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No. 53797-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

CORTNY R. SCOT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Chris Lanese, Judge
Cause No. 17-1-01790-34

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE2

C. ARGUMENT9

 1. The defense did not adequately preserve the issue, and if it did the State did not withhold material exculpatory evidence9

 2. Scot has not demonstrated that his trial counsel rendered ineffective assistance.12

 a. The theory of the case presented by the defense was consistent throughout trial.....13

 b. Scot cannot demonstrate ineffective assistance of counsel based on the pretrial investigation of witness statements.....20

 c. Defense counsel’s closing argument was strategically designed to benefit the defense case, and Scot cannot demonstrate prejudice caused by the closing argument of his defense team.....27

 3. The trial court did not err by instructing the jury to disregard the defense closing argument regarding what a father may or may not have done and even if the order was erroneous, any error was harmless.....43

 4. The trial court’s order to disregard counsel’s argument was not an unconstitutional comment on the evidence.....45

 5. Sufficient evidence supported the jury’s findings of guilt49

6. Remand is proper to correct scrivener’s errors in the judgment and sentence and warrant of commitment51

7. The appellant is not entitled to relief under the doctrine of cumulative error.....52

D. CONCLUSION.....53

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>In re Pers. Restraint of Pirtle,</u> 136 Wn.2d 467, 965 P.2d 593 (1996).....	13
<u>State v. Allen,</u> 70 Wn.2d 690, 424 P.2d 1021 (1967).....	24, 25
<u>State v. Bencivenga,</u> 137 Wn.2d 703, 974 P.2d 832 (1999).....	50
<u>State v. Brush,</u> 183 Wn.2d 550, 353 P.3d 213 (2015).....	48
<u>State v. Camarillo,</u> 115 Wn.2d 60, 794 P.2d 850 (1990).....	49
<u>State v. Cunningham,</u> 93 Wn.2d 823, 613 P.2d 1139 (1980).....	45
<u>State v. Delmarter,</u> 94 Wn.2d 634, 618 P.2d 99 (1980).....	49
<u>State v. Elmore,</u> 139 Wn.2d 250, 985 P.2d (1999).....	49
<u>State v. Greif,</u> 141 Wn.2d 910, 10 P.3d 390 (2000).....	17, 18, 52
<u>State v. Hendrickson,</u> 129 Wn.2d 61, 917 P.2d 563 (1996).....	13, 42
<u>State v. Jacobsen,</u> 78 Wn.2d 491, 477 P.2d 1 (1970).....	46
<u>State v. Jones,</u> 183 Wn.2d 327, 352 P.3d 776 (2015).....	21 - 23

<u>State v. Lane,</u> 125 Wn.2d 825, 889 P.2d 929 (1995).....	48
<u>State v. Levy,</u> 156 Wn.2d 709, 132 P.3d 1076 (2005).....	46, 48
<u>State v. Linville,</u> 191 Wn.2d 513, 423 P.3d 842 (2018).....	22
<u>State v. McFarland,</u> 127 Wn.2d 322, 899 P.2d 1251 (1995).....	13, 22
<u>State v. Salinas,</u> 119 Wn.2d 192, 829 P.2d 1068 (1992).....	49
<u>State v. Smith,</u> 106 W.2d 772, 725 P.2d 951 (1986).....	45
<u>State v. Stenson,</u> 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), <i>cert. denied</i> , 523 U.S. 1008 (1998).....	13, 42
<u>State v. Swan,</u> 114 Wn.2d 613, 790 P.2d 610 (1990).....	24
<u>State v. Thomas,</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	13
<u>State v. Weber,</u> 159 Wn.2d 252, 149 P.3d 646 (2006), <i>cert. denied</i> , 551 U.S. 1137 (2007).....	52
<u>State v. White,</u> 72 Wn.2d 524, 433 P.2d 692 (1967).....	45
<u>State v. Wittenberger,</u> 124 Wn.2d 467, 880 P.2d 517 (1994).....	10

Decisions Of The Court Of Appeals

<u>Ang v. Martin</u> , 118 Wn. App. 553, 562, 76 P.3d (2003), <i>aff'd</i> , 154 Wn.2d 477, 114 P.3d 637 (2005).....	43
<u>In re Pers. Restraint of Mayer</u> , 128 Wn. App. 694, 117 P.3d 353 (2005).....	52
<u>Jankelson v. Cisel</u> , 3 Wn. App. 139, 473 P.2d 202 (1970).....	46
<u>Safeco Ins. Co. v. Jmg Rests.</u> , 37 Wn. App. 1, 680 P.2d 409 (1984).....	46
<u>State v. Burden</u> , 104 Wn. App. 507, 17 P.3d 1211 (2001).....	10
<u>State v. Groth</u> , 163 Wn. App. 548, 261 P.3d 183 (2011).....	11
<u>State v. Israel</u> , 113 Wn. App.243, 54 P.3d 1218 (2002), <i>review denied</i> , 149 Wn.2d 1013, 69 P.3d 874 (2003).....	27
<u>State v. Neidigh</u> , 78 Wn. App. 71, 895 P.2d 423 (1995).....	45
<u>State v. Perez</u> , 137 Wn. App. 97, 151 P.3d 249 (2007).....	26
<u>State v. Price</u> , 126 Wn. App. 617, 109 P.3d 27 (2005).....	53
<u>State v. Walton</u> , 64 Wn. App. 410, 824 P.2d 533 (1992).....	50
<u>State v. White</u> , 80 Wn. App. 406, 907 P.2d 310 (1995).....	12

<u>State v. Yarbrough</u> , 151 Wn. App. 66, 210 P.3d 1029 (2009).....	52
---	----

U.S. Supreme Court Decisions

<u>Kimmelman v. Morrison</u> , 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).....	19
---	----

<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).....	13, 21, 22, 42
---	----------------

Statutes and Rules

Wash. Const. Art. 4, § 16	45
CrR 4.7.....	11, 12
RCW 5.60.060(1).....	24
RCW 7.69.030(7).....	11
RCW 9A.20.021(1)(b).....	52
RCW 9A.44.020.....	38
RCW 9A.44.086.....	52

Other Authorities

<u>Anderson v. Butler</u> , 858 F.2d 16 (1st Cir. 1988).....	18
---	----

<u>Howard v. Davis</u> , 815 F.2d 1429 (11 th cir.), <i>cert denied</i> , 484 U.S. 864, 108 S.Ct. 184, 98 L.Ed.2d 136 (1987).....	18
--	----

<u>People v. Lewis</u> , 240 Ill.App.3d 463, 586 N.E.2d 1384, 609 N.E.2d 673, 182 Ill.Dec. 139 (1992).....	18
--	----

<u>People v. Ortiz</u> , 224 Ill.App.3d 1065, 586 N.E. 2d 1384, 167 Ill. Dec. 112 (1992).....	18
--	----

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the defense preserved its claim that the State failed to preserve evidence for appeal and if so, whether the State fails to preserve evidence of text messages where it provides photographs of the text messages and advises defense counsel that the cellular phone is not in the State's custody.

