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

STATE OF WASHINGTON, RESPONDENT

V.

SIMEON REYES JUAREZ, APPELLANT

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Appeal from the Superior Court of Mason County  
The Honorable Monty D. Cobb, Judge

No. 18-1-00434-23

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**BRIEF OF RESPONDENT**

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A. STATE'S COUNTER-STATEMENTS OF ISSUES  
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court's instructions to the jury, together with the prosecutor's election to tie three specific incidents of rape to each of the three charges of rape in this multiple acts case adequately informed the jury that it must unanimously agree on a separate and distinct rape in relation to each of the three counts charged; therefore, there was neither a unanimity error nor a double jeopardy violation in this case.
2. The prosecutor did not minimize the burden or proof or the meaning of the term abiding belief when he used a TV show analogy; instead the prosecutor's point was that the jury should be careful to receive all the evidence and consider the entire trial before reaching an abiding belief.
3. Ample, overwhelming evidence supports each of the three counts of rape of a child in the first degree as charged in this case.
4. Defense counsel did not render ineffective assistance of counsel by engaging in a trial strategy and tactics that were designed and intended to undermine the credibility of the child-victim where the evidence was otherwise overwhelming if the jury otherwise believed the child-victim's testimony.
5. The cumulative error doctrine is inapplicable in this case because no error occurred, or if error did occur, no combination of error is sufficient to warrant a new trial, particularly where Reyes Juarez has not shown that any combination of the errors he alleges have affected the verdicts rendered by the jury in this case.

B. FACTS AND STATEMENT OF THE CASE

The child-victim in this case, N.V., was born in August of 2006. 240. Until about 2017, she lived in a house that was occupied by her parents, her siblings, and her uncle, Simeon Reyes Juarez. RP 208, 209, 213. Reyes Juarez was born on January 5, 1984. RP 279, 298. When N.V. was between five and seven years old, Reyes Juarez began raping her frequently. RP 210-11, 219.

The rapes stopped in 2017 after N.V.'s family moved to a new house and her uncle, Reyes Juarez, began living in a separate dwelling. RP 209-10, 232. About a year and a half later when N.V.'s baby sister was born, N.V. disclosed the rapes to her mother, because Reyes Juarez was living in a trailer on the same property as N.V. and she was afraid that Reyes Juarez would rape her sister. RP 234-38. N.V.'s mother took her to a counselor, which resulted in a report to police. RP 239.

The State charged Reyes Juarez with three counts of rape of a child in the first degree that each had the same charging period, but each count contained language stating that each count was based on "an act separate and distinct from those alleged in" the other counts. CP 94-96. At trial, the state elected three specific incidents of rape that corresponded to each

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of the three charged counts. RP 210-16, 223-26, 226-27, 290, 330-45.

The jury returned guilty verdicts as to all three counts. RP 371-74. The instant appeal followed. Further facts are provided, below, as necessary to address each of Reyes Juarez's contentions on appeal.

C. ARGUMENT

1. The trial court's instructions to the jury, together with the prosecutor's election to tie three specific incidents of rape to each of the three charges of rape in this multiple acts case adequately informed the jury that it must unanimously agree on a separate and distinct rape in relation to each of the three counts charged; therefore, there was neither a unanimity error nor a double jeopardy violation in this case.

Reyes Juarez contends that the instructions given in this case violated his right to be free from double jeopardy. Reyes Juarez also contends that the instructions in this case violated his right to unanimous jury verdicts. These two claims are fundamentally different. *State v. Ellis*, 71 Wn. App. 400, 404, 859 P.2d 632 (1993). For clarity, the State will address each claim separately, below.

a) Unanimity

Criminal defendants in Washington have a constitutional right to a unanimous jury verdict. Wash. Const. art. I, § 21; *State v. Smith*, 159

Wn.2d 778, 783, 154 P.3d 873 (2009). Review is de novo. *State v. Furseth*, 156 Wn. App. 516, 520, 233 P.3d 902 (2010); *State v. Brown*, 159 Wn. App. 1, 14, 248 P.3d 518 (2010).

