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

STATE OF WASHINGTON, Respondent

v.

DARYL ROGERS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-00097-3

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court did not abuse its discretion in admitting expert testimony that was helpful to the trier of fact.**
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- V. The trial court did err in imposing a community custody condition in which the defendant's treatment provider is required to make a report to the Department of Corrections.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Daryl Rogers was charged by second amended information with two counts of Child Molestation in the First Degree and four counts of Rape of a Child in the First Degree. CP 12-15. The child molestation counts were alleged to have been committed on or about or between January 1, 2005 and December 31, 2008 and on or about or between January 1, 2010 and December 31, 2010, respectively. CP 12-13. All of the rape of a child counts were alleged to have been committed on or

about or between January 1, 2010 and December 31, 2010. CP 12-14.

Additionally, the rape of a child charged in count 2 and the child molestation charged in count 3 involved the same incident. CP 12-13; RP 682. The victim of each of these crimes was J.O., who Rogers babysat on occasion, who temporarily lived with him in 2010, and who at all relevant times was less than twelve years old. CP 12-14; RP 197-98, 215-17. Each charged count also contained the “ongoing pattern of sexual abuse” and the abuse of trust aggravating circumstances. CP 12-14.

The case proceeded to a jury trial before the Honorable Robert Lewis, which commenced on October 29, 2018 and concluded on November 2, 2018 with the jury’s verdicts. RP 167-782. The jury convicted Rogers of counts 2 (Rape of a Child in the First Degree), 3 (Child Molestation in the First Degree), 4 (Rape of a Child in First Degree), and 5 (Rape of a Child in the First Degree) and found the aggravating circumstances on each count in which they convicted. CP 54-61; RP 782-85. The jury was unable to reach a unanimous verdict as to counts 1 (Child Molestation in the First Degree) and 6 (Rape of a Child in the First Degree) so a mistrial was declared as to those counts. CP 52-53, 62-65; RP 782-87. The trial court, after finding counts 2 and 3 constituted the same criminal conduct, sentenced Rogers to an indeterminate sentence pursuant to RCW 9.94A.507 with a minimum term of 277 months of total

confinement (the high end of the standard sentencing range). CP 104-09; RP 816-17. Rogers filed a timely notice of appeal. CP 122.

B. STATEMENT OF FACTS¹

In about 2006, J.O.'s family, to include her mother, Amanda Poindexter, and her two younger brothers met and befriended the Rogers family, which included the defendant Daryl, his mother, step-father, and siblings. RP 195-97, 322-24, 585-86. J.O. was about seven years old at the time. Rogers' stepfather worked at the Fishers Mill Apartment complex where J.O.'s family lived in a three bedroom apartment. RP 502. The two families grew close, attended the same church, and even shared a Thanksgiving together. RP 195-97, 323, 522-23, 585-89.

When J.O.'s family lived at the Fishers Mill Apartment complex, Rogers occasionally babysat. RP 197-98, 324-28, 359, 470-71, 483-84, 488-89, 491-92, 520, 590-91, 612-18. J.O. testified that the first time Rogers babysat that he touched her inappropriately.² RP 198-99. She explained that she fell asleep on the couch watching Nickelodeon and when she woke up she felt her pants and underwear being taken down, Rogers weight on top of her, and then him rubbing his penis between her thighs until the point that he ejaculated on her. RP 199-203. Rogers then

¹ Facts related to the assignments of error are developed in the Argument section.

² The incident, hereinafter explained, formed the basis of count 1 on which the jury did not reach a verdict.

got up to get paper towels, came back to clean up J.O., and pulled her pants back up. RP 199-203. J.O. just laid there the entire time and testified that she was scared and wanted to be asleep. RP 203.

After about a year of living at the Fishers Mill Apartment complex, J.O.'s family moved to Alaska. RP 198, 212-13, 276-77, 328-330. The move was an attempt by Ms. Poindexter, J.O.'s mother, to flee an abusive relationship with James Poindexter who was the father of one of J.O.'s younger brothers. RP 212-13, 276-77, 593. Ms. Poindexter and Rogers kept in touch while J.O.'s family lived in Alaska, and in 2010 when J.O.'s family returned to Vancouver they moved in with Rogers in the home he shared with his siblings and that his mother owned. RP 215-16, 281, 331-34, 489-490, 540-41, 594-96.

J.O.'s family only lived with Rogers for about three months before a dispute about rent ended with J.O.'s family moving out and a confrontation that included a call to the police when Ms. Poindexter returned to Rogers' home to retrieve some belongings. RP 282-83, 343-44, 346-47, 364, 471-73, 484, 605-07. No contact was made between the families at any point after the rent dispute in 2010. RP 286, 490, 530, 607, 633. But during that three or so months when the families lived together, Rogers sexually abused J.O. on multiple occasions. RP 221, 254-55, 278-79.

J.O. described one incident, much like the incident at the Fishers Mill Apartments, where she fell asleep on the couch and woke up on her stomach to Rogers' penis going in and out of the top of her thighs. RP 222-23. This time, Rogers' penis was much closer to J.O.'s vagina and included "rubbing the outside of [her] vagina area" and a brief moment where the top part of Rogers' penis penetrated her vagina. RP 222-25, 441-42. This was the only time that Rogers' penis entered J.O.'s vagina. RP 225, 279. The penetration hurt J.O. RP 224-225. Rogers ejaculated and then went to the kitchen to get paper towels to clean up. RP 226, 442.

J.O. also testified that Rogers made her perform oral sex on him about ten times.³ RP 254-55. One specific occasion happened in Rogers' bedroom. RP 230-36. J.O. was watching Hannah Montana on Disney when Rogers began pleading with her to suck on his penis and instructed her to suck on it like a popsicle. J.O. kept telling Rogers that she did not want to but "I had to do that. And then I did, and then he gave me ice cream." RP 230-33, 235. J.O. explained that Rogers pulled his pants down and was underneath the blankets on his bed, which is where he put his penis in her mouth while he held J.O.'s head and moved it up and down until he ejaculated in her mouth. RP 233-36, 442-43.