2. Whether defense counsel's pretrial interviews, closing argument, and defense themes constituted ineffective assistance of counsel where the record demonstrates that the defense attorneys' actions were strategic and did not prejudice the defense.

3. Whether the trial court erred by instructing the jury to ignore counsel's argument made during closing argument that violated an evidentiary ruling of the Court.

4. Whether a trial court comments on the evidence by directing the jury to ignore an improper argument.

5. Whether the evidence, when viewed in a light most favorable to the State, is sufficient to support each of the convictions.

6. The State concedes that scrivener's errors in the judgment and sentence and warrant of commitment should be corrected.

7. Whether Scot is entitled to relief pursuant to the doctrine of cumulative error where the record does not demonstrate prejudicial error that affected the outcome of the proceedings.

B. STATEMENT OF THE CASE.

SNM (DOB 11/2/04) and her sister TRM (DOB 12/18/02) disclosed that their step-father, the appellant, Cortny R. Scot, was sexually abusing them after their mother Wendy Scot told them that she was leaving Mr. Scot because he had cheated on her. RP (5/23/19) 42, 66-67, 120, 127; RP 724-725.¹ Wendy Scot indicated that she began dating Mr. Scot in 2014 and began residing together at the end of 2014 at a residence in Tolmie Cove in Lacey. RP 718. Wendy married Mr. Scot on April 4, 2016. RP 721. The family moved to a residence on Primrose Lane in Tumwater at the end of March 2017. RP 722, 723.

SNM described several sexual assaults perpetrated by Scot. She indicated that Scot “had sex with” her and stated that meant, “he put his dick in my vagina.” RP (5/23/19) 66. She described the last time that it occurred, stating it was a week before she told her mom. RP (5/23/19) 68.

¹ The trial in this matter occurred on May 20, 22, 23, 28-30, June 4-6, 2019, with additional hearings and sentencing on July 18, 25, 2019. The verbatim report of proceedings of the trial and sentencing occurs in 8 volumes. Court reporter Cheri Davidson reported the May 20, 22, 28-30, June 4-6 and July 18 and 25 dates and those appear sequentially number with a gap between pages 394 (end of the May 22nd volume) and 544 (the start of the May 28-29 volume). Those reports are collectively referenced as RP herein. The May 23 proceedings were reported by Kathern Beehler and are separately referenced herein as RP (5/23/19). All other reports of proceeding are referenced by their date.

It was later clarified that the last time was a week before she provided a statement, which would have been October 5, 2017. RP (5/23/19) 116. She described the incident stating:

The last time we were on the couch, and he – he usually used lube. And I just laid on my back. And that was usually how it always went. He would put his penis in me, and then I would - - well, I didn't do much, I would just lay there and not move.

RP (5/23/19) 68. She indicated that he “would use a condom” and said that it was dark when it happened. RP (5/23/19) 68-69.

SNM indicated, “He would do it multiple places out around the dining room, kitchen, or the living room.” RP (5/23/19) 69. She said that the first time she cried and said that she didn't want to do it, and then he broke something the next day. RP (5/23/19) 69. She said that she didn't want to do it because it “hurt a lot.” *Id.* SNM indicated that the first time that he did it was in 2017 and she was in school. *Id.* at 70. She said that it had been at least a month after they moved into the Primrose house, which the prosecutor clarified by asking, “So sometime after May 2017?” to which she responded, “yes.” *Id.* at 71. She indicated that the first time that it happened was in the “kitchen that was all by itself.” *Id.*

SNM described a thick yellow-white blanket with flowers on it that was involved in the assault. RP (5/23/19) 72-73. She testified that after the first time that he did it, “it started out as something he would do every

week or so, but after a while, he would start doing it more.” RP (5/23/19) 74. She stated he “would start doing it four to three times a week,” and confirmed that he put his penis in her vagina, wore a condom, and would “also pull out when he came.” RP (5/23/19) 75.

SNM described other places in the house where it happened, stating it happened by the wall before the hallway, several times on her mom’s bed, and two times on the couch, but she emphasized that it was usually on the floor in the kitchen. RP (5/23/19) 76. She indicated that a few times he would send her text messages, but most of the time he would wake her up. RP (5/23/19) 76. SNM testified that it happened in her mom’s bed more than once but less than five times when her mom was at work. RP (5/23/19) 78. She described an incident in her mom’s bed that happened in the summertime of 2017 stating, “I would lay on my back. He would put his penis in my vagina after using lube and putting a condom on, and then he would go until he came.” RP (5/23/19) 80. She said that he said things like, “I could crush your neck with my hands,” and said that he would talk about them becoming a couple in the future. RP (5/23/19) 80-81.

While describing incidents on the couch, SNM indicated that he gave her wine coolers to help her “feel less pain and deal with it.” RP (5/23/19) 83. She identified photographs of text messages that the

detective took from her phone as messages that Scot sent her and indicated that a few of them cause her to go meet him and have sex. RP (5/23/19) 84-85. She said that sometimes he would send a “dot or a dot, dot, dot.” RP (8/23/19) 86. In one message on September 8, 2017, at 3:19 AM, she indicated that Scot sent her “just dots” to wake her up and then she went to meet him, and he put his penis in her vagina. RP (8/23/19) 87-88. In a separate message sent at 5:36 AM, he said, “meet me by the freezer in two minutes,” which SNM acknowledged caused her to meet him to have sexual intercourse by putting his penis in her vagina. RP (8/23/19) at 89-90. There was another message sent on September 30, 2017, at 4:31 AM, that SNM testified was probably “another sex attempt,” and indicated that she did not remember where it happened but agreed that it was another sexual assault by Scot. RP (5/23/19) 92-93.

SNM indicated that she had pain and there was “blood a few times.” RP (5/23/19) 94. After she disclosed, swabs were taken from her vagina. *Id.* at 95. SNM submitted to a sexual assault kit examination which included swabs of her vaginal vault. RP 589-590. SNM indicated that the yellow and white blanket that was used during the assaults was still in its package when it was given to her and confirmed that the blanket recovered by law enforcement was the blanket that was used. RP 913, 963-964. DNA analysis revealed semen on the blanket that matched Scot’s

DNA with an estimated probability of selecting an unrelated individual at random from the U.S. population with a matching profile at one in 160 undecillions. RP 782-783. Y-STR male DNA testing revealed DNA consistent with Scot on the vaginal swabs of SNM. RP 886. The Y-STR profile matched Scot or any of his paternal male relatives and would not be “expected to occur more frequently than one in 5,500 male individuals in the U.S. population.” RP 886.