At trial, Reyes Juarez did not propose a unanimity instruction, and he had no objection to the court's instructions. RP 289-90. Despite the lack of a defense objection, the prosecutor raised the issue of unanimity, as follows:

The one comment I would like to make on the record – and counsel and I have discussed this, but I just want it on the record that we've discussed it, and that is as to the to-convict instructions, the immediate – the instruction immediately preceding those three instructions, is the instruction that says, “The State alleges multiple acts and that for any one count the jury has to be unanimous as to enact [sic].”

RP 290. The prosecutor then explained, as follows:

Because of that, I didn't carry forward the separate and distinct from Counts II and III on Count one and et cetera, as it's in the Information because I – I'm always leery of introducing a comment on the evidence unintentionally and I think with that instruction and with our arguments, it'll be clear that we're relying on three separate acts. I just wanted to make sure we do agree that that's the appropriate way to cast the instructions.

RP 290. To this explanation, counsel for Reyes Juarez responded, “I informed [the prosecutor] to defer to the Court on that.” RP 290. Thus,

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with no objection from any party, the trial court included the following

*Petrich*<sup>1</sup> instruction in the packet of instructions provided to the jury:

The State alleges that the defendant committed acts of rape of a child in the first degree on multiple occasions. To convict the defendant on any count of rape of a child in the first degree, one particular act of rape of a child in the first must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of rape of a child in the first degree.

CP 110 (Instruction No. 10; WPIC 4.25). Additionally, the trial court provided the following instruction:

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.

CP 103 (Instruction No. 3; WPIC 3.01).

At the outset, the State contends that Reyes Juarez's claim should be denied because, by deferring to the trial court when the unanimity instructions were discussed, Reyes Juarez in effect invited the error that he now claims for the first time on appeal. "The invited error doctrine applies ... where the defendant engaged in some affirmative action by

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<sup>1</sup> *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), *abrogated in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988).

which he knowingly and voluntarily set up the error.” *State v. Phelps*, 113 Wn. App. 347, 353, 57 P.3d 624 (2002).

Reyes Juarez’s unanimity claim should also fail on its merits. The evidence in this case showed that Reyes Juarez raped the child victim repeatedly throughout the charging period. RP 242; CP 94-96. However, the State charged only three counts of rape of a child in the first degree. CP 94-96. The right to a unanimous jury verdict requires that the jury members unanimously conclude that the defendant committed the criminal act with which he is charged. *State v. Petrich*, 101 Wn.2d 566, 569, 683 Wn.2d 173 (1984). The *Petrich* instruction used in this case was an accurate statement of the law. *State v. Carson*, 184 Wn.2d 207, 219, 357 P.3d 1064 (2015). Nevertheless, despite being a correct statement of the law, “the *Petrich* instruction was designed for single-count cases and is confusing when read in a multicount case.” *Id.* The instruction located at WPIC 4.26 may have been a more useful instruction on the facts of this case, but was not required, because “neither the pattern instructions nor their comments have any binding effect.” *Carson* at 224, n.11.

But even if the trial court's unanimity instruction used in the instant case (CP 110; Instruction No. 10) was potentially confusing, precedent holds that a similar, but arguably inferior, instruction is at least marginally adequate. In the case of *State v. Ellis*, 71 Wn. App. 400, 589 P.2d 632 (1993), a multiple acts case involving four counts, the trial court gave the following unanimity instruction:

Evidence has been introduced of multiple acts of sexual contact and intercourse between the defendant and [C.R.]. Although twelve of you need not agree that all the acts have been proved, you must unanimously agree that at least one particular act has been proved beyond a reasonable doubt for each count.

*Id.* at 402. As in the instant case, the prosecutor in *Ellis* argued to the jury that a separate and distinct act supported each of the charged counts and that the jury must be unanimous as to each count. *Id.* at 403; RP 330, 333, 334, 342-43. Counsel for Reyes Juarez also argued to the jury that it must be unanimous as to each count. RP 353-54. The prosecutor then repeated the unanimity argument again in rebuttal closing argument, as follows: "Make sure that you are all 12 – the 12 who deliberate on the case are unanimous as to each count, that each count relates to the three specific acts, not hundreds, not dozens." RP 367.

The *Ellis* court cited *State v. Noltie*, 116 Wn.2d 831, 809 P.2d 190 (1991), and *State v. Noel*, 51 Wn. App. 436, 753 P.2d 1017, *review denied*, 111 Wn.2d 1003 (1988), and held that the unanimity instruction above “marginally but adequately insured jury unanimity on each count....” *Ellis* at 406.

In a later case, *State v. Corbett*, 158 Wn. App. 576, 242 P.3d 52 (2010) – rather than to affirmatively defer to the trial court on use of the State’s proposed unanimity instruction as Reyes Juarez did in the instant case – the defendant actually proposed the instruction that he later challenged on appeal. *Id.* at 586, n.9. As in the instant case, in *Corbett* “the entire trial focused on evidence and distinguishing characteristics of... separate and distinct instances of abuse.” *Id.* at 592. And, as in the instant case, “[d]uring closing arguments, the State clearly connected the trial evidence of [the] separate incidents to the... separate ‘to-convict’ instructions.” *Id.* at 592-93.

The harmless beyond a reasonable doubt standard is the appropriate standard of review for constitutional error. *State v. Kitchen*, 110 Wn.2d 403, 405, 756 P.2d 105 (1988). The court in *Corbett* acknowledged that its holding denying the defendant’s appeal was based

preliminarily on the fact that the defendant had proposed the instruction that he was then challenging for the first time on appeal, but the court went on to declare an additional basis, as follows: “Moreover, where, as here, the context of the presentation of evidence and argument at trial eliminates a strained, prejudicial reading of an instruction, the jury’s verdict is clear and any error is harmless.” Although the State contends that if any error occurred in the instant case it was harmless beyond a reasonable doubt, the State also contends that no error occurred here.

Our Supreme Court has repeatedly affirmed that prejudice occurs when in a multiple acts case there is neither a unanimity instruction from the court *nor* an election from the State as to which specific act it is relying for each conviction. *See, e.g., State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988); *State v. Coleman*, 159 Wn.2d 509, 150 P.3d 1126 (2007). Although only one of the two conditions is required, in the instant case both conditions were met. As discussed previously, although only marginally adequate, the trial court gave two unanimity instructions: one at CP 110 (Jury Instruction 10; WPIC 4.25), and the other at CP 103 (Instruction No. 3; WPIC 3.01). But still more, here both the evidence presented at trial and the closing arguments clearly specified three clearly

distinguishable incidents that corresponded to each of the three counts of rape of a child in the first degree. The victim testified and described three specific, separate rapes. RP 211-28. In closing arguments, the prosecutor clearly specified one act in conjunction with each of three counts of rape of a child in the first degree. RP 330-334, 341-345, 367.

In summary, because the State clearly elected three specific acts of rape of a child to support each of the three convictions in this case, there is no unanimity error in this case. *State v. Kitchen*, 110 Wn.2d 403 (1988); *State v. Coleman*, 159 Wn.2d 509, 150 P.3d 1126 (2007).

b) Double Jeopardy

Reyes Juarez cites several outdated cases to support his contention that his right to be free from double jeopardy was violated in this case, but Reyes Juarez fails to cite the most recent landmark case on this issue: *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011). Because *Mutch* is decisive of the issue in this case, for the sake of brevity the State will focus on *Mutch* rather than to engage in a case-by-case rebuttal of the cases cited by Reyes Juarez.

*Mutch* reaffirms the longstanding legal maxims that the Washington State and United States constitutions guarantee defendants the right to not face multiple punishments for the same offense, that the claim of a double jeopardy violation may be brought for the first time on appeal, and that review is de novo. *Mutch* at 661-62.

As in *Mutch*, the three to-convict jury instructions provided to the jury in the instant case were each identical, with identical charging periods, and did not contain classic *separate and distinct* language to distinguish each count from the others. CP 111-13. Reyes Juarez argues that the instructions resulted in a double jeopardy violation because, he contends, the instructions *allowed* the jury to *potentially* base multiple convictions on a single incident of rape. Br. of Appellant at 22-28. *State v. Mutch* refutes Reyes Juarez’s contention. 171 Wn.2d at 661-67.

In *Mutch*, the Court agreed that “[t]he jury instructions... were lacking for their failure to include a ‘separate and distinct’ instruction[.]” *Id.* at 663. The Court declared, however, that:

[F]lawed jury instructions that permit a jury to convict a defendant of multiple counts based on a single act do not necessarily mean that the defendant received multiple punishments for the same offense; it simply means that the defendant *potentially* received multiple punishments for the same offense. “In order to violate

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federal and state double jeopardy standards, there must be multiple punishments for the ‘same offense.’”

*Mutch* at 663 (emphasis in original) (quoting *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991)). The *Mutch* Court explained as follows:

While the court may look to the entire trial record when considering a double jeopardy claim, we note that our review is rigorous and is among the strictest. Considering the evidence, arguments, and instructions, if it is not clear that it was “*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense” and that each count was based on a separate act, there is a double jeopardy violation. [*State v.*] *Berg*, 147 Wn. App. [923] at 931 (emphasis added). The remedy for such a violation is to vacate the potentially redundant convictions. We note here that our holding would be the same whether we rigorously considered the entire trial record to decide if the jury instructions, in light of the full record, actually effected a double jeopardy error or if we held the instructions to be erroneous because of the risk of error and then reviewed for harmlessness.

*State v. Mutch*, 171 Wn.2d 646, 664-65, 254 P.3d 803 (2011). On facts very similar to the instant case, the *Mutch* Court found that although the jury instructions used were flawed, there was no double jeopardy violation because it was manifestly apparent that the jury based each conviction on a separate act. *Id.* at 665.

The instant case is substantially similar to *Mutch*. As in *Mutch*, each count charged was based on a separate unit of prosecution, and the victim in the instant case testified as to distinct events in regard to each the three counts charged. The first incident of rape occurred in the living room when the victim was between five and seven years old. RP 210-16. The second rape occurred in Reyes Juarez's bedroom – a rape that is distinguished from the others because the victim remembers Reyes Juarez forcing her to assume different positions during the rape. RP 223-26. The third rape is distinguished from the others because on this occasion Reyes Juarez shoved his penis into the victim's mouth. RP 226-27. In closing arguments the prosecutor clearly distinguished between the three events. RP 330-45.

Faced with circumstances substantially similar to the instant case, the *Mutch* Court found “that it was manifestly apparent to the jury that each count represented a separate act” and that “if the jury believed [the victim] regarding one count, it would as to all.” *Mutch* at 665-66. The Court's ultimate finding was that, despite flawed jury instructions and the absence of separate and distinct language in the jury instructions, the defendant was that “not being punished multiple times for the same

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criminal act.” *Id.* at 666. Accordingly, the defendant’s double jeopardy claim was rejected.

The State contends that this court should follow *Mutch* and reject Reyes Juarez’s claim of double jeopardy.

2. The prosecutor did not minimize the burden or proof or the meaning of the term abiding belief when he used a TV show analogy; instead the prosecutor’s point was that the jury should be careful to receive all the evidence and consider the entire trial before reaching an abiding belief.

Reyes Juarez contends that the prosecutor committed misconduct in closing argument by trivializing the burden of proof by comparing it to a TV show. Br. of Appellant at 28-35. Rather than attempt to describe the prosecutor’s argument, together with its context, the State provides the following lengthy quote from the prosecutor’s closing argument:

So the testimony of all of the other witnesses is going to be valuable to you, I expect and I trust, in evaluating the credibility of the witnesses from whom you've heard in this trial to determine whether or not you have an abiding belief in the truth of the charge. And that language comes from the fourth instruction in your packet, and it – that instruction deals with a couple of different things.

It deals with the fact that the defendant has pled guilt -- not guilty and that he doesn't have to prove anything; that the burden of proof is on the State -- and if you don't know who that is, in this case it's the guy wearing this tie; that he is presumed innocent, unless and until, even right now, even when Mr. Sergi talks, even

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when I talk again, until you start deliberating and unless you find that the State has proven the elements contained in those instructions that I talked about, that's what this instruction tells you.

But it also tells you what reasonable doubt is, what it means legally, because that's not a term that we're familiar with using in our regular everyday life. And what it tells you about that is that a reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence, that it's such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. And if you don't know by now, this whole process was meant to try to make sure it was reasonable people that were sitting on this jury. And so, hopefully, we've been successful on that.

And finally, it ends by saying that if after such careful consideration, you have an abiding belief in the truth of the charge, you have been satisfied beyond a reasonable doubt. And I will leave to you to work out what that means to you as a panel, but I would suggest to you that an abiding belief is one that -- you know, if you think about a Dateline or a 20/20 episode where, you know, you would watch -- I don't know if any of you have ever seen those shows, but you watch the beginning of the show and they sort of give you one side of the story and you're kind of wondering why this even merits a television show because it seems pretty obvious what happened. And then they might start giving the other side of the story after the first major commercial break. And then you're thinking, like, gosh, nothing is as I thought it was. There is a whole other side to this. And then there is a wrap-up. And ultimately in the end -- perhaps not, but typically, people form an opinion on what they believe happened, what's -- what was proved.

And that's a lot like what this is like. That's what an abiding -- I would suggest to you, an abiding belief is. That considering all of the evidence, once it's all done, once we're finished talking, once you go back into that room, if in evaluating all of the evidence and carefully considering the credibility of each witness you've heard from, you have an abiding belief in the truth of the charge, and the charge here is what Nieves Juarez Villa testified to you happened

to her at the hands of her uncle, Simeon Reyes Juarez, then you've been satisfied beyond all reasonable doubt and you should return guilty verdicts as to each of the three counts.

RP 345-48. The prosecutor's actual argument shows that, rather than to trivialize the burden of proof or the meaning of the term abiding belief as contended by Reyes Juarez, the prosecutor's words and the intent of his words was to caution the jury that it should consider the entire trial and all the evidence – rather than mere parts of it – before reaching its final decision. The comparison to a TV show was not to suggest that the importance of the jury's decision was comparable to a TV show; instead, the prosecutor used the TV show analogy to suggest that the trial is broken into segments, and that the jury should consider the entire trial when reaching its decisions rather than to focus exclusively on any particular segment.

A defendant alleging prosecutorial misconduct in closing argument bears the burden of showing that the prosecutor's argument was both improper and prejudicial. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). If a defendant fails to object to alleged misconduct during closing argument and then attempts to raise the allegation for the first time on appeal, the claim will be deemed waived unless the prosecutor's

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conduct was so flagrant and ill-intentioned that no curative instruction could have remedied the resulting prejudice. *Id.* Misconduct is prejudicial only if there is a substantial likelihood that it affected the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). When deciding whether prejudicial misconduct has occurred, reviewing courts "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762. "Courts review allegations of prosecutorial misconduct during closing argument in light of the entire argument, the issues in the case, the evidence discussed during closing argument, and the court's instructions." *State v. Rodriguez-Perez*, 1 Wn. App. 2d 448, 458, 406 P.3d 658, 664 (2017) (citing *State v. Sakellis*, 164 Wn. App. 170, 185, 269 P.3d 1029 (2011)).

The State contends that Reyes Juarez's claim of prosecutorial misconduct should fail for a number of reasons. Reyes Juarez has not shown that the prosecutor's statements were both improper and prejudicial, as required by *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). As argued above, the prosecutor did not trivialize the burden of proof or the meaning of abiding belief; instead, he merely properly

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urged the jury to consider the entire trial and all the evidence presented before forming an abiding belief.

Also, other than to urge the jury to consider the entire trial and all the evidence presented before reaching an abiding belief – which is a proper argument done with good intentions – there is virtually no likelihood that the prosecutor’s argument affected the jury’s verdict. With no likelihood of prejudice, Reyes Juarez’s claim of prosecutorial misconduct should be rejected. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

Finally, because Reyes Juarez waived the issue of prosecutorial misconduct by failing to object to the prosecutor’s argument at trial, he contends on appeal that his attorney’s failure to object constitutes ineffective assistance. Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel’s performance was deficient and, if so, whether counsel’s errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011). To demonstrate prejudice, defendant must show that but for

the deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

Here, as argued above, the prosecutor did not commit misconduct. Therefore, Reyes Juarez fails the first part of the *Strickland* test, which is to show that his counsel's performance was deficient. Reyes Juarez also fails the second part of the *Strickland* test, because there is virtually no probability that the prosecutor's TV analogy affected the jury's verdict. Accordingly, the State contends that Reyes Juarez's prosecutorial misconduct argument should be rejected.

3. Ample, overwhelming evidence supports each of the three counts of rape of a child in the first degree as charged in this case.

Reyes Juarez contends that there was insufficient evidence at trial to sustain the jury's convictions on counts II and III for rape of a child in the first degree. Br. of Appellant at 35-39.

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v.*

*Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). On review of a jury conviction, the evidence is viewed in the light most favorable to the State and is viewed with deference to the trial court's findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004), *abrogated on other grounds by Crawford v. Washington*. 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). ““Where there is any evidence, however slight, and the evidence is conflicting or is such that reasonable minds may draw different conclusions therefrom, the question is for the jury.”” *State v. Hunter*, 3 Wn. App. 552, 554, 475 P.2d 892 (1970) (quoting *State v. Reynolds*, 51 Wn.2d 830, 834, 322 P.2d 356 (1958)).

To support his assertion that the evidence was insufficient, Reyes Juarez argues the weight of the evidence in an effort to undermine the jury's factual determinations. The elements of the crime of rape of a child

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in the first degree are correctly set forth in the to-convict instructions. CP 111-13. Notably, the State is not required to prove whether Reyes Juarez had a firm erection each time he raped the victim, nor is the State required to prove whether the child-victim knows what an erection is or whether her understanding of the term matches Reyes Juarez's understanding.

Here, there was ample, overwhelming evidence to support each of the jury's three convictions. *See, e.g.*, RP 210-27. Accordingly, Reyes Juarez's claim of insufficiency of the evidence must fail. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992).

4. Defense counsel did not render ineffective assistance of counsel by engaging in a trial strategy and tactics that were designed and intended to undermine the credibility of the child-victim where the evidence was otherwise overwhelming if the jury otherwise believed the child-victim's testimony.

Reyes Juarez contends that his trial counsel was ineffective because he elicited information from the child-victim about her mental health. Br. of Appellant at 39-45.

As argued in relation to Reyes Juarez's first claim of prosecutorial misconduct in part two, above, ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial

counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32-34, 246 P.3d 1260 (2011).

To demonstrate prejudice, defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). Additionally, legitimate trial tactics are not deficient performance. *Grier*, 171 Wn.2d at 33. The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

The child-victim's credibility was crucial to proof of the three counts of rape of a child in the first degree in this case. Thus, during cross examination of the child-victim, counsel for Reyes Juarez attempted to

draw out certain information from the victim about her mental health and other matters in an attempt to undermine her credibility. RP 243-46. In closing argument Reyes Juarez used this information in an attempt to undermine the child-victim's credibility. Reyes Juarez argued that the victim's testimony could be calculated to suggest that she'd had sex the defendant "over 936 times." RP 349. He then argued that her various reports of "different disorders" were uncorroborated and unsupported by evidence. RP 350. Counsel for Reyes Juarez repeatedly referred to "credibility" and in essence implied that the victim's uncorroborated claims various disorders were exaggerated or fabricated, as were her other allegations against the defendant, such as that he kept picture of girls on his cell phone. RP 351-52. The inference was that if the victim were prone to exaggerate or fabricate such matters, then perhaps the jury should doubt her allegation as to whether she was subjected to sex with the defendant "900 times" or "600 times" or even a mere "300 times[,]" particularly considering the "lack of a lubricant, a child's sexual organs, their rectum, common sense would dictate that there would be some trauma that would be reported." RP 353. This argument suggested to the jury that if the child-victim exaggerated or fabricated these stories, then

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perhaps the jury should doubt her testimony in regard to the three specific instances of child rape that corresponded to each of the three to-convict instructions.

Again, “[d]eficient performance is not shown by matters that go to trial strategy or tactics.” *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); see also, *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011); *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995).

5. The cumulative error doctrine is inapplicable in this case because no error occurred, or if error did occur, no combination of error is sufficient to warrant a new trial, particularly where Reyes Juarez has not shown that any combination of the errors he alleges have affected the verdicts rendered by the jury in this case.

Reyes Juarez contends that there were several errors committed at trial that together are sufficient to undermine the jury’s verdicts under the cumulative error doctrine. Br. of Appellant at 43-45.

“The cumulative error doctrine applies to cases in which ‘there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.’” *State v. Fisher*, 165 Wn.2d 727, 772, 202 P.3d 937 (2009), quoting *State v.*

*Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citations omitted). The State alleges that Reyes Juarez has failed to show error in the instant case and that, accordingly, the cumulative error doctrine does not apply. Additionally, however, even if any claim of error were deemed to be shown, which it isn't, Reyes Juarez also has not met his burden of showing how the purported error or errors affected the verdicts in this case. Accordingly, for this reason also, his cumulative error claim should be denied. *State v. Thorgerson*, 172 Wn.2d 438, 454, 258 P.3d 43, 52 (2011)

D. CONCLUSION

The trial court's instructions to the jury, together with the prosecutor's election to tie three specific incidents of rape to each of the three charges of rape in this multiple acts case adequately informed the jury that it must unanimously agree on a separate and distinct rape in relation to each of the three counts charged; therefore, there was neither a unanimity error nor a double jeopardy violation in this case.

The prosecutor did not minimize the burden or proof or the meaning of the term abiding belief when he used a TV show analogy;

instead the prosecutor's point was that the jury should be careful to receive all the evidence and consider the entire trial before reaching an abiding belief. Accordingly, the prosecutor's TV show analogy did not constitute prosecutorial misconduct. Nor did the prosecutor's argument affect the jury's verdicts.

Ample, overwhelming evidence supports each of the jury's three guilty verdicts for the three counts of rape of a child in the first degree as charged in this case, and Reyes Juarez's arguments go to his view of the weight and persuasiveness of the evidence rather than its sufficiency. Accordingly, Reyes Juarez has not met his burden of showing insufficiency of the evidence.

Reyes Juarez's trial counsel did not render ineffective assistance of counsel by engaging in a trial strategy and tactics that were designed and intended to undermine the credibility of the child-victim where the evidence was otherwise overwhelming if the jury otherwise believed the child-victim's testimony. Because legitimate trial tactics are not ineffective assistance of counsel, Reyes Juarez's claim that his attorney was ineffective should be rejected.

Finally, the cumulative error doctrine is inapplicable in this case because no error occurred, or if error did occur, no combination of error is sufficient to warrant a new trial, particularly where Reyes Juarez has not shown that any combination of the errors he alleges have affected the verdicts rendered by the jury in this case.

DATED: September 21, 2020.

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