³ Two of the counts of Rape of a Child in the First Degree for which Rogers was convicted, counts 4 and 5, were based on specific incidents of oral sex. The jury did not reach a verdict on count 6, which was a more generalized allegation of oral sex.

During the time period of sexual abuse at Rogers' home, J.O. did not tell anybody. RP 256-57. J.O. said that at first she was worried that telling would leave her family without a place to live and later that she was "too scared and too ashamed and embarrassed" to tell anyone. RP 256-58. In fact, aside from a minimal disclosure to her best friend, J.O. did not really tell anybody about what had happened until 2016. RP 259-260, 272, 306-312, 351, 365-66. At that point, when J.O. was about 16 years old, she told her mother about the abuse while the two were having an argument in which Ms. Poindexter was lecturing J.O. about her behavior and decision making. RP 259-260, 272, 306-312, 351, 365-66. In fact, Ms. Poindexter said something to J.O. along the lines of that if she kept behaving in that way that she was that she "was going to get raped." RP 365-66. To which J.O. responded that she already had. RP 366.

Eventually, at the insistence of her mother, J.O. reported Rogers' abuse to the police. RP 260-63, 450, 461-62. J.O. also began seeing a mental health counselor and visited with a child abuse pediatrician, which included a physical exam. RP 264-66, 399, 401, 431, 437. Following Rogers' abuse, J.O. began engaging in self-harm, to include burning and cutting; she also suffered from nightmares, flashbacks, mood swings, paranoia, and had difficulty communicating with her mother. RP 261-62, 264-67, 350, 357, 403-06. She was diagnosed with PTSD. RP 405-06.

At trial, Rogers called his siblings and a close friend that had stayed at Rogers' home during the time period of the abuse as witnesses. RP 501, 537-38, 560-61. Each testified that they did not see Rogers alone with J.O., did not see or hear anything suspicious, and intimated that the events were unlikely to have happened without someone noticing. RP 515-16, 548-49, 573-74. Rogers also testified and denied the accusations. RP 604, 608-09, 641. But he did agree that there were times when he was alone with J.O. such that things could have happened. RP 626-27, 637-38 *contra* RP 641-42.

ARGUMENT

I. The trial court did not abuse its discretion when it denied defendant's motion for a mistrial, and instead gave a curative instruction, following a non-professional witness's comment that the defendant had been in juvenile detention.

Prior to trial, the court ruled that any mention of Rogers' juvenile criminal history was prohibited. RP 53. Nonetheless, during the direct examination of J.O.'s mother, Ms. Poindexter, she mentioned that Rogers had been in juvenile detention in the following exchange:

[State:] . . . How did you first meet the defendant? How did you come to know him?

[Ms. Poindexter:] His stepfather was the maintenance guy at the Fisher Mill Apartments and he knew that we were new here, so we became friends with him, and then his

mother used to come to the apartments in the community room, so we met her as well. They invited us to church. He was in juvenile detention at the time of us meeting with his mom and his sister and his brother. Then when he got out of - -

Mr. Staples: Your Honor - -

[Ms. Poindexter:] - - juvenile detention - -

The Court: I'm sorry, if I could have you stop for just a moment.

RP 317-18. At that point, the jury was excused and Rogers moved for a mistrial. RP 318-19.

The trial court denied the motion reasoning that a curative instruction would suffice because (1) “although there was a reference to juvenile detention, it did not come in response to the actual question being asked . . . an so [it was] not a deliberate attempt to violate the Court’s orders on the State’s part;” and (2) the “reference [wa]s to juvenile detention, not to any specific criminal activity.” RP 320. Before providing the curative instruction to the jury, however, the trial court asked Rogers if he “want[ed] a curative instruction” to which Rogers replied “I’d ask that the Court orally admonish the jury to the [sic] curative instruction and then we’ll (inaudible) the instructions, as well.” RP 321.⁴ The trial court then stated to the jury:

⁴ Rogers maintained that “a mistrial is appropriate,” but requested that a curative instruction be given in the “absence of that request being granted.” RP 321.

Before we proceed, I'm going to give you an instruction regarding a remark the witness made and that wasn't in response to a question. It was some reference made by the witness - - to the possibility defendant may have been in juvenile detention at some point. That was inappropriate. That has nothing to do with this case. It's irrelevant to this case. I'm instructing you at this time to disregard that remark and not to consider it or discuss it during your deliberations.

RP 321-22.

Rogers now argues that the trial court's curative instruction "only served to emphasize Rogers' juvenile criminal history in the eyes of the jury" and that "a mistrial was the only way to ensure a fair trial." Brief of Appellant at 8-9. But because this was a one-time, unintentional interjection of inadmissible testimony by a non-professional witness that was unlikely to have much prejudicial effect, the trial court did not abuse its discretion in denying Rogers' motion for a mistrial.

a. Standard of Review

A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010) (citation omitted). Moreover, the "denial of a motion for mistrial should be overturned only when there is a substantial likelihood that the prejudice affected the verdict." *Id.* (citation omitted). In making such a determination, reviewing courts must keep in mind that a "trial judge, not an appellate court, is in the best position to evaluate the dynamics of a jury

trial and therefore the prejudicial effect of a piece of evidence.” *State v. Posey*, 161 Wn.3d 638, 648, 167 P.3d 560 (2007) (citing *State v. Taylor*, 60 Wn.2d 32, 40, 371 P.2d 617 (1962)). Because of this fact, our trial courts are granted “wide discretion to cure irregularities resulting from improper witness statements.” *Gamble*, 168 Wn.2d at 177. (citation omitted).

b. Trial Irregularities and Mistrial

Testimony that violates a court’s pretrial ruling is considered a “trial irregularity.” *Gamble*, 168 Wn.2d at 177. A trial irregularity can form the basis of a successful mistrial motion but only when “the improper testimony was so prejudicial that the defendant [could] not get a fair trial.” *Id.* In reviewing the denial of a mistrial based on a trial irregularity appellate courts must consider the trial irregularity’s “prejudicial effect.” *Id.* Such a determination is made by examining “(1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it.” *Id.*

A violation “of a pretrial order is serious irregularity.” *Id.* at 178. The “unintentional interjection of inadmissible testimony,” however, is less serious than the “intentional introduction of inadmissible evidence relating to criminal history.” *Id.* Similarly, a trial irregularity is less serious when the introduction of the inadmissible testimony is done by a non-

professional witness as compared to a professional witness, e.g. a police officer. *State v. Johnson*, 60 Wn.2d 21, 27-28, 371 P.2d 611 (1962) (affirming the denial of mistrial in an indecent liberties case where the mother of the victim mentioned that defendant had a parole officer and where the remark was instantly stricken and the jury instructed to disregard it); *State v. Taylor*, 60 Wn.2d 32, 36, 371 P.2d 617 (1962); *Gamble*, 168 Wn.2d at 178.

Here, when viewed in the context of all the evidence, Rogers was not deprived of a fair trial. While the violation of the trial court's pretrial order should be considered serious, the seriousness of the violation was lessened by the fact that the evidence of Rogers' time in juvenile detention was unintentionally introduced by a non-professional witness, Ms. Poindexter. RP 320. Moreover, the introduction of Rogers' potential misbehavior as a child—prior to when he was alleged to have committed the crimes—is straightforwardly less prejudicial than an allegation the same or similar criminal behavior or of criminal behavior as an adult. *See State v. Hopson*, 113 Wn.2d 273, 284-85, 778 P.2d 1014 (1989); *State v. Escalona*, 49 Wn.App. 251, 252-53, 256, 742 P.2d 190 (1987).

Furthermore, while Ms. Poindexter's mention of juvenile detention was not cumulative of other properly admitted evidence, it was only introduced in response to one question and never referenced again. And

the trial court instructed the jury that Ms. Poindexter's "reference" was "inappropriate . . . has nothing do [sic] with this case . . . [i]t's irrelevant to this case" and told the jury "to disregard that remark and not to consider it or discuss it during your deliberations." RP 321-22. This instruction, requested by Rogers in light of the denial of the mistrial, cured any potential prejudice especially because a "jury is presumed to follow instructions." *Gamble*, 168 Wn.2d at 178 (citation omitted). And contrary to Rogers' claim, the instruction did not "emphasize" the testimony by referencing it. Br. of App. at 8-9. Rather, the instruction seemed to cast doubt on the credibility of the claim by referring to Ms. Poindexter's statement as "the *possibility* defendant *may have been* in juvenile detention *at some point*" and calling it "inappropriate." RP 321 (emphasis added). Accordingly, the trial court did not abuse its discretion in denying Rogers' motion for a mistrial.

Gamble is instructive. There, a police detective violated a pretrial ruling by testifying that the investigation into the defendant began, in part, by utilizing a picture of him from a booking file. 168 Wn.2d at 176, 178. The trial court sustained the defendant's objection to the statement and ordered the jury to disregard it and eventually denied the defendant's motion for a mistrial. *Id.* Despite the fact that a police witness violated the pretrial ruling by introducing the idea that the defendant had criminal

history and that the trial irregularity was considered serious, our Supreme Court affirmed the denial of the mistrial noting that the “jury was instructed to disregard” the statement and “in the context of the trial as a whole” that the defendant was not deprived of a fair trial. *Id.* at 179.

If a curative instruction was sufficient to cure any prejudice in *Gamble*, where a professional, police witness introduced a defendant’s criminal past, than the trial court’s curative instruction here must suffice where the less prejudicial information was introduced by Ms. Poindexter, a non-professional witness. Rogers received a fair trial. This Court should affirm the trial court’s denial of Rogers’ motion for a mistrial.

II. The trial court did not abuse its discretion in admitting expert testimony that was helpful to the trier of fact.

The State presented expert testimony from two witnesses who counseled, examined, or treated J.O. following her disclosure of sexual abuse at the hands of Rogers. Maureen Garrett, a mental health counselor, initially met with J.O. on December 22, 2016 and saw her for five additional counseling sessions before J.O. stopped showing up. RP 399, 401, 407. Garrett testified that J.O. reported being sexually abused as a child and that she had been experiencing nightmares, flashbacks, mood swings, and difficulty communicating with her mother. RP 403-05. J.O. indicated that these symptoms had been escalating over the past six

months. RP 404. Based on the reported symptoms, Garrett diagnosed with J.O. with post-traumatic stress disorder (PTSD). RP 405.

Based on her training and experience, Garrett explained to the jury that a variety of trauma can cause PTSD, including sexual abuse.⁵ RP 405-07, 411. Garrett also explained that victims of sexual abuse—children and adults—often do not report the abuse right away; rather disclosure of the abuse can be delayed for a variety of reasons.⁶ RP 408-09. Finally, Garrett testified that based on her education and counseling experience that she was familiar with “self-harming behavior,” which she described as a way for people to “somehow help[] to manage or deal with or express very disturbing or distressing negative emotions.” Garrett indicated that self-harming behavior can develop in response to having experienced trauma and that there’s “a strong correlation between - - traumatic experiences and sexual abuse and - - and self-harming behavior.” RP 409-410, 412. Garrett, however, did not testify that J.O. reported self-harming behaviors or that she observed evidence of J.O. harming herself. *See* RP 399-412.

Dr. Kimberly Copeland, a child abuse pediatrician, met with J.O. on April 11, 2016. RP 437. J.O. reported to Dr. Copeland that she was suffering from nightmares related to past events and, more specifically,

⁵ Rogers does not claim that this testimony was improper. Br. of App. at 10-13.

⁶ Rogers does not claim that this testimony was improper. Br. of App. at 10-13.

that an adult-aged roommate had touched her in ways that he should not have. RP 439-440. J.O. informed Dr. Copeland, at times by writing, that this person touched her vagina with his penis, that the touching was on the outside and a little bit on the inside, that oral sex occurred, and ejaculation occurred “all the time” to include in her mouth. RP 440-43.⁷

Dr. Copeland also conducted a physical exam of J.O. RP 443. She noted no abnormal findings and observed nothing that would indicate a “penetrative abusive event[.]” RP 444, 446-47. Dr. Copeland also testified that such medical findings are common because that part of the female body “oftentimes will heal completely and there won’t be any scarring” or because there was no injury at the time of the event. RP 444-45.⁸

Rogers argues that the testimony provided by Garrett, in which she briefly discussed the correlation between sexual abuse and self-harm, and by Dr. Copeland, in which she testified that sexual assault examinations generally do not show evidence of physical injury, amounted to “opinion testimony that was indistinguishable from an explicit opinion that J.O. was truthful and [Rogers] was, therefore, guilty.” Br. of App. at 10. On the contrary, because the testimony from each expert was not improper opinion testimony—neither testified that J.O. was credible, claimed that

⁷ Rogers does not claim that this testimony was improper. Br. of App. at 10-13.

⁸ Rogers now claims this testimony was improper but did not object below. Br. of App. at 10-13; RP 44-45, 425-26, 444-46; CP 16-18.

she was the victim of sexual abuse, diagnosed her with a condition caused by sexual abuse, or said her symptoms were the result of, or inextricably linked to, sexual abuse—and was expert testimony that would be helpful to the trier of fact, the trial court properly concluded that the testimony was admissible.

a. Standard of Review

A trial court's decision to admit expert testimony is reviewed for abuse of discretion. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (citations omitted). Expert testimony is admissible when it is helpful to the trier of fact, and more specifically, when the topic on which the expert testifies is “beyond the ordinary understanding of laypersons” so long as the expert's testimony does not amount to an improper opinion on the victim's credibility or the defendant's guilt. *State v. Green*, 182 Wn.App. 133, 146-47, 328 P.3d 988 (2014); ER 702; *Kirkman*, 159 Wn.2d at 927-28; *State v. Florczak*, 76 Wn.App. 55, 73-74, 882 P.2d 199 (1994).

b. Proper Expert Testimony in Sexual Abuse Cases

“Cases involving alleged child sex abuse make the child's credibility an inevitable, central issue.” *Kirkman*, 159 Wn.2d at 933 (internal quotation omitted). As a result, a trial court “has broad discretion to admit evidence corroborating the child's testimony.” *Id.* (citation omitted). Because topics like PTSD, delayed disclosure, and a lack of

“physical evidence of sexual contact” when a child alleges sexual abuse are outside of a juror’s ordinary understanding, our courts have held that expert testimony on such topics is admissible in child sex abuse cases. *Id.* at 929-933 (affirming the admission of expert testimony that no physical evidence of sexual contact “is actually the norm rather than the exception”); *State v. Petrich*, 101 Wn.2d 566, 575-76, 683 P.2d 173 (1984) (holding that expert testimony about delayed disclosure is admissible if it is limited to an opinion that delayed reporting is not unusual); *Green*, 182 Wn.App. at 146 (surveying cases that support that mental disorders “and specifically PTSD . . .are beyond the ordinary understanding of laypersons”).

Notably, expert testimony “that certain behaviors or injuries of victims are not inconsistent with abuse in general has been found admissible as not constituting an opinion on the defendant’s guilt.” *State v. Jones*, 71 Wn.App. 798, 815 n. 6, 863 P.2d 85 (1993) (citing cases); *State v. Stevens*, 58 Wn.App. 478, 496-98, 794 P.2d 38 (1990). Similarly, an expert may testify that, based on his or her professional experience and observations, “a victim exhibits behavior typical of a group” since such testimony “does not relate directly to an inference of guilty of the defendant.” *Florezack*, 76 Wn.App. at 73 (approving of expert testimony that a certain symptoms “could be correlated with a child who has been

sexually abused”) (citing *Jones*, 71 Wn.App. at 815, 820-21) (holding that expert testimony “regarding the sexual acting out of abused children” was proper); *Stevens*, 58 Wn.App. at 496-98; *State v. Cleveland*, 58 Wn.App. 634, 645-46, 794 P.2d 546 (1990). On the other hand, an expert may not opine that a victim was sexually abused, that he or she believed the victim’s account, that the victim fits the profile of a child sexual abuse victim, or testify about a diagnosis of sexual abuse or of a diagnosis that is dependent on a finding of sexual abuse, or that the defendant is guilty. *Kirkman*, 159 Wn.2d at 930-33; *Florczak*, 76 Wn.App. at 73-74; *Jones*, 71 Wn.App. at 819-820.

In reviewing whether a trial court abused its discretion in admitting expert testimony, appellate courts must also consider how the jury was instructed. *Kirkman*, 159 Wn.2d at 937. Proper jury instructions that inform the jury that they are the “sole triers of fact and the sole deciders of the credibility of the witnesses,” and are not required to find experts credible or be bound by their opinions may cure whatever prejudicial effect inheres in otherwise admissible expert testimony. *Id.*

Here, as mentioned above, Rogers failed to object to Dr. Copeland’s testimony that “an absence of abnormal medical findings is common.” Br. of App. at 13; RP 44-45, 425-26, 444-46; CP 16-18. Instead, Rogers ended up conceding that Dr. Copeland’s testimony was

admissible under ER 803(a)(4)⁹ and only objected to playing the video of Dr. Copeland's interview of J.O. RP 425-26. On appeal, a "party may only assign error . . . on the specific ground of the evidentiary objection made at trial." *State v. Guloy*, 104 Wn.2d 413, 421-22, 705 P.2d 1182 (1985). Rogers' objection to playing the video of Dr. Copeland's interview of J.O. is not the same ground upon which Rogers now challenges Dr. Copeland's testimony. Thus, this Court should decline to review this claim.

Moreover, Rogers has failed to address issue preservation or RAP 2.5(a)(3). Br. of App. at 10-13. The general rule is that an issue, theory, or argument not presented at trial will not be considered on appeal. RAP 2.5(a); *State v. Hayes*, 165 Wn.App. 507, 265 P.3d 982 (2011) (citing *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995)). A defendant seeking appellate review of an issue or argument not presented to the trial court bears the burden of satisfying the strictures of RAP 2.5(a)(3). *State v. Knight*, 176 Wn.App. 936, 309 P.3d 776 (2013); *State v. Bertrand*, 165 Wn.App. 393, 267 P.3d 511 (2011). More specifically, "[i]n order to benefit from this exception, 'the [defendant] must identify a constitutional error and show how the alleged error actually affected the [defendant]'s rights at trial,'" i.e., show that the error is manifest. *State v. Grimes*, 165 Wn.App. 172, 267 P.3d 454 (2011) (alterations in original) (quoting *State*

⁹ This evidentiary rule would only apply to the statements J.O. made to Dr. Copeland.

v. Gordon, 172 Wn.2d 671, 260 P.3d 884 (2011)) (quoting *State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009)). Consequently, a defendant cannot meet his burden if he “simply assert[s] that an error occurred at trial and label[s] the error ‘constitutional. . . .’” *Grimes*, 165 Wn.App. at 186. Because Rogers failed to object to Dr. Copeland’s medical testimony in the trial court and has failed to address issue preservation, this Court should consider the alleged error waived and decline to review it.

Regardless of issue preservation, however, Dr. Copeland’s testimony was proper and the trial court did not abuse its discretion by allowing her to testify that normal medical findings are common in cases where a child claims to have suffered from sexual abuse. For one, our courts have approved of this exact type of testimony. *Kirkman*, 159 Wn.2d at 929-933; *Jones*, 71 Wn.App. at 815 n. 6. For another, this type of testimony does not function as a “comment directly or indirectly” on Rogers’ guilt nor as a comment on J.O.’s credibility. *Kirkman*, 159 Wn.2d at 930. As our Supreme Court held in *Kirkman*, this type of testimony “d[oes] not come close to testifying on any ultimate fact.” *Id.* at 933.

The same can be said for Garrett’s testimony regarding self-harming behavior. For one, as the trial court recognized, self-harming behavior is outside the common understanding of “laypeople.” RP 396. Thus, expert testimony on the subject would be helpful to a trier of fact.

Second, as the trial court also recognized, Garrett would not—and did not—testify that “any self-harm that [J.O.] did . . . was, in fact, caused by sexual abuse.” RP 396-97. On the contrary, neither expert testified that J.O. reported harming herself and neither testified to observing evidence of self-harm; rather Garrett testified that self-harming behavior can develop in response to having experienced trauma and that there is a “correlation between trauma and sexual abuse, specifically in self-harming behaviors.” RP 409-410, 412. As Rogers helped emphasize during his cross-examination, “[s]elf-harm is not a phenomenon exclusive to sexual assault victims.” RP 412.

Accordingly, Garrett’s testimony that a correlation exists between self-harm and sexual abuse does not amount to “opinion testimony that was indistinguishable from an explicit opinion that J.O. was truthful and [Rogers] was, therefore, guilty” as Rogers claims. Br. of App. at 10. Instead, this is the type of testimony specifically allowed by *Florczak*, *supra*, which held that testimony that certain symptoms “could be correlated with a child who has been sexually abused” was permissible because the “observation also is not a conclusion that the child was in fact sexually abused.” 76 Wn.App. 55; *Cleveland*, 58 Wn.App. at 645-46; *Jones*, 71 Wn.App. at 815 n. 6 (noting that “testimony that *certain behaviors* . . . of victims are not inconsistent with abuse in general has

been found admissible as not constituting an opinion on the defendant's guilt") (citing cases).

As our Supreme Court has acknowledged "[c]ases involving alleged child sex abuse make the child's credibility an inevitable, central issue," and this fact allows for the admission of evidence that corroborates a child's claim. *Kirkman*, 159 Wn.2d at 933 (internal quotation omitted). J.O.'s credibility was at issue in this case. RP 269-283, 290-91, 710, 731-36. Rogers argued in closing that "it's an equally big deal . . . that there is no medical evidence here . . . [t]here's nothing objective that they found in the exam to corroborate this." RP 725-27. He also argued that J.O.'s delayed disclosure cast doubt on her credibility. RP 727-730. The above arguments made by Rogers buttress the trial court's decision to allow Garrett and Dr. Copeland to testify, especially because Rogers' arguments would have misled the jury without the additional context that the experts were able to provide. Accordingly, the trial court did not abuse its discretion in allowing the testimony about which Rogers complains.

Furthermore, as in *Kirkman*, the jury was specifically instructed that "[y]ou are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to testimony of each witness." CP 26 (Instruction No. 1); 159 Wn.2d at 937. The jury was also instructed that, regarding expert testimony, "[y]ou are not . . . required to

accept his or her opinion.” CP 32 (Instruction No. 6); *Kirkman*, 159 Wn.2d at 937. These instructions are relevant to the court’s decision on the propriety of allowing experts to testify as well as curative of any potential prejudice as a result of said testimony. *Kirkman*, 159 Wn.2d at 937. Consequently, any error in allowing Garrett and Dr. Copeland to testify about self-harm and normal medical findings, respectively, was harmless. That any error was harmless is especially true in light of the fact that each expert was also able to relate comments by J.O. under ER 803(a)(4) and discuss J.O.’s PTSD diagnosis and delayed disclosure all of which corroborated her trial testimony.

III. The trial court did not abuse its discretion when it did not *sua sponte* remove Juror 16 for cause because the juror’s comments did not evince actual bias.

Each party utilized two rounds of questioning in aid of selecting a jury. RP 88-164. The State made use of all of its peremptory challenges in seating the first twelve jurors and one peremptory in selecting the alternates. CP 144; RP 165-66. Rogers only used three of his peremptory challenges in seating the first twelve jurors and also used one in selecting the alternate jurors. CP 144; RP 165-66. Rogers now argues that the trial court “failed to take action to protect Rogers’ right to a fair trial by an impartial jury” when it did not *sua sponte* remove Juror 16, who was eventually seated on Rogers’ jury. Br. of App. at 14.

Rogers claims that Juror 16 revealed an “egregious indication of bias in favor of the State and against the accused’s presumption of innocence,” and, therefore, that Juror 16 was actually biased and should not have been seated. Br. of App. at 20. In support of this claim, Rogers relies exclusively on one statement made by Juror 16 and fails to reference or assess any of the other 6 substantive comments made by Juror 16 or any of the five potential jurors who the trial court did remove for cause. Br. of App. at 14-20; RP 83-84, 90-91, 97, 99, 103, 113, 115, 116, 119-120, 134-35, 144.

That one statement made by Juror 16 was in response to defense counsel asking how the potential jurors would feel if he presented no defense case.¹⁰ RP 128-134. Juror 16 responded:

Well, without strong exculpatory evidence on the defense part, the State has the scales tipped in their favor. There is just no way I could look at everything they present without a defense and judge otherwise.

RP 134-35. But Juror 16 opined on other topics too, for example, when asked about his concerns with the court system he replied:

My only concerns about the court system in general -- and I’m new to Washington state, so I don’t know for sure, but things like mandatory minimums and the three-strike rule, those are grossly unfair, in my opinion; appointed judges and elected judges. Elected judges always seem to want to throw the book at a defendant to appear tough on crime so

¹⁰ Defense did in fact present a case. Rogers called three witnesses and testified himself.

they will be elected for the next leg [sic]. That's my personal opinion.

RP 103. When asked if those feelings would make it hard for him to be fair today, Juror 16 stated that "I would do the best I could." RP 103. Later, when asked whether his mother being a victim of sexual abuse would make it very difficult for him to be impartial in the matter, Juror 16 responded "No. No, not on that." RP 113. Additionally, when asked about the difference between what one's personal thoughts about what a particular crime is as compared to what the legal elements of the crime are Juror 16 replied that "[i]f the crime meets the definition of what is set on paper is written as a law, that's what needs to be followed, not what you think it means." RP 144. Because defense counsel did not strike Juror 16 and Juror 16's statements as a whole show that he did not harbor actual bias against the defense, the trial court did not abuse its discretion when it did not *sua sponte* remove Juror 16.

a. Standard of Review

A judge's decision to not *sua sponte* remove a juror is reviewed for abuse of discretion. *State v. Lawler*, 194 Wn.App. 275, 287-89, 374 P.3d 278 (2016); *State v. Phillips*, 6 Wn.App.2d 651, 662, 668, 431 P.3d 1056 (2018).

b. The Right to an Impartial Jury

The State and criminal defendants both have the right to trial before an impartial jury. Wash. Const. art. I, § 22; U.S. Const. amend. VI; *State v. Hughes*, 106 Wn.2d 176, 185, 721 P.2d 902 (1986) (citing *Hayes v. Missouri*, 120 U.S. 68, 70–71, 7 S.Ct. 350, 30 L.Ed. 578 (1887)). Thus, the jury must be “free [] from . . . bias against the accused and for the prosecution, but [also] free [] from . . . bias for the accused and against the prosecution.” *Hughes*, 106 Wn.2d at 185. Accordingly, seating a biased juror violates the right to trial before an impartial jury. *State v. Irby*, 187 Wn.App. 183, 193, 347 P.3d 1103 (2015) (*Irby II*). A trial judge has an independent duty to dismiss biased jurors in order to protect the right to an impartial jury. *Id.*

Actual bias, under the law, is “the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.” RCW 4.44.170(2). “Prejudice” is defined as “[a] forejudgment; bias; partiality preconceived opinion. A leaning towards one side of a cause for some reason other than a conviction of its justice.” *State v. Alires*, 92 Wn.App. 931, 937, 966 P.2d 935 (1998) (citing BLACK’S LAW DICTIONARY 1061 (6th ed.1990)).

Even if a juror has expressed or formed an opinion, however, “such opinion shall not of itself be sufficient to sustain [a] challenge [for cause], but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.” RCW 4.44.190. Furthermore, a party must show that there is a probability of actual bias to successfully challenge a juror for-cause; the *possibility* of actual bias does not suffice to warrant the dismissal of a juror. *State v. Noltie*, 116 Wn.2d 831, 838-840, 809 P.2d 190 (1991). As a result, equivocal answers alone cannot rise to the level of actual bias. *Id.* at 838 (citing cases). Jurors properly dismissed for being biased, or that should have been dismissed, generally pair an opinion antithetical to our justice system with an inability to set that opinion aside and decide the case on the evidence. *Irby II*, 187 Wn.App. at 190, 196-197 (juror was unable to abide by the presumption of innocence); *State v. Gonzales*, 111 Wn.App. 276, 278-282, 45 P.3d 205 (2002) (same); see *State v. Jackson*, 75 Wn.App. 537, 879 P.2d 307 (1994) (racial bias of juror); *State v. Witherspoon*, 82 Wn.App. 634, 637-38, 919 P.2d 99 (1996) (same); *State v. Elmore*, 139 Wn.2d 250, 278-79, 985 P.2d 289 (1999) (juror’s religious convictions prevented her from following the law).

One of the primary purposes “of the voir dire process is to determine whether prospective jurors harbor ‘actual bias’ and are thus

unqualified to serve in the case.” *State v. Saintcalle*, 178 Wn.2d 34, 77, 309 P.3d 326 (2013) (Gonzalez, J., concurring) (citing *State v. Tharp*, 42 Wn.2d 494, 499, 256 P.2d 482 (1953)). In addition to for cause challenges that seek to excuse jurors who have displayed actual bias, courts “have consistently recognized peremptory challenges as integral to ‘assuring the selection of a qualified and unbiased jury.’” *Saintcalle*, 178 Wn.2d at 67 (Stephens, J., concurring) (quoting *Batson v. Kentucky*, 476 U.S. 79, 91, 106 S.Ct. 1712 (1986). Essentially, “[i]t is the interplay of challenges for cause and peremptory challenges that assures the fair and impartial jury.” *State v. Vreen*, 99 Wn.App. 662, 666-68, 994 P.2d 905 (2000).

Our courts have consistently held that the trial judge is in the best position to determine “whether a particular potential juror is able to be fair and impartial based on observation of mannerisms, demeanor, and the like.” *Irby II*, 187 Wn.App. at 194 (citing *State v. Gonzales*, 111 Wn.App. 276, 278, 45 P.3d 205 (2002); *Noltie*, 116 Wn.2d at 839 (noting that “[c]ase law, the juror bias statute, our Superior Court Criminal Rules and scholarly comment all emphasize that the trial court is in the best position to determine a juror’s ability to be fair and impartial”). This holding is unsurprising since:

[a] judge with some experience in observing witnesses under oath becomes more or less experienced in character analysis, in drawing conclusions from the conduct of

witnesses. The way they use their hands, their eyes, their facial expression, their frankness or hesitation in answering, are all matters that do not appear in the transcribed record of the questions and answers. They are available to the trial court in forming its opinion of the impartiality and fitness of the person to be a juror.

Noltie, 116 Wn.2d at 839. These observations by the trial judge, and, of course, trial attorneys, that are not reflected in the transcribed record take on additional importance with the recognition that “[p]rospective jurors represent a cross section of the community, and their education and experience vary widely.” *State v. Davis*, 175 Wn.2d 287, 314 FN 9, 290 P.3d 43 (2012). Naturally then, “[j]urors . . . cannot be expected invariably to express themselves carefully or even consistently.” *Id.* As a result, “[w]e must recognize that it is difficult if not impossible to detect juror bias except in clear cases. . . .” *Saintcalle*, 178 Wn.2d at 105 (Gonzalez, J., concurring). Part and parcel of this recognition is the acknowledgment that “most biases do not render jurors unqualified, and that the solemnity of the proceedings and substance of deliberations will help to ensure just verdicts from our juries.” *Id.* (citations omitted). Bearing in mind these notions, and the role of the trial court in the voir dire process, it is incumbent that “if there is sufficient evidence that a juror is unqualified, that evidence should be presented to the trial court and ruled upon. Otherwise, the juror should be allowed to serve.” *Id.*

A juror who has not been challenged for cause and against whom the parties did not exercise a peremptory challenge shall be seated on jury following recital of the jury oath. At this point, “[t]he law presumes that each juror sworn in a case is impartial and above legal exception, otherwise he would have been challenged for ‘cause.’” *State v. Persinger*, 62 Wn.2d 362, 366, 382 P.2d 497 (1963) (citing *U.S. v. Marchant & Colson*, 12 Wheat. 480, 25 U.S. 480, 6 L.Ed. 700 (1827)). Moreover, once seated “[t]here is a presumption that [the juror] will be faithful to his oath and follow the court’s instructions.” *State v. Moe*, 56 Wn.2d 111, 115, 351 P.2d 120 (1960); *State v. Eggers*, 55 Wn.2d 711, 713, 349 P.2d 734 (1960) (noting that jurors are “assumed to be fair and reasonable”); *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982) (“The jury is presumed to follow the instructions of the court.”). As *State v. Pepoon* held, and, as our courts have repeatedly quoted with approval:

[w]e must indulge some presumptions in favor of the integrity of the jury. It is a branch of the judiciary, and if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure.

State v. Pepoon, 62 Wn. 635, 644, 114 P. 449 (1911); *Grisby*, 97 Wn.2d at 509; *Moe*, 56 Wn.2d at 115.

Here, Juror 16's statements did not evince actual bias. RP 83-84, 90-91, 103, 113, 134-35, 144. Even assuming the statement about which Rogers now complains showed favoritism towards the State, Juror 16 did not indicate an inability to (1) follow the court's instructions on the law¹¹; (2) presume Rogers innocent; or (3) hold the State to its burden of proof. Juror 16 also did not express any bias or prejudice against Rogers in particular, or in general against people charged with the crimes at issue. Thus, Rogers' answers were not similar to those of jurors in other cases in which our courts have held that jurors in question expressed actual bias. *Irby II, supra; Gonzales, supra; Jackson, supra; Witherspoon, supra; Elmore, supra.*

Instead, Rogers' comments that "the State has the scales tipped in their favor" when the defense fails to put on a case or provide exculpatory evidence reflects a common misperception that many laypersons may have and *not* a preference for one side or an inability to be fair. In fact, Rogers' defense counsel was quick to retort that "I suspect that might be a preconceived notion that a lot of people come in with." RP 135. At most, Juror 16's statement shows the possibility of bias, but not the probability

¹¹ Juror 16 raised his hand or number card at some point indicating an issue with following the instructions, but he later explained that he did so because "lately in the last few years, I've had short-term loss of memory." RP 77, 81-82. Moreover, he later explicitly indicated that jurors should follow the instructions and "not what you think." RP 144.

of bias that is required to remove a juror for actual bias. *Noltie*, 116 Wn.2d 831, 838-840. And from all the circumstances, and all of Juror 16's statements there is insufficient evidence that Juror 16 could not "disregard such opinion and try the issue impartially." RCW 4.44.190. Accordingly, the trial court did not abuse its discretion when it did not *sua sponte* remove Juror 16.

c. The Trial Court's Independent Duty

While the trial court has an independent duty to insure the right to trial before an impartial jury; where it *sua sponte* (1) dismisses jurors who have not demonstrated bias or (2) dismisses jurors that a defendant specifically chose not to challenge for tactical reasons, it runs the risk of unlawfully interfering with the defendant's fundamental right to make decisions about the course of his defense. *Lawler*, 194 Wn.App. at 284-85, 288-89; *Phillips*, 6 Wn.App.2d at 667-69. The Sixth Amendment provides a defendant with the right to present a defense. *State v. Coristine*, 177 Wn.2d 370, 375, 300 P.3d 400 (2013). This right arises from the respect of the "individual dignity and autonomy" of the defendant, and, [c]onsistent with this right, the Sixth Amendment requires *deference to the defendant's strategic decisions.*" *Id.* (emphasis added). Moreover, this right applies "equally to a defendant's strategic decision not to challenge for cause or exercise a preemptory challenge regarding a prospective juror." *Lawler*,

194 Wn.App. at 285. Because the defendant enjoys the fundamental right to control important strategic decisions, a trial court errs where it interferes with those decisions. *Coristine*, 177 Wn.2d at 375-77; *State v. Jones*, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983) (holding a “defendant has a constitutional right to at least broadly control his own defense”).

This right extends to the jury selection process as our courts have held, in discussing the right of the defendant to be present during voir dire, that “a defendant's presence at jury selection ‘bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend’ because ‘it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.’” *State v. Irby*, 160 Wn.2d 874, 883, 246 P.3d 796 (2011) (*Irby I*) (quoting *Snyder v. Mass.*, 291 U.S. 97, 106, 54 S.Ct. 330 (1934); *Lawler*, 194 Wn.App. at 284-85, 288-89; *Phillips*, 6 Wn.App.2d at 667-69. In fact, the ABA Standards provide that strategic decisions to be made by defense counsel after consultations with the defendant include which jurors to accept or strike. ABA Standard 4-5.2(b). Consequently, given the strategic importance of voir dire and the wide room for strategic decisions a defendant can make concerning which jurors to strike or accept, a court must not wade into the jury selection process *sua sponte* dismissing jurors absent an unmistakable demonstration of bias lest it interfere with a defendant’s right to control

his defense. *Lawler*, 194 Wn.App. at 284-85, 288-89; *Phillips*, 6 Wn.App.2d at 667-69.

In contrast, in *Irby II* the trial court was faulted for neglecting its independent duty to assure the defendant a fair trial by allowing a biased juror to be seated. *Irby II*, 187 Wn.App. 183. But the factual differences between *Irby II* and this case could not be starker. There, not only was the defendant *pro se*, but he was absent during the entire voir dire process and had no opportunity to question jurors, excuse jurors by way of for cause or peremptory challenges, or exercise any strategy or tactics to get a jury free of bias. *Irby II*, 187 Wn.App. 183. Thus, *Irby II* does not change the proper role of judge in the voir process when a defendant is present and represented by competent counsel. *Phillips*, 6 Wn.App.2d at 667-69.

Here, the trial court understood its proper role and, instead of acting *sua sponte*, dismissed those jurors on which the parties exercised for cause challenges to include Jurors 3, 14, 27, 31, and 33. RP 97-99, 115-16, 119-120. Rogers agreed on those the State suggested, raised his own, and properly exercised three of his initial peremptory challenges and one of his peremptory challenges to the alternates¹² in order to secure the jury he desired. CP 144; RP 97-99, 115-16, 119-120. Because these decisions were a part of Rogers' right to control his defense, had the trial

¹² Leaving a challenge unused strongly suggests a strategic motive to select a particular jury or to avoid a particular juror. *See infra*.

court dismissed Juror 16, it may have erred. When combined with the fact that (1) “the trial court is in the best position to evaluate whether a juror must be dismissed;” (2) Juror 16’s problematic answer was “at least slightly equivocal” and when combined with his other answers far from “unqualified statements expressing actual bias;” (3) the record shows that the “trial court was alert to the possibility of biased jurors” as evidenced by granting the parties for cause challenges; (4) “the record shows that defense counsel also was alert to the possibility of biased jurors” as evidenced by making multiple for cause challenges; and (5) Rogers “had a peremptory challenge available that he chose not to use on juror [16] and in fact remained unused,” which “leads to a presumption that [Rogers] wanted juror [16] on the jury;” the trial court cannot be considered to have abused its discretion by choosing not to excuse Juror 16 *sua sponte*.

Lawler, 194 Wn.App. at 287-89.

IV. Because there were no errors, cumulative error did not deny defendant a fair trial.

Under the cumulative error doctrine, “[a]n accumulation of errors that do not individually require reversal may still deny a defendant a fair trial.” *State v. Nguyen*, --- Wn.App.2d ----, 450 P.3d 630, 646-47 (2019) (citation omitted). But the “doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial.” *Id.* at 647

(citation omitted). As argued above, Rogers fails to establish any errors, thus, the cumulative error doctrine does not apply.

V. The trial court did err in imposing a community custody condition in which the defendant's treatment provider is required to make a report to the Department of Corrections.

Community custody condition 8 requires Rogers' treatment provider to file reports with the Department of Corrections. CP 118. As Rogers' correctly argues, this condition "must be stricken because exceeds" the trial court's authority. Br. of App. at 21. This condition appears to be modeled after former RCW 9.94A.120(8)(a)(iii), which included identical language. But when RCW 9.94A.120 was recodified as RCW 9.94A.505, that language was eventually dropped and no longer appears in any current statute that would otherwise authorize the condition. Additionally, Rogers' treatment provider cannot be required to engage in affirmative conduct solely by virtue of Rogers' conviction in his own criminal case. As a result, the State concedes that condition 8 is unlawful and must be stricken upon remand.

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CONCLUSION

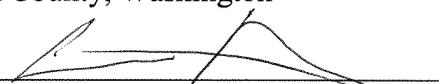
For the reasons argued above, Rogers' convictions should be affirmed and the case should be remanded for the striking of the unauthorized community custody condition.

DATED this 16th day of December, 2019.

Respectfully submitted:

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