Detective Tyler Boling of the Tumwater Police Department became aware of the text messages on SNM’s phone during the investigation. RP 916. He contacted her and she opened her phone and showed him a string of text messages that were from Scot. RP 917. Detective Boling took photographs of the text messages that appeared to be related to the sexual assaults. RP 922-923. He only took pictures of the messages that he considered to be of evidentiary value. RP 923. He gave the phone back to SNM after he took the photographs. RP 953.

TRM testified that the first-time sexual activities with Scot occurred was in Tolmie Cove in her mom’s room. RP (5/23/19) 129. She described the incident stating “I laid down on the bed. I took my clothes off. I was standing, and then I laid down on the bed. And the he was licking me in my vagina area and playing with me down there in my vagina area.” RP (5/23/19) 130. She stated, “he was licking my clit,” and

“putting his finger in my hole.” *Id.* Afterwards, she went into her bedroom and started to cry. *Id.* at 131.

TRM indicated that Scot touched her with his fingers, mostly, “every time we would have sex.” *Id.* She described sex, stating, “I mean he would put his dick in my vagina hole, and he would start humping me.” *Id.* She described an incident at the Tolmie Cove house where Scot put a Dora the Explorer blanket on the bed, grabbed a condom and lube, put lube on her vagina area, put the condom on and then “he would put his penis in [her] vaginal hole.” *Id.* at 132. She said that it “hurt really bad” and that she sometimes bled from him putting his penis in her vagina. *Id.*

TRM described an incident in the Tumwater house where Scot told her to “suck harder or not to bite him” and to “grip his penis better.” *Id.* at 134. She described that sperm feels “sticky and slimy” and indicated that she has felt Scot’s sperm on her hands because she was rubbing his penis. *Id.* 135. She said that she would stroke his penis, “usually more than [she] would have sex with him, but it would be usually whenever he wanted.” *Id.* 136. When asked how many times Scot had sex with her, she stated, “Probably more than ten times,” and confirmed that it happened at both the Tolmie Cove house and the Tumwater House. *Id.* 137. She said that she was “pretty sure” the last time that she had sex with him in her mom’s

room at the Tumwater house was “a month go,” and clarified that it was a month before she and SNM “came out with the truth.” *Id.* at 137-138.

TRM indicated that sex also happened in her mom’s bedroom at the Tolmie Cove house and that Scot used a condom every time that he had sex with her. *Id.* at 140-141. When asked to describe the first time that he put his fingers inside of her vagina, she stated that it happened at “Tolmie Cove,” and she indicated that the first time he put his tongue on her vagina was also at Tolmie Cove. *Id.* 140-141. She indicated that “every time, usually when [she] was having sex with him,” he would have her suck on his nipples. *Id.* 142.

Scot was ultimately charged with 8 counts of rape of a child in the second degree, one count of child molestation in the first degree and one count of child molestation in the second degree. CP 177-180. After trial commenced, Scot failed to reappear which resulted in a finding that he had voluntarily absented himself from the proceedings and some of the trial occurring in absentia. RP 548, 555-564. He returned on May 30, 2019. RP 858. The jury convicted Scot on counts 1, 2, 4, 6, and 7, and acquitted him on the remaining 5 counts. RP 1153-1155. In a bifurcated proceeding, the jury found aggravating factors that the offenses were part of an ongoing pattern of sexual abuse and that Scot had abused his position of trust in commission of the offenses. RP 1174-1176. The trial court

imposed an exceptional sentence 20 months above the high end of the standard range, for a total sentence of 300 months to life. RP 1223. This appeal follows.

Additional facts are contained in the argument sections below.

C. ARGUMENT.

1. The defense did not adequately preserve the issue, and if it did the State did not withhold material exculpatory evidence.

Prior to trial, defense counsel filed a motion to suppress the photographs of the text messages on SNM's phone. CP 141. In the motion, defense counsel argued that the investigating detective failed to take SNM's phone into custody and thereby prevented the defense from conducting its own forensic evaluation of the phone. CP 142. The State responded indicating that the phone was not in the State's custody. CP 144-146. A hearing on the motion was held on January 7, 2019. RP (1/7/19).

During the hearing, defense counsel argued that "the authenticity of the text messages is what's at issue." RP (1/7/19) 6. The prosecutor responded that the State had complied with CrR 4.7 and the photographs of text messages that had been provided were the evidence that the State intended to produce at trial. RP (1/7/19) 8-9. The prosecutor noted "the State doesn't have jurisdiction over the victim here," and indicated that the

defense “certainly could have sought a subpoena duces tecum.” RP (1/7/19) 9. The trial court noted that a “motion to compel discovery is not before the Court at this time,” and indicated that there was “no basis to suppress the photographs, copies of which were provided to the Defendant.” RP (1/7/19) 12, 14. The defense did not object to the admission of the text messages during trial. RP (5/23/19) 85.

By not objecting to the admission of the photographs during trial, the defense failed to adequately preserve this issue on appeal and this Court is not required to consider it. RAP 2.5. If this Court considers the issue, it is clear that the State did not fail to preserve evidence.

The government’s failure to preserve evidence specific to the defense may violate a defendant’s due process rights. State v. Wittenberger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). However, the State has a duty to preserve material exculpatory evidence, which is evidence that both possess an exculpatory value that was apparent before it was destroyed and of such a nature that the defendant would be able to obtain comparable evidence by other reasonable available means. *Id.* By contrast, the State’s failure to preserve evidence that is merely “potentially useful” does not violate due process unless the defendant can show bad faith on the part of the State. State v. Burden, 104 Wn. App. 507, 512, 17 P.3d 1211 (2001). “Potentially useful” evidence of “evidentiary material

of which no more can be said that it could have been subjected to tests, the results of which might have exonerated the defendant.” State v. Groth, 163 Wn. App. 548, 557, 261 P.3d 183 (2011). The presence or absence of bad faith must necessarily turn on the State’s knowledge of the exculpatory value of the evidence at the time it was lost or destroyed, and the defendant must show that the destruction was improperly motivated. *Id.* at 558-559.

In this case, Detective Boling acted in good faith when he photographed the text messages which had evidentiary value, which were inculpatory. RP 921-923. There was nothing readily apparent to Detective Boling that would suggest that anything else on the phone had any exculpatory value. His actions were consistent with the victim’s rights because he had no reason to believe testing of the phone was necessary at the time. RCW 7.69.030(7), RP 953-955. The State never took custody of the phone and provided the photographs that it intended to rely upon at trial as required by CrR 4.7(a). CrR 4.7(d) says that upon defense request, if material that would be discoverable, if it was in the possession of the prosecutor, is held by others, the prosecutor shall attempt to cause such evidence to be available to defense. The prosecutor complied with the rule by providing the photographs. Additionally, the prosecutor indicated that it did not have the phone and had no jurisdiction to compel production of

it. The rule contemplates the defense motioning the court to “issue suitable subpoenas or orders to cause such material to be made available to the defendant.” CrR 4.7(d). The defense made no such request.

Victims have privacy rights in their personal cell phones. Scot has never demonstrated that the cell phone contains “potentially exculpatory” evidence and certainly has not demonstrated that the phone had “material exculpatory evidence.” Detective Boling acted in good faith and it is clear from his testimony that he had no improper motive to not collect SNM’s phone. Moreover, there are other readily available options for the defense to have pursued. For example, if the defense was arguing that the defendant did not send the text messages, they could have examined his phone, admitted records from his cellular phone provider, or, as noted, sought a subpoena duces tecum. The State preserved the evidence that was related to this case. The defense’s argument that the state failed to preserve evidence is purely speculative. There was no violation of Scot’s due process rights nor was there a violation of CrR 4.7.

2. Scot has not demonstrated that his trial counsel rendered ineffective assistance.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel’s performance was deficient; and (2) the deficient performance

prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 697.

- a. The theory of the case presented by the defense was consistent throughout trial.

During opening statements, Scot's counsel made it clear that the defense's theory of the case was that Scot was not in the residence on the

morning of October 5, 2017 but was with Jennifer Lunge. RP (5/23/19) 30-31. Defense counsel indicated that the allegations of sexual assault came after Wendy Scot confronted Mr. Scot about his relationship with Jennifer and indicated, “Mrs. Scott told Mr. Scott, I wish you were dead. I’m going to get you.” RP (5/23/19) 30. The focus of the opening statement, however, was Mr. Scot’s lack of presence in the residence on the morning of October 5, 2017. RP (5/23/19) 31. Defense counsel noted, “You can decide the prosecutor could not and did not prove beyond a reasonable doubt that a sexual assault occurred on the only specific date mentioned in the total charges.” RP (5/23/19) 33. Much of the remainder of the defense opening statement focused on the quality of the investigation. RP (5/23/19) 38-40.

While cross-examining SNM, defense counsel focused on a lack of prior disclosure of harm to Wendy Scot or teachers. RP (5/23/19) 104-107. Defense counsel later specifically asked about SNM’s statements regarding the last time there was sexual contact with Mr. Scot before she told her mom, to which she responded, “It is debatable if it was a week or a day.” RP (5/23/19) 113. Defense counsel then attempted to narrow the date down. RP (5/23/19) 113-114. The questions prompted the State to address her previous statement on re-direct, during which she indicated that she had said, “It hurt all the way up to the last time I did it, which was

Thursday of last week,” which based on the date of the interview would have been October 5, 2017. RP (5/23/19) 116. During cross examination of TRM, defense counsel focused on her close relationship with her mother. RP (5/23/19) 144.

After SNM and TRM testified, Mr. Scot voluntarily absented himself from the proceedings. RP 549, 556, 560-564. Mr. Scot was not present in the courtroom when Wendy Scot testified. RP 717. During a pause in Mrs. Scot’s testimony, defense counsel, Mr. Hetter indicated that he was hoping to get some evidence, unrelated to Mrs. Scot’s testimony, in through Mr. Scot. RP 741. It was clear at that at that point of the trial, defense counsel did not know whether or not Mr. Scot would present himself before the court during the remainder of the trial.

On cross examination defense counsel Hetter asked Mrs. Scot whether she had previously stated that the children “never really liked,” Mr. Scot. RP 730. He specifically asked her whether she had told the children that she was upset with Mr. Scot. RP 730. Mr. Hetter asked about whether Mrs. Scot was suspicious that Mr. Scot was seeing other women, to which she responded “yep,” and indicated her suspicion was based on his lies. RP 730-731. She indicated that she found out he had been lying when she “found a woman with a baby on his phone,” and saw comments from Mr. Scot indicating, “I love you to the moon and back.” RP 733. Mr.

Hetter then asked, “Had you discussed the repercussions with Mr. Scott if you did catch him other women,” to which Mrs. Scot responded, “I told him I would leave him.” RP 733-734. Defense counsel then focused on Mrs. Scot’s efforts to leave Mr. Scot. RP 734, 753-754. Defense counsel strategically elected not to ask further questions regarding the repercussions to Mr. Scot for having an affair at that point.

During the defense case in chief, the defense offered testimony from Jennifer Lunge indicating that Scot had been with her on the night of October 4, 2017 and woke up with her the next morning. RP 976. The defense also introduced evidence that Scot went to work on October 5, 2017. RP 1008. Though he had returned to the courtroom, Scot elected not to testify at trial. RP 998, 1037.

During closing arguments, Mr. Hetter argued that there was a lack of evidence and “virtually no possibility” that Scot was guilty. RP 1092. He argued that the demeanor of the victims during their testimony as not consistent with abuse. RP 1093. Mr. Hetter returned to the opening theme of Mrs. Scot being emotional after finding out that Mr. Scot had another child and family. RP 1094. He then immediately argued that SNM and TRM would have brought the abuse to the attention of someone else if it had occurred. RP 1094-1095. Much like Mr. Chapman had done during the opening statement, Mr. Hetter then focused on arguing that the DNA

evidence lacked strength and the quality of the investigation. RP 1097-1098; 1101-1102. Mr. Hetter then focused on the timing of the allegations arguing that the evidence showed that other people were in the residence during the times alleged. RP 1108. Hetter argued that “somebody in that house would have woken up,” if the allegations had occurred. RP 1112.

When defense counsel, Mr. Chapman, took over the closing argument, he focused on the limitations of the DNA evidence and the possibility of transfer from the blanket to SNM. RP 1123-1124. He then focused on the alibi provided by Ms. Lunge and Scot’s employment records. RP 1126. As discussed in the opening statement, Chapman argued that Scot could not have committed an offense on October 5, 2017, as alleged. RP 1127.

Scot now argues that the discussion of statements made by Mrs. Scot during opening statements and the failure to follow up on those statements constituted ineffective assistance of counsel. Scot relies on State v. Greif, 141 Wn.2d 910, 921, 10 P.3d 390 (2000), for the proposition that a failure to follow up on promises to elicit certain evidence during opening statements is “quite serious.” However, Greif involved a misstatement from a law enforcement officer that was relied upon by defense counsel during their opening statements. *Id.* at 917. The Court’s decision noted, “in our judgment, the doctrine of ineffective

assistance of counsel is inapplicable in the present context.” *Id.* at 925. The decision discussed cases relied upon by Greif, including Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988); People v. Lewis, 240 Ill.App.3d 463, 586 N.E.2d 1384, 609 N.E.2d 673, 182 Ill.Dec. 139 (1992); and People v. Ortiz, 224 Ill.App.3d 1065, 586 N.E. 2d 1384, 167 Ill. Dec. 112 (1992). Greif, at 925-926.

In Anderson v. Butler, defense counsel indicated in his opening statement that he would call an expert witness and failed to do so. 858 F.2d at 17. The First Circuit Court of Appeals noted that “counsel substantially damaged the very defense he primarily relied upon.” *Id.* at 19. The Court distinguished the facts in that case from those in Howard v. Davis, 815 F.2d 1429 (11th cir.), *cert denied*, 484 U.S. 864, 108 S.Ct. 184, 98 L.Ed.2d 136 (1987), where defense counsel made the plausible move of abandoning one defense in favor of another. Anderson v. Butler. 858 F.2d at 19.

In People v. Lewis, the Court found that trial counsel was ineffective by promising to introduce the defendant’s pretrial statement into evidence, even though the statement was inadmissible. 240 Ill.App. 3d at 468. In People v. Ortiz, defense counsel suggested to the jury that there was another suspect, never introduced that evidence, and was found to be deficient. 224 Ill.App.3d at 1073.

Unlike those cases, defense counsel in this case acted strategically in deciding to abandon the line of questioning of Mrs. Scot that could have led to admission of the statement indicated during opening that, “Mrs. Scot told Mr. Scott, I wish you were dead. I’m going to get you.” RP (5/23/19) 30. Presumably, only two people were party to that conversation if it occurred, Mr. Scot and Mrs. Scot. At the time that defense counsel cross examined Wendy Scot, Mr. Scot had absented himself from the proceedings. When it became evident that such a statement would be denied, it was a legitimate trial strategy to elect to abandon the line of questioning.

“The reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances.” Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). At the time that counsel was cross examining Mrs. Scot, had defense counsel asked if she told Mr. Scot that she wanted him dead or was going to get him, regardless of her answer, it was unclear whether or not Mr. Scot would be available to contradict her response. It was strategic not to ask the question, thereby giving a chance for the witness to deny making the statement and then, possibly have no avenue to contradict the denial because of the defendant’s absence. It

cannot be said that the decision not to ask that question to Wendy Scot constituted deficient performance in the context of this case.

Even if the failure to produce such a statement was somehow deficient, it was not prejudicial in the context of the entire case. The evidence demonstrated that the disclosure came after Wendy Scot had found out that Mr. Scot had another life with another family. The defense was able to imply a potential motive for Wendy Scot to seek revenge as was implied during the opening statement. The failure to elicit a direct quote as such did not compromise the defense in any way.

During closing arguments, it was appropriate for counsel to focus on the DNA evidence, which provided a huge hurdle for Mr. Scot to overcome in order to be exonerated. The fact that the jury did not convict Scot of all of the counts that he was charged with demonstrates that the jury did not lose confidence in the defense as Scot now argues. Given the overwhelming evidence, including Y-STR DNA in SNM's vaginal vault consistent with Scot, Scot cannot demonstrate that the decision to slightly modify the defense tactics during trial had any probability of affecting the verdicts. This is especially true given the consistent theme of an alibi on October 5, 2017, which was presented throughout the trial.

- b. Scot cannot demonstrate ineffective assistance of counsel based on the pretrial investigation of witness statements.

A failure to interview a particular witness can constitute deficient performance. State v. Jones, 183 Wn.2d 327, 340, 352 P.3d 776 (2015). In this case, the State set up defense interviews of Wendy Scot, SNM and TRM. CP 81, 98, 101. After interviewing Wendy Scot, defense counsel indicated that he did not want to interview SNM or TRM. CP 112. The entire interview of Wendy Scot was not included in the record cited to in the Brief of Appellant. The State attached portions of the interview to its response to a defense motion for a new interview of the victims, but the transcript skips from page 4 to page 44. CP 111-112.

Defense counsel eventually withdrew its request for another interview time with SNM and TRM. CP 119. Defense counsel indicated that the decision to initially not interview the children was well founded. CP 119. So long as representation was reasonable, this court should neither interfere with the constitutionally protected independence of counsel nor restrict the wide latitude counsel must have in making tactical decisions. Strickland, 466 U.S. at 689.

Whether a failure to interview a witness constitutes deficient performance “depends on [the] reason for the trial lawyer’s failure to interview.” State v. Jones, 183 Wn.2d at 340. When counsel is aware of the facts supporting a possible line of defense, “the need for further investigation may be considerably diminished or eliminated altogether.”

Strickland, 466 U.S. at 691. The standard is whether counsel investigates the case and makes an informed and reasonable decision against conducting a particular interview or calling a particular witness.” Jones, 183 Wn.2d at 340.

If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). In his pleading, defense counsel indicated that the decision to not interview SNM or TRM was “well founded” but did not further elaborate. CP 119. When it is impossible to tell from the record whether there is a legitimate reason for trial counsel’s action, it does not support a claim of ineffective assistance of counsel. State v. Linville, 191 Wn.2d 513, 525-526, 423 P.3d 842 (2018). Defense counsel may have strategically decided not to interview the children so as not to give them a rehearsal of potential cross examination questions. The defense already had the child forensic interview and the medical interview prior to the decision not to interview SNM or TRM. CP 86, RP 146. Moreover, defense counsel was clearly aware of the prior report of sexual assault involving TRM and Christopher Metcalf and had filed motions seeking to admit evidence regarding that evidence. CP 72.

It is clear that defense counsel had engaged in a comprehensive investigation of the issues, was aware of facts which supported theories of

the defense and made an informed decision to not interview SNM or TRM. This case is not similar to the defense counsel in State v .Jones, who failed to interview a witness and did not know what he would have testified to prior to deciding not to call him. 183 Wn.2d at 341-342.

Scot relies on only a small portion of the pretrial interview of Wendy Scot which was included in the record to opine that if defense counsel had conducted more thorough interviews, defense counsel would have been able to demonstrate that TRM was not competent to testify. Brief of Appellant, at 22. The full transcript was marked, but not admitted at trial. Ex 13. The medical report of Lisa Wahl regarding TRM also included TRM's learning disability and was available to the defense without an interview of TRM. Ex. 17. Additionally, the argument that TRM was not competent to testify is not supported by the record at trial.

ARNP Lisa Wahl testified at trial regarding her conversation with TRM about the abuse that occurred. RP 826-829. Child forensic interview Sue Villa testified at trial that both girls promised to tell the truth when she interviewed them. RP 659-660. Ms. Villa indicated that TRM's "presentation was much flatter than her younger sister's. It wasn't robotic, but there was no animation or great intensity." RP 651. However, Villa indicated that TRM did make a disclosure to her. RP 651.

Wendy Scot testified regarding that TRM has a hard time with reading and with math and was on an Individual Education Plan (IEP). RP 760-761. She noted that the school brings it up “every four years for testing.” RP 761. Nothing in the record suggests that TRM was not competent to testify.

To be competent to testify as a witness, a person must be of sound mind and discretion and must appear to the trial judge to be capable of receiving just impressions of the facts they are examined about and capable of relating them truly. RCW 5.60.060(1); State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). The court must be satisfied that a child witness understands the need to tell the truth in court, could perceive the events accurately at the time, has a good enough memory to retain an independent recollection of the occurrence, and is able to understand simple questions about it. State v. Swan, 114 Wn.2d 613, 645, 790 P.2d 610 (1990).

While Scot engages in a purely speculative analysis of the *Allen* factors to suggest that a more thorough investigation could have shown that TRM was not competent, the record demonstrates that TRM understood the need to tell the truth, could perceived the events accurately at that time, had a good enough memory to relate an independent recollection of the occurrences, and was able to understand simple

questions about it. The trial court swore TRM in to testify stating, “You’re about to be asked a lot of questions. Do you promise to only tell the truth and not tell any lies,” to which TRM stated, “yes.” RP (5/23/19) 118-119.

TRM was able to answer questions regarding herself and the sexual abuse that she endured. She was asked about her special needs class and indicated, “my special needs class is for my reading issues. Then I also have problems with math, and it takes me longer to think about things, and I am really slow at, um, reading basically, reading and math.” RP (5/23/19) 121. She could not remember the street name of her previous residence with Scot in Tumwater but was able to recall the Tolmie Cove residence that they had also resided in. RP 122.

TRM acknowledged that timelines were not easy for her. RP 123. However, she was able to provide detail regarding the sexual abuse that Scot committed. RP 124, 126-127, 129-130. Her description was consistent with the medical interview that Lisa Wahl testified regarding. RP 826-829. A review of her testimony reveals that she was clearly competent to testify.

Scot’s assertion that, “had trial counsel obtain Social Security administration diagnosis, IEP’s, other school records and/or call her teachers...These records likely would have supported a motion to disqualify her,” has no basis in law or fact. The *Allen* factors have been

applied to find that very young children are competent to testify. State v. Perez, 137 Wn. App. 97, 100, 103-105, 151 P.3d 249 (2007)(upholding a trial court's finding that a four-year old child was competent to testify). There is absolutely no basis in the record to support the contention that the defense interview of Wendy Scot was insufficient or that any amount of investigation would have resulted in a finding that TRM was not competent to testify.

Scot's argument that a pretrial interview of SNM could have developed inconsistencies that could have been exploited at trial is also without merit. As noted above, defense counsel had the records from SNM's forensic interview and medical evaluation. Scot's argument that an interview of SNM would have allowed trial counsel "to learn about the text messages that were withheld by the lead detective," is wholly without merit. The original defense interview was scheduled for September 14, 2018, but defense counsel indicated in pleadings that they had requested to view the cell phone on August 31, 2018, and September 25, 2018. CP 76, 148. Clearly, defense counsel was aware of the photos taken from SNM's phone long before any scheduled defense interview.

Scot has not demonstrated that counsel's pretrial investigation and witness interviews was deficient and cannot demonstrate that the quality or quantity of pretrial witness interviews prejudiced him in any way.

Nothing in the record supports a reasonable probability that the verdicts would have been different if defense counsel had conducted the pretrial investigation differently.

- c. Defense counsel's closing argument was strategically designed to benefit the defense case, and Scot cannot demonstrate prejudice caused by the closing argument of his defense team.

“The determination of which arguments to advance in closing is a tactical decision susceptible to a wide range of acceptable strategies.” State v. Israel, 113 Wn. App.243, 271, 54 P.3d 1218 (2002), *review denied*, 149 Wn.2d 1013, 69 P.3d 874 (2003). As noted in previous sections, during closing argument, both of Scot's defense attorney's focused on the evidence presented, Scot's alibi defense, and argued that the DNA evidence was lacked strength. The decision to put forward these arguments was well within the scope of reasonable tactical decisions for arguments.

While Mr. Hetter's closing argument drew several objections from the prosecutor, most were overruled. Toward the beginning of his argument, Mr. Hetter indicated that the jurors were “gonna use your emotions,” which was objected to by the State. RP 1090. The trial court sustained the objection, stating, “I'm going to sustain the objection and tell the jury to disregard any reference to your emotions. You cannot use your emotions to decide this case.” RP 1090. Mr. Hetter followed the trial

court's comments with the statement, "Well, I was going to say despite the disregard –despite being instructed not to," to which the trial court responded, "Well, I did that for you, don't do it. You may proceed." RP 1090-1091. While this interaction was not ideal, it ultimately conveyed the point that Mr. Hetter was attempting to make a point that emotions should not play a part in deliberations.

Scot's argument that Mr. Hetter reversed the burden of proof by enumerating a number of facts which should have been present if Scot had committed the crimes is without merit. Mr. Hetter argued that the police should have found other evidence, such as a condom wrapper, lubricant, and a towel to clean up with. RP 1091. He criticized law enforcement's review of "telephone communications." RP 1092. He then stated, "If you find one or more of them probable or reasonably possible, you're required by the constitution, the judge, the jury instructions, the government, to enter a not guilty, and also a promise that you made at the beginning." RP 1092. The prosecutor objected to this statement indicating that it misstates the law, to which the trial court responded:

And ladies and gentlemen, just remember that the law that you are to follow is what I gave you. Sometimes lawyers may think things are consistent or inconsistent with that. I allow them to make their argument, but when in doubt, look at the jury instructions, and that's what the law is.

RP 1092. Mr. Hetter immediately responded, “If there’s reasonable doubt” before arguing that “it’s virtually impossible.” RP 1092-1093. While the argument drew an objection, the trial court did not sustain the objection and ultimately defense counsel tied his argument to the correct legal standard, reasonable doubt.

Defense counsel next discussed SNM and TRM’s demeanor while testifying arguing that they should have reacted differently while testifying “as to how they were aggressively and violently raped and how they bled for days afterward” which the prosecutor again objected to, arguing, “that is not in evidence.” RP 1093. The trial court did not sustain the objection, but stated, “I’m not going to rule either way, ladies and gentlemen. The evidence is what you heard.” RP 1093. Defense counsel then continuing making his argument that the demeanor of the witnesses was inconsistent with the allegations and compared their demeanor with that of their mother, who got emotional when she testified about learning that Scot had another child and family. RP 1093-1094.

Defense counsel continued his argument by arguing that had the abuse occurred as SNM and TRM described, they would have brought it to the attention of someone. RP 1094-1095. He then indicated that the mother did the laundry and “never noticed anything to make an inquiry” to which the prosecutor objected, arguing facts not in evidence and indicated,

“she was never asked,” to which defense counsel responded, “Asked what? Who did the laundry? Of course, she was asked who did the laundry. I asked the mother and the daughter.” RP 1095. The trial court again declined to rule on the objection, stating “I’m going to not give a standing objection, because I think these objections are fair, but I would just remind you, facts are the facts. The lawyer’s statements are simply here to help you.” RP 1095.

Defense counsel then focused on the testimony of the defense expert witness, Dr. Welch, arguing “Dr. Welch testified that gynecological tests were not consistent with sexual abuse. He looked at all of the evidence and the examinations and the reports,” to which the prosecutor again objected, stating, “that’s not what he ultimately testified to.” RP 1096. The trial court stated, “And I’m going to overrule the objection and remind the jury again, that’s what you’re here for and what you need to consider. And I’ll just note that the prior objection along this line I technically overruled with that admonition.” RP 1096. Dr. Welch had testified that he did not “see any abnormal findings for either of the girls,” when he reviewed the colposcopic photos. RP 1020. When asked if the evidence was consistent with sexual abuse, he indicated, “Well no. No, it is not.” RP 1020. On cross examination, the prosecutor asked Dr. Welch if DNA on the endocervical swab of SNM matched the defendant’s DNA,

would that change his opinion, to which he responded, “yes.” RP 1030. The argument that Mr. Hetter made was somewhat supported by the record and was certainly a legitimate strategic argument to make during closing.

As defense counsel continued, he began discussing the DNA evidence and an objection from the prosecutor was overruled. RP 1096-1097. As he continued his discussion of the DNA testing, the prosecutor objected to the use of the term “trace” which was also overruled by the trial court. RP 1097. Defense counsel then discussed the transfer of DNA, stating, “And the expert testified via transfer that it is equally consistent with there having been no sexual contact because transfer of DNA occurs everywhere, especially where you live. You can touch anything,” at which the prosecutor began to request a sidebar, and the trial court stated, “I’m going to sustain that objection. That was not the expert’s testimony.” RP 1098. The trial court then instructed the jury to leave and heard argument.

The trial court told defense counsel:

You are not the DNA expert. You didn’t call your DNA expert. The matters you are calling attention to right now is you trying to introduce pieces of information that haven’t been talked about during trial. Ms. Winder didn’t object to the million cells because she feels like she is objecting so much that it’s going to draw attention to her. But that wasn’t testified by anyone. That question was asked, and that has continued.

RP 1098-1099. Defense counsel then indicated, “He testified to that. No, the DNA loss.” RP 1098. The trial court responded:

Regardless there are a lot of liberties being taken in this closing argument that are not acceptable. I will continued to - - I will start sustaining these objections. Ms. Winder is walking a careful and appropriate line here with respect to her objections, but I have not seen this many objections in a closing argument, nor have I seen such an objectionable closing argument. And so you’re going to have to rein this in, and if that means deviating from your apparent script, you’re going to need to do that.

RP 1099. Defense counsel then indicated that the prosecutor had asked the DNA expert about transfer DNA and if that had been the source of the DNA, and the trial court responded, “No one ever said that it’s equally consistent with sexual assault and not sexual assault. Did they say it was possible? Yes.” RP 1099-1100. The trial court further remarked “equally consistent means it’s 50 percent as likely this was sexual assault and it wasn’t.” RP 1100. The trial court then stated:

And I will say there is zero percent chance that testimony ever came out of anyone’s mouth, and it’s inconceivable, given the line of testimony, that that could be a reasonable inference. It didn’t happen.

RP 1100. The trial court’s comments were outside the presence of the jury.

Mr. Carhart was asked during cross examination about the secondary transfer of DNA. RP 796. Carhart indicated, “My DNA could be transferred to another object without me touching it directly through an intermediate or transfer step.” RP 797. When asked, “could the male DNA

found on a vaginal swab have come from a secondary transfer,” Carhart responded, “I think that’s too vague to be able to answer. I mean, I would need a - - I guess a specific mechanism question if that makes sense.” RP 798. He was then asked, “could the male DNA on the perineal swab have come from a secondary transfer from the underpants?” to which Carhart responded, “yes, it’s a- - it’s a possibility.” RP 798.

The State’s other DNA expert, Laura Kelly also testified that “DNA is contained in cells, and these cells can be transferred from the body onto other objects or people.” RP 875. She further indicated:

DNA is typically transferred either by direct contact from one body to another body or an object or by transfer of body fluids. DNA can be transferred by what we call a secondary transfer where DNA is transferred from a person’s body onto an object, and then if that object comes into contact with a second object, DNA may transfer that way, but most of the time DNA is transferred through direct contact or transfer of a body fluid.

RP 882-883. Defense counsel asked if a person sheds, “on million cells a day,” to which Kelly responded, “I don’t have an estimate for that. That’s going to vary substantially from person to person.” RP 892. Defense counsel asked Ms. Kelly, “Is it possible Y-STR DNA was transferred into the vaginal vault by the alleged victim using her own hand or foreign object?” to which she responded, “I cannot determine.” RP 897. When asked further, she stated, “That is possible.” RP 898.

A review of the record demonstrates that there was a basis for defense counsel's argument, but he took it slightly too far in his client's favor. This was strategic because defense counsel had a significant hurdle to overcome the presence of Y-STR DNA consistent with Mr. Scot inside SNM's vagina. RP 886. While the prosecutor and the trial court found the argument to be objectionable, it was not deficient performance. It is clear that defense counsel was arguing that the presence of DNA in the vagina of SNM was not enough to support conviction of his client.

When the trial court brought the jury back in, defense counsel continued to talk about the transfer of DNA and the lack of evidence collected by the police. RP 1101. Defense counsel argued, "If the police were looking for those things, they would be part of the evidence," to which the State objected, "These are facts not in evidence." RP 1102. The trial court stated, "And I'm going to overrule but remind you all that you just need to make sure that you use your recollection and your notes as to what was said. Again, this is not evidence." RP 1102. Defense counsel then re-iterated that "what we're talking about is the evidence or the lack thereof." RP 1102.

Defense counsel then argued that law enforcement's ability to analyze phones is common knowledge, and that the evidence of such analysis in this case was "non-existent." RP 1103. He began discussing the

text messages collected by law enforcement arguing, “I asked the detective, were you aware that there is an application in which text messages can be created after the fact? He said yes,” to which the State objected, and the trial court sustained. RP 1103. The trial court then indicated:

Ladies and gentlemen, I directed during that line of inquiry that the testimony and information received from counsel would not be admissible testimony, and so you may disregard that last statement in closing.

RP 1103. Mr. Hetter indicated, “but I asked the detective that question.”

RP 1104. At that time, the trial court again excused the jury and had further discussion outside of their presence.

The trial court indicated:

The testimony at that time – and I distinctly recall it – was that the detective said, well, yeah because you just told me about it, or something to that effect. There was not an objection, and I said that the only testimony that this witness was going to be allowed to testify as to was things that he actually knew and that hearing it from counsel didn’t count. And so that testimony never came into this trial, and to the extent there is something that may not have actually been stricken in hindsight, it was a statement by the defendant, sorry, a detective- wrong D word, my apologies – that he heard from a lawyer that that was a thing but that he didn’t previously know that that was a thing.

RP 1104.

While cross examining Detective Boling, defense counsel asked, “children have applications that they use to create totally fabricated texts;

is that true?” to which Detective Boling responded, “I was made aware of that by you yesterday.” RP 955. When asked “but now you certainly believe it can be done, is that true?” the trial court interjected, “pursuant to counsel’s prior objection, this witness may answer based on his personal knowledge, which would not include conversations with counsel.” RP 955. Defense counsel then withdrew the question.

While objectionable, there was nothing about the argument that would strain defense counsel’s credibility with the jury or otherwise prejudice Mr. Scot. At the end of the discussion outside of the presence of the jury, defense counsel Chapman asked permission to handle the end of the closing argument and the trial court indicated it would not stand in the way of a “hand-off.” RP 1108.

Mr. Hetter continued with the closing argument, arguing that Mrs. Scot would have awoken for some reason and discovered the events if they had occurred. RP 1109. The prosecutor again objected that the facts were not in evidence, and the trial court overruled the objection. RP 1109-1110. Mr. Hetter continued to argue that the allegations could not have occurred in the home without the mother noticing. RP 1112-1113. He then turned his argument to “odd statements” of the victims. RP 1114-1115.

Hetter stated:

Now, there were a lot of weird things that kind of came into testimony, and I just want to kind of talk a little bit about

some of them. And each of you have your independent recollection, and I'm not trying to put words into - - I'm just going off my recollection. I was asking - - or [TRM] was answering a question about a description of what Mr. Scott had done to her, and at one point she blurted out, "No, that's what my father did."

RP 1118.

At that point, the State objected, and the trial court sustained the objection. RP 1118. The trial court then directed the jury to leave the courtroom. RP 1118. The trial court asked defense counsel to indicate why there should not be a sanction imposed for intentionally violating the Court's order "about this hard-fought issue where we're not referencing this." RP 1118. Mr. Hetter responded, "you indicated to me that I could not ask any further questions after you read the answer to that question. I'm not intentionally trying to do anything." RP 1118.

The trial court expressed concern about what counsel was going to do with the statement next, to which Hetter stated, "it was just an odd thing," at which time the trial court imposed a \$2000 sanction as a willful violation of the trial court's order. RP 1119. The trial court stated, "I cannot believe how anyone would think that we should be talking about that whatsoever given the length of time that we talked about this and how it's inappropriate for you to invite the jury to speculate as to what happened earlier, sir." RP 1119.

Defense counsel had previously filed a motion to admit evidence regarding a prior sexual assault of TRM by her biological father under ER 404(b). CP 72, 76-77. In a motion in limine, the State sought to exclude the proposed testimony pursuant to the rape shield statute, RCW 9A.44.020. CP 203-205. The State acknowledged that during the forensic interview of TRM, TRM was asked if anybody had done anything like this to her before and TRM stated “when I was like 4, but that was my real dad.” CP 204. She indicated that her “mom knew.” CP 204. In the motion in limine, the State noted that there is no record of a conviction for TRM’s father, but he did go to jail for a protection order violation that was ultimately dismissed when TRM was approximately 4 years old. CP 204.

In addition to the rape shield statute, the State argued that the evidence was irrelevant. CP 204. When the motion was addressed at trial, the prosecutor asked the trial court to prohibit defense from asking TRM about any prior allegations of sexual abuse that she suffered. RP 163. The trial court asked defense counsel if the defense was seeking some implication, “that the alleged victim routinely makes these kinds of accusations such that it would harm her credibility in making these accusations here.” RP 165.

Defense counsel argued:

We’re not asking about behavior. We’re asking about the disclosure about past abuse, the disclosure from the alleged

victim, the disclosure from the mother, and how these past abuses or disclosures were used in a similar setting. From our perspective, past sexual behavior is not an issue. Consent is not an issue. It's the allegations that were brought forward in the past, similar legal setting that is similar to this legal setting, and we think it's relevant...

RP 165-166. The prosecutor argued that such a line of questioning would be prohibited by ER 608 and ER 404 because the "defense is attempting to attack or impeach the witness by evidence of poor reputation or specific incidents of the witness' past." RP 167. The prosecutor noted that this "is other information that is completely and separate and apart from the issue at trial in this case and would simply seek to confuse the jury." RP 167.

The trial court asked if there was any collateral information regarding the allegation, to which defense counsel responded:

It would go back to an order for protection that was lodged against the biological father that caused an investigation to be made by DSHS, an allegation by the mother against the biological father as well as the stepbrother, the son of the biological father, having made sexual assault—having perpetuated or perpetrated a sexual assault against a four-year-old at that time. Now, the four-year-old in this trial says I don't know, you'll have to ask my mother, and so her alleged allegations were made that were prompted by allegations by the mother.

RP 168-169.

The trial court reserved on the issue but ordered that the parties not discuss until the trial court allowed. RP 170. When the trial court readdressed the issue, the court noted that cases that allow such evidence

to have “either been a recantation or some other demonstrable falseness that has been relied upon.” RP 186. The trial court stated, “It’s not truly a rape shield question so much as an impeachment question under 608 with considerations under other associated impeachment rules and 403.” RP 187. The trial court held that no evidence had been proffered that “would even be relevant.” RP 188. After a lengthy discussion, the trial court stated, “the Court is not going to permit that line of inquiry in this case.” RP 190.

During TRM’s testimony, TRM answered a question stating:

And he told me not to tell anybody, but first he was laying on the bed saying, “please don’t tell anybody or I’m going to get in trouble. I don’t want that.” This is what my dad used to do. But - -yeah. It was pretty much it.

RP (5/23/19) 130. