant was “still the love of her life” even though they were divorced. 8RP 1120. She testified she never saw the defendant act inappropriately with either girl. 8RP 1189. She said she left D.W. alone with the defendant despite knowing of A.T.’s allegations because she “didn’t believe it.” 8RP 1145-46. She implied the same when she said she left A.T. alone with the defendant despite Shauna’s request she watch them when they were together. 8RP 1164-67.

Peggy denied the State’s portrayal of she and the defendant living separately. 8RP 1125-26. She provided an alibi for the weekend D.W. said she was raped at the restaurant. 10RP 1435. She contradicted D.W.’s and Pierce’s descriptions of what the defendant looked like in the timeframe of the rape at the restaurant. 10RP 1439. She contradicted many of the details provided by A.T., D.W., Shauna, and Bethany about the circumstances of each girls’ abuse. 8RP 1173-90; 10RP 1432-39, 1443-44.

The court granted counsel’s request for the lesser included offenses of assault in the fourth degree for the child molestation charges. 10RP 1463. Counsel in closing argument emphasized the defendant’s denial of the crimes. 12RP 1537-38. She presented the unifying theory the allegations were “about money and attention and the fractured family dynamics of the Thompson family.” 12RP 1524-28, 1535.

Counsel suggested Shauna did not really believe A.T. given her failure to contact authorities right away and Bethany did not really believe D.W. because she removed her from counseling. 12RP 1525, 1528-29. She said the girls' accounts were internally inconsistent and contradicted by the evidence. 12RP 1526, 1529, 1532-34. She argued Peggy loved A.T. so deeply she would never have allowed the defendant to abuse her. 12RP 1537-38. She alleged D.W.'s account of the rape in the restaurant was implausible. 12RP 1531. Her discussion of the law focused on the State's burden and the lesser included offenses. 12RP 1538-41. She asked the jurors to find the defendant not guilty. 12RP 1541.

Following trial, counsel filed a sentencing memorandum and letters of support on the defendant's behalf. CP 301-03, 433-36. Her conduct at every stage embodied the vigorous adversarial testing required by the Sixth Amendment. *Cronic*, 466 U.S. at 656. This Court should find counsel performed effectively given the entirety of the record.

D. Counsel strategically refrained from objecting to avoid highlighting evidence beneficial to the State and permit evidence advantageous to her client.

When, whether, and how to object are legitimate tactical and strategic decisions afforded exceptional deference by a reviewing court. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (citing *Strickland*, 466 U.S. at 763); *Elmore*, 162 Wn.2d at 257. Refraining from

objection is included among those legitimate strategic decisions. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Counsel may strategically decline to object to avoid highlighting harmful admissible evidence. *Davis*, 152 Wn.2d at 714. The same strategy may be employed in regard to inadmissible evidence. *State v. Kloepper*, 179 Wn. App. 343, 355, 317 P.3d 1088 (2014). Refraining from objection can also be a tactical choice when the evidence supports the defendant's theory of the case or is beneficial to its presentation. *In re Tortorelli*, 149 Wn.2d 82, 95-96, 66 P.3d 606 (2003); *State v. Harstad*, 153 Wn. App. 10, 29, 218 P.3d 624 (2009).

Ineffective assistance of counsel based on lack of objection is only established when (1) there was no legitimate strategic or tactical reason for refraining from objection; (2) the objection likely would have been sustained; and (3) the result of the trial would have been different if the objection was successful. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *State v. Johnston*, 143 Wn. App. 1, 19, 438 P.3d 541 (2007) (quoting *Madison*, 53 Wn. App. at 763). Error for lack of objection must truly be "manifest" as demonstrated by a "plausible showing ... the asserted error had practical and identifiable consequences in the trial of the

case.” *Kirkman*, 159 Wn.2d at 935 (quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

“This court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption.” *Johnston*, 143 Wn. App. at 20. The defendant in this case fails to rebut the presumption that his counsel declined to object for tactical reasons. He also fails to show that the objections, if made, would have been sustained and the outcome of the trial would have changed. The defendant wrongly accuses his counsel of passivity when she strategically addressed the evidence at issue through cross-examination and argument.

1. Counsel strategically refrained from objecting to avoid highlighting admissible information about the circumstances allowing the defendant to abuse both girls.

Counsel strategically refrained from objecting to admissible information about the problems in the defendant’s marriage including Peggy filing for divorce in 2013 and 2016. Br. of Appellant at 29-34. *Davis*, 152 Wn.2d. at 745. Her decision to avoid highlighting this admissible evidence through fruitless objection was sound. *See, e.g., State v. Yarbrough*, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009)¹⁴ (legitimate

¹⁴ Case includes additional authority on the legitimate strategy of declining to highlight evidence disadvantageous to the defendant.

strategic decision to refrain from requesting a limiting instruction for admissible gang evidence).

Evidence is relevant when it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). A fact bearing on the credibility or probative value of other evidence is also relevant. *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987).

“Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience.” *State v. Jackson*, 145 Wn. App. 814, 818, 187 P.3d 321 (2008) citing Washington Practice Pattern Jury Instructions 5.01. Circumstantial evidence and the inferences stemming from it can be used to prove an element of a crime. *State v. Aguilar*, 176 Wn. App. 264, 273, 308 P.3d 778 (2013).

The ongoing marital problems leading the defendant and Peggy to live separate lives under the same roof created the perfect environment for the defendant to abuse A.T. and D.W. without interference. *Jackson*, 145 Wn. App. at 818. Peggy’s filings for divorce in 2013 and 2016 were manifestations of the problems in the marriage relevant to the credibility

and probative value of evidence she and the defendant were living separate lives. *Rice*, 48 Wn. App. at 12.

Evidence the defendant and Peggy were living separate lives was highly relevant circumstantial evidence that the crimes took place as the children described them, out of the view of Peggy when she was asleep or out of the house. *Aguilar*, 176 Wn. App. at 273. It was also relevant evidence Peggy was not in a position to accurately observe there was nothing suspicious happening in the house. *See State v. Hall*, 10 Wn. App. 678, 680-81, 519 P.2d 1305 (1974).

Counsel's strategic thinking about this topic was demonstrated by how she addressed the evidence at trial. Both Peggy and the defendant minimized the extent to which they were living separately and the defendant described their issues as "normal problems." 1RP 42-44; 8RP 1126-28. Both testified Peggy didn't really want a divorce but felt forced into it by external pressures. 1RP 108; 8RP 1121, 1140.

Counsel attempted to further undermine the importance of these facts by arguing in closing:

There has been a lot of testimony about the Thompsons' marriage and the issues throughout their marriage, and that is a fact that's not in dispute, okay? There were problems. Peggy filed for divorce twice and eventually divorced Mr. Thompson. Obviously, there were issues. And it's not disputed that they slept in separate bedrooms, although the testimony as to why they slept in separate bedrooms has varied between individuals,

but at the end of the day, why does it really matter why they slept in different bedrooms? Now, the State, their position is that it's a sexless marriage, okay. Again, so what? Lots of people are in sexless marriages. It's not an indicator that you are going to go out and commit crimes against children.

12RP 1527-28. She even used the divide between Peggy and the defendant

as a reason why A.T. would accuse the defendant of abuse, arguing:

[A.T.] also discussed her desire to have papa out of the home, okay. Remember that? She talked about he sits outside, he just drinks his adult juice and he smokes and he doesn't do anything. Grandma does all the work, and I love grandma, and I want to spend Christmas at grandma's house with grandma. She doesn't want grandma to be the one to have to leave, okay, she wants Mr. Thompson out of the home so that she can see her grandmother.

12RP 1526. This fits the defendant's theory that A.T.'s accusations arose out of the "fractured family dynamics" of the Thompson family and Shauna's desire for money. 12RP 1524. The defendant cannot rebut the presumption his counsel's decision to refrain from objecting to evidence of filings for divorce was tactical. *Johnston*, 143 Wn. App. 1. He furthermore cannot show manifest error given the totality of the evidence admitted at trial. *Kirkman*, 159 Wn.2d at 935.

2. Counsel strategically refrained from objecting to the proper impeachment of Peggy to avoid highlighting issues with her credibility.

a. Law and Argument.

Counsel strategically refrained from highlighting the importance of information used to impeach Peggy through fruitless objection. *Davis*, 152

Wn.2d. at 745. The credibility of a witness may be attacked by any party including by the party who called the witness. ER 607. There are many acceptable methods. A witness may be questioned about her ability to see, hear, and observe the matters she is testifying about. *See State v. Pryor*, 74 Wn. 121, 132 P. 874 (1913); *Hall*, 10 Wn. App. at 680-81. Her observations and testimony can be shown to be affected by bias or prejudice. *State v. McDaniel*, 37 Wn. App. 768, 772-73, 683 P.2d 231 (1984). Prior inconsistent statements can be used to impeach her testimony at trial. ER 613. And finally, a party can introduce evidence contradicting the witness's assertions. *Jacqueline's Washington, Inc. v. Mercantile Stores Co.*, 80 Wn.2d 784, 788-89, 498 P.2d 870 (1972). These methods were properly used by the State to question Peggy's credibility, her observations, and her testimony. The information was elicited for impeachment and discussed as such in closing argument. 12RP 1480-1522. Counsel strategically avoided highlighting this information by refraining from objection.

b. Specific Instances of Impeachment.

(1) Filings for divorce.

Evidence Peggy and the defendant were living separate lives as demonstrated by the filings for divorce was relevant to Peggy's ability to observe instances of abuse, her bias as a witness, and evidence contrary to her assertions she had never observed anything suggestive of abuse. Br. of

Appellant at 29-34; *Hall*, 10 Wn. App. at 680-81; *McDaniel*, 37 Wn. App. at 772-73; *Mercantile Stores Co.*, 80 Wn.2d at 788-89.

First, the problematic relationship between Peggy and the defendant was important information for the jury to consider in conjunction with her claim she never observed the defendant act inappropriately with either victim. 8RP 1189; *Hall*, 10 Wn. App. at 680-81. Peggy's separate existence from the defendant created the circumstances he used to abuse the children when she was asleep or away. The filings for divorce also contradicted her claims she and the defendant were not really living separate lives at the time A.T. and D.W. were abused. *Mercantile Stores Co.*, 80 Wn.2d at 788-89.

Next, evidence Peggy had filed for divorce from the defendant in 2013, reconciled with him, followed through with the divorce after 2016, and then professed her love for him at trial was relevant information to assessing Peggy's ability to testify neutrally regarding someone she "always forgave." 10RP 1391; *McDaniel*, 37 Wn. App. at 772-73. Peggy's vacillation and inconsistent stance towards the defendant was as relevant to her credibility as an inconsistent statement.

Finally, evidence Peggy repeatedly filed for divorce contradicted her assertion she never observed anything consistent with the defendant committing the crimes. *Mercantile Stores Co.*, 80 Wn.2d at 788-89. Peggy was so close to A.T. she referred to her as her "other daughter" and

undoubtedly had personal knowledge of behavior or events consistent with abuse in her household. 10RP 1437. A.T. was frequently in the defendant's bedroom day and night. 6RP 751-52; 9RP 1213-15; Ex 85, 87. She said her grandmother was the second person she told about the abuse. 6RP 760, 771. Peggy, however, denied she ever found A.T. in the defendant's bedroom and denied A.T. ever told her directly about the abuse. 6RP 752; 8RP 1134-37, 1141, 1150, 1158, 1180. D.W. testified about her interactions with Peggy the weekend of her mother's wedding. 7RP 914, 922, 934-35. Peggy disputed the entire sequence of events as related by D.W. and Bethany. 8RP 1149-53. The jury could interpret Peggy's filings for divorce as evidence she actually had knowledge of abuse consistent with the girls' disclosures and acted upon it before forgiving the defendant. It contradicted her claims at trial she did not.

The defendant wrongly asserts that evidence from which belief may be inferred is the same as witness expressing her belief at trial. It is not. Inferences that are drawn from the evidence do not constitute improper opinions. *See, e.g. State v. Haq*, 166 Wn. App. 221, 226, 268 P.3d 997 (20012); *Madison*, 53 Wn. App. at 760. Counsel strategically refrained from objection to minimize the impact of this relevant impeachment information.

(2) Separate lives and lack of intimacy.

The lack of intimacy in the Thompson marriage was relevant to Peggy and the defendant living separate lives and specifically that Peggy was not in the defendant's bedroom at night when abuse occurred. Br. of Appellant at 29-36, 44, 46; *Aguilar*, 176 Wn. App. at 273; *Rice*, 48 Wn. App. at 12; ER 401. Peggy minimized living separately from the defendant and denied lack of intimacy, presumably to lend credibility to her claim she never saw abuse and refute the idea the defendant was using A.T. for sex. 8RP 1125-27. Her statements to Shauna, Detective Miniken, and Detective Wilcox about lack of intimacy and living separate lives were relevant impeachment. ER 613; 6RP 802; 8RP 1125-27; 9RP 1313-14, 1332. Counsel strategically refrained from objection to minimize the impact of this impeachment evidence.

(3) The defendant taking A.T. out of her crib.

Peggy was properly impeached with her prior inconsistent statements about the defendant taking A.T. out of her crib at night. Br. of Appellant at 38, 44, 47; ER 613. Peggy testified she never saw the defendant act inappropriately with either victim and never found A.T. in the defendant's room at night. 8RP 1135, 1189. Her prior inconsistent statements to the contrary were relevant impeachment. ER 607, 613.

Shauna briefly brought up this information prior to Peggy's testimony. 8RP 811-12. Subsequent to Peggy's testimony Shauna provided more detail about her mother's prior statements:

Q. Now, prior to A.T. disclosing to you in the bathtub, did you come to find out that A.T. was -- when she went over to your parents' house -- sleeping in your father's room?

A. Yes.

Q. How did you find that out?

A. Because he would go take her out of her crib.

Q. How did you know that?

A. Because my mom called and told me.

Q. What was it your mom called and say?

A. "Shauna, he keeps on taking her out of her crib. He keeps on taking her out of her crib. I don't know how to stop it."

Q. And was your mom, when she discussed this with you, upset about it?

A. Yes.

10RP 1385-86. Detective Miniken was questioned about a similar statement made by Peggy:

Q. Did she tell you that there were a number of occasions that [A.T.] woke up crying, went down to Jerry's room and Peggy went down to get her?

A. Yes.

Q. And so Peggy indicated that she had to go downstairs to Jerry's room to get [A.T.]?

A. Correct.

9RP 1313-14. Counsel strategically refrained from objection to minimize the impact of these highly relevant prior inconsistent statements.

- (4) Leaving A.T. with the defendant; the defendant making a stick.

Peggy's statements to Detective Wilcox about leaving A.T. alone with the defendant and the defendant making a stick two years prior were admissible prior inconsistent statements. Br. of Appellant at 47; 9RP 1332; ER 607, 613. Peggy claimed at trial that Shauna also left A.T. alone with the defendant in 2015 and 2016. 8RP 1165-67. This was likely to cast doubt on Shauna's belief in A.T. That Peggy had previously told Detective Wilcox she left A.T. alone with the defendant but did not say anything about Shauna was relevant to her credibility.

Testimony about the stick was relevant because A.T. described its use as the reason she was afraid of the defendant. ER 401; Ex 85. Peggy denied knowing anything about a stick at trial. 8RP 1156-57. Her prior inconsistent statement to Detective Wilcox was relevant impeachment. ER 607, 613; 9RP 1332. Counsel strategically refrained from objection to minimize the impact of these highly relevant prior inconsistent statements.

(5) Peggy's reaction to the involvement of Sigournia and Rachel.

Peggy's upset at outsiders being aware of family business was relevant to the jury's evaluation of her bias. Br. of Appellant at 41-42; ER 607; *McDaniel*, 37 Wn. App. at 772-73. The jury could infer that Peggy's desire to "keep the allegations in the family" would affect whether she testified truthfully when her husband was on trial for abuse. 9RP 1224; ER

607; *McDaniel*, 37 Wn. App. at 772-73. Counsel strategically refrained from objection to minimize the impact of this relevant impeachment.

- (6) Denial she told Bethany defendant was going to flee the state.

Peggy's denial she told Bethany she thought the defendant was going to flee the state due to D.W.'s rape allegations was a relevant prior inconsistent statement. Br. of appellant at 43, 45; ER 607, 613. Peggy denied she told Bethany she believed the defendant was going to flee. 8RP 1157. She attempted to minimize her statements by saying she spoke to Bethany and Detective Wilcox about the defendant having a job opportunity and loading up his car. 8RP 1157; 10RP 1440-44. Bethany testified that she received a phone call from Peggy who told her that the defendant was going to flee the state because of D.W.'s allegations. 9RP 1307-08.

Peggy's inconsistent statements about what she told Bethany about the defendant's behavior was relevant to the jury's evaluation of her credibility. ER 607; 9RP 1307-08. Detective Wilcox's brief testimony on the same point was not offered for the truth but as information relevant to why she called Peggy that day and spoke to her in person four days later. Br. of Appellant at 45; 9RP 1324-25; ER 801(c). The subject was mentioned in the State's closing as relevant to Peggy's credibility. 12RP 1519. Counsel was not ineffective for declining to highlight this information.

(7) Sending photos of A.T. to the defendant.

Evidence Peggy sent photographs of A.T. to the defendant following his charges for abusing her was relevant to her bias. Br. of Appellant at 52-53; ER 607; *McDaniel*, 37 Wn. App. at 772-73. Peggy was not acting in a neutral fashion by sending a photograph of a child asserting sexual abuse to her perpetrator. ER 607; 8RP 1171. The record does not indicate the comment “I bet he does” following Peggy’s testimony about the defendant loving his grandchildren was sarcastic or aggressive as the defendant alleges. 8RP 1171. Peggy’s continued response following the comment indicates it did not affect her testimony. Counsel was not ineffective for declining to highlight this exchange through objection.

(8) Telling A.T. to not reveal contact with her grandfather.

Counsel may strategically decline to object even when evidence is inadmissible when doing so would only serve to highlight the importance of the evidence. Br. of Appellant at 42; *Klopper*, 179 Wn. App. at 355. Sigournia’s testimony A.T. said that Peggy didn’t want her to tell anyone when she saw the defendant was based on hearsay. Br. of Appellant at 42; ER 801; 8RP 1240. The testimony was brief and the product of the State’s attempt to clarify an earlier answer about how A.T. felt about Peggy. 8RP 1227. *See State v. Priest*, 132 Wn. 580, 584, 232 P. 353 (1925); *State v. Emery*, 174 Wn.2d 741, 765, 278 P.3d 653 (2012) (irregularities at trial

introduced by non-professional witnesses have less impact than those by professional witnesses).

Even if it had been excluded the outcome of the trial would not have changed. *Kirkman*, 159 Wn.2d at 935. There was ample admissible evidence Peggy did not believe the accusations and let A.T. have contact with the defendant so the exclusion of this further evidence would not change the outcome of the trial. 8RP 1164-67. Counsel was not ineffective for declining to highlight this information by objection.

c. Counsel's strategy.

Instead of fruitlessly objecting to relevant impeachment, counsel attempted to minimize Peggy's inconsistent statements by asking her during trial about all the people she had spoken to about the allegations over the years. 8RP 1173. In closing argument counsel characterized Peggy's inconsistencies as the product of confusion and forgetfulness. 12RP 1538. Counsel strategically reacted to Peggy's impeachment in a manner designed to minimize its importance and portray her inconsistencies as the product of understandable confusion.

3. Counsel tactically refrained from objecting to statements used to explain the sequence of events when the substance of those statements had already been admitted.

Statements not offered for the truth of the matter asserted are not hearsay. ER 801(c). Evidence and testimony is admissible as *res gestae* if it

“constitutes proof of the history of the crime charged.” *State v. Schaffer*, 63 Wn. App. 761, 769, 822 P.2d 292 (1991) (internal citation omitted). Evidence is also res gestae if it “complete[s] the story of the crime on trial by proving its immediate context of happenings near in time and place.” *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (quoting *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *aff’d*, 96 Wn.2d 591, 637 P.2d 961 (1981)). Furthermore, the prejudicial effect of improper admission of facts is lessened when those facts have already been properly admitted. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). Counsel tactically refrained from needless objection to statements already admitted and used to provide context at trial. *Lane*, 125 Wn.2d at 831.

a. Sigournia telling Shauna about A.T.’s disclosure.

Sigournia telling Shauna what A.T. said to her about the defendant’s abuse was relevant contextual information for why she and Rachel subsequently went to speak with the defendant and not offered for the truth. Br. of Appellant at 39; *Lane*, 125 Wn.2d at 831; ER 801(c); 9RP 1218-19. The substance of A.T.’s statements had been admitted as child hearsay. 2RP 251; 9RP 1211-16. It was not prejudicially repetitive given the context. ER 403. Counsel was not deficient for declining to object.

- b. Sigournia's testimony about Peggy's knowledge of the allegations.

Sigournia's testimony that Shauna was on the phone with Peggy "going back and forth with her" when she arrived at Shauna's apartment and that Peggy would call wanting to see A.T. was based at least in part on her observations. Br. of Appellant at 40; ER 602; 9RP 1208; 10RP 1386. It was also duplicative of evidence Shauna provided about communications with Peggy. 6RP 818, 832; 10RP 1386. Counsel was not deficient for declining to object to this duplicative and non-prejudicial information.

4. Counsel tactically refrained from objecting to information beneficial to the defendant's theories.

In *Harstad*, the defendant alleged his counsel was deficient for refraining from objection to evidence of a note a victim wrote to her sisters during the forensic interview. *Harstad*, 153 Wn. App. at 29. The court declined to find ineffective assistance of counsel because the evidence was relevant to "one of the defense themes, which was that the girls were influenced by one another in a manner that tainted the reliability of their statements." *Id.* The court noted it would not "find ineffective assistance of counsel if the actions go to the theory of the case or to trial tactics." *Id.*

- a. Stacia Adams' testimony regarding D.W.'s forensic interviews.

Stacia Adams testified that D.W. did not disclose abuse in her first forensic interview and did disclose abuse in her second. Br. of Appellant at

42-43; 9RP 1301-02. Detective Wilcox testified to the same when explaining the sequence of events related to her investigation. Br. of Appellant at 45; 9RP 1320-24. This information was not offered for the truth but to add to the timeline and explain that disclosure of sexual abuse is a process. ER 801(c). It did not contain D.W.'s actual statements. ER 801(c). The information was consistent with D.W.'s testimony and not prejudicial. 7RP 958-61, 982. Furthermore, counsel used evidence D.W. did not immediately and fully disclose to repeatedly attack her credibility and argue she should not be believed.¹⁵ Counsel strategically refrained from objection to information beneficial to the defense. *Harstad*, 153 Wn. App. at 29.

b. D.W.'s statement to her mother in 2015 that the defendant had hurt her.

D.W. told Bethany in 2015 that the defendant "had hurt her very badly." Br. of Appellant at 39; RP 1034. This statement was not offered for the truth here but as evidence of D.W.'s gradual process of disclosure. ER 801(c). The statement also supported the defendant's contention her delayed and gradual disclosure affected her credibility.¹⁶ Counsel strategically declined to object to this evidence. *Harstad*, 153 Wn. App. at 29.

¹⁵ 7RP 993-997, 1001-05, 1007-08, 1110; 8RP 1059, 1066; 10RP 1410.

¹⁶ 7RP 993-997, 1001-05, 1007-08, 1110; 8RP 1059, 1066; 10RP 1410.

c. D.W.’s comments to her mother that she had seen the defendant at the restaurant.

Bethany testified D.W. told her she had seen the defendant at the restaurant and he had “cornered her.” Br. of Appellant at 40; 8RP 1056. She provided no further details. 8RP 1056. Bethany described D.W. as “extremely distraught” when she was relating this. 8PR 1055-56. D.W.’s comments were admissible as statements made under the influence of a startling event. ER 803(a)(2). They were also evidence beneficial to the defendant’s theory D.W.’s disclosures evolved over time regardless of its admissibility, especially because D.W. did not tell her mother she was raped at the restaurant.¹⁷ *Harstad*, 153 Wn. App. at 29. Counsel strategically refrained from objecting to this information.

d. Sigournia’s testimony that she thought “he did it” after speaking with the defendant.

Sigournia testified that after she spoke with the defendant, “Shauna asked me what did I think, and I said, ‘He did it.’” Br. of Appellant at 41; 9RP 1223. This was a non-responsive answer to a question ending with, “where did you go?” 9RP 1223. It’s admission was not overwhelming especially given Sigournia was a non-professional witness. *See Priest*, 132 Wn. at 584; *Emery*, 174 Wn.2d at 765. The defendant has not shown manifest error affecting the outcome of the trial. RAP 2.5(a)(3); *Haq*, 166

¹⁷ 7RP 993-997, 1001-05, 1007-08, 1110; 8RP 1059, 1066; 10RP 1410.

Wn. App. at 266. The comment was not repeated or mentioned in the State's closing. 12RP 1480-1522.

Furthermore, this evidence supports the defendant's theory that Shauna, Sigournia, and Rachel acted inconsistently with actually believing the abuse had occurred. 9RP 1235; 10RP 1380; 12RP 1525, 1528-29; *Harstad*, 153 Wn. App. at 29; *Kloepper*, 179 Wn. App. at 355. Counsel specifically questioned Sigournia about how she had never contacted law enforcement or CPS despite her knowledge of the accusations. 9RP 1235. Counsel had previously asked Shauna if she "believed [her] daughter's disclosures" to contrast that with her decision to let A.T. continue going to the defendant's home. 6RP 844-845. She pursued a similar theory by asking Bethany if she "believe[d] the allegations" to contrast her answer with D.W.'s nonattendance at counseling for the prior year. 8RP 1068. Sigournia's failure to call authorities despite her professed belief in the allegations fit the defendant's theory that the people closest to A.T. doubted her disclosures. 12RP 1525, 1528-29; *Harstad*, 153 Wn. App. at 29. Counsel was not ineffective for refraining from objection.

5. Counsel tactically refrained from objecting to the State's proper questioning of witnesses, admissible corroborating evidence, and information inconsequential to the result of the trial.

a. State's use of leading questions with D.W.

Leading questions are permissible when dealing with young and unsophisticated witnesses. Br. of Appellant at 49-52; *State v. Ridley*, 61 Wn.2d 457, 460, 378 P.2d 700 (1963). Leading can be acceptable so long as the questions are not suggestive. *See, e.g. Kennealy*, 151 Wn. App. at 883 (discussing spontaneity in the context of a child hearsay determination). D.W. was 14 at the time she testified about the traumatic and multiple rapes she endured. 7RP 907. It was not improper for the State to lead appropriately given her age. *Ridley*, 61 Wn.2d at 460.

b. State's use of the term "rape."

The State's use of the term "rape" did not constitute improper vouching. Br. of Appellant at 50-52. Vouching is an improper expression of personal belief by an attorney. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010). In D.W.'s testimony the term "rape" was first used by D.W. to describe what happened. 7RP 930; *See, e.g., Kennealy*, 151 Wn. App. at 883. The State then used D.W.'s own word in further questions. The State's use of the term when directing Detective Wilcox to her investigation of the reported rape in the restaurant also did not express the prosecutor's personal

belief. 9RP 1329. Counsel was not ineffective for refraining from objecting to the State's proper questioning of the witnesses.

c. State's questioning of D.W. about emotional impact.

The State did not invite the jurors to decide the case on an improper basis by eliciting facts about D.W.'s response to the rapes relevant to the jury's assessment of her credibility. Br. of Appellant at 49-52. Jurors, as fact-finders, are tasked with assessing the credibility of witnesses. *State v. Demery*, 144 Wn.2d 753, 762, 30 P.3d 1278 (2001). A witness's demeanor and response to an event, including an emotional response, is an essential part of a credibility determination. *State v. Fleming*, 27 Wn. App. 952, 956, 621 P.2d 779 (1980); *In re Detention of Stout*, 159 Wn.2d 357, 382-83, 150 P.3d 86 (2007). Reference to emotion is not improper unless it invites the jury to decide a case based on emotions. *State v. Jones*, 71 Wn. App. 798, 807-08, 863 P.2d 85 (1993); *State v. Claflin*, 38 Wn. App. 847, 849-50, 690 P.2d 1186 (1984) (citing *State v. Fleetwood*, 75 Wn.2d 80, 84, 448 P.2d 502 (1968), and *State v. Buttry*, 199 Wash. 228, 251, 90 P.2d 1026 (1939)).

D.W.'s reaction to the extremely traumatic events she described was relevant to the jury's assessment of her credibility and determination of whether those charges had been proven. *Demery*, 144 Wn.2d at 762; *Fleming*, 27 Wn. App. at 956. The information elicited from D.W. encompassed the expected emotional consequences of being raped at age

eleven. 7RP 976, 954, 960-61. The jury's inability to decide two of the charges related to D.W. demonstrates this information did not overcome the jury's ability to make a rational decision. CP 284, 330-32. Counsel was not ineffective for refraining from objecting to this admissible information.

d. Defendant's attraction to African-American women.

Evidence the defendant was attracted to African-American women bore on the credibility of Sigournia's and Rachel's account of their conversation with the defendant. Br. of Appellant at 48-49; *Rice*, 48 Wn. App. at 12; 9RP 1218-22. The defendant specifically mentioned A.T. was biracial when he told Sigournia how beautiful A.T. was and how she was "developing nicely." 9RP 1218-22. She and Rachel said the defendant told them he was attracted to African-American women like them. 9RP 1218-22, 1240, 10RP 1375. Evidence of the defendant's interest in African-American women corroborated Sigournia's and Rachel's account of their conversation with the defendant and his sexualization of A.T. *Rice*, 48 Wn. App. at 12. How counsel chose to strategically address this information was revealed when she argued in closing:

If you take everything that the State has brought up in their case in regard to Mr. Thompson's sexual proclivity, we are to believe that he's interested in biracial three-year-olds, Caucasian 11-year-olds, and African-American women. That spans a lot of time and a lot of different interests, and is throwing everything at the dart board to see which sticks.

12RP 1537. Counsel strategically minimized the information through this argument. She also used it to argue against the State's assertion A.T. and D.W. were abused as part of the defendant's common scheme or plan. Counsel's lack of objection was strategic.

e. Soundproof walls.

Counsel strategically refrained from objecting to inconsequential information about the Thompson house having soundproof walls. Br. of Appellant at 46; 9RP 1324-27. This information was arguably relevant to Peggy's lack of observation of any abuse but didn't add much to the determination of the charges. Even if inadmissible, its admission was inconsequential and counsel was not deficient for declining to object.

6. Counsel's chosen strategy was effective.

Counsel made tactical choices to forgo fruitless objections and address the evidence when she was in control during cross-examination, the defense case, and argument. *Garrett*, 124 Wn.2d at 520. That the defendant was convicted does not mean counsel's choices were deficient. *Garrett*, 124 Wn.2d at 520. The court correctly noted at sentencing that "the jury clearly found [counsel] to be effective. They found in favor of the State on several of the counts, and acquitted on two of the counts finding the evidence insufficient to find Mr. Thompson guilty." 15RP 1614. This Court should also find counsel effectively represented the defendant.

E. The defendant cannot show that one or more evidentiary errors affected the outcome of trial.

“The test to determine whether cumulative errors require reversal of a defendant’s conviction is whether the totality of circumstances substantially prejudiced the defendant and denied him a fair trial.” *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660, 678 (2014), *abrogated on other grounds*, *State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018). “The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary.” *Yarbrough*, 151 Wn. App. at 98. There is no prejudice if the evidence is overwhelming. *Cross*, 180 Wn.2d at 691. The cumulative error doctrine “does not apply where the errors are few and have little or no effect on the outcome of the trial.” *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646, 660 (2006).

The defendant fails to show evidentiary error affected the outcome of his trial. *Yarbrough*, 151 Wn. App. at 98. None of the examples he cites would alone affect the outcome of the trial. *Kirkman*, 159 Wn.2d at 935. The cumulative error doctrine does not apply either because any errors were few and the evidence overwhelming. *Weber*, 159 Wn.2d at 279. What the defendant alleges was ineffective was actually strategic and tactical. Many

of his examples involve information properly admitted or that could not affect the outcome. The few instances that might be characterized as error did not affect the outcome of trial given the great weight of the evidence. *Weber*, 159 Wn.2d at 279.

A.T.'s statements thoroughly and compellingly described the years of sexual abuse she suffered by the defendant. 6RP 743; Ex. 85, 87. Her description of the circumstances was corroborated by her mother. 6RP 786. Her anguish was apparent in her repeated efforts to tell her mother, grandmother, Sigournia, a counselor, and other professionals what had happened to her.¹⁸ It was demonstrated by years-long bedwetting and issues with toileting.¹⁹ The defendant's conversation with Sigournia and Rachel about A.T. reveals his sexualization of her and that he regularly slept and bathed with her as she described. 9RP 1220-22.

D.W.'s repeated rapes by the defendant were thoroughly and compellingly described in her testimony. 7RP 906-1009. Her mother and counselor testified to the understandable and expected emotional

¹⁸ 6RP 6RP 768, 771; 9RP 1211-16; 10RP 1423-28; Ex. 85, 87.

¹⁹ 6RP 764-65, 821, 838; 7RP 889-91; 9RP 1211, 1356.

consequences these events had on her, which corroborated her account. 7RP 1024-29; 10RP 1403-05. Her mother witnessed the defendant brazenly “cupping” her buttocks at a family event, an act consistent with his comments to D.W. that she was his whore. 7RP 933, 942, 1031-32.

The defendant’s actions with A.T. and D.W. demonstrated his intent, opportunity, and common scheme or plan to isolate children in his care, threaten them, and use them for his own sexual needs. The jury had the opportunity to weigh the credibility of the accounts provided by A.T. and D.W. and convicted the defendant accordingly. Any minor evidentiary errors did not affect the magnitude of the evidence demonstrating the defendant’s guilt. This Court should affirm his convictions.

V. CONCLUSION

The defendant fails to show the absence of strategy in his counsel’s agreement to joinder when she subsequently argued the allegations of the two victims were connected and therefore suspect. The defendant fails to show the absence of strategy in his counsel’s decisions to refrain from highlighting evidence of his guilt and address the relevant issues elsewhere at trial. Counsel thoroughly and effectively defended her client. But she

could not prevent the overwhelming evidence from convicting him. This Court should affirm his convictions.

RESPECTFULLY SUBMITTED this 14th day of April, 2020.

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The undersigned certifies that on this day she delivered by E-file to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her 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.

4-14-20 Therese Kahn
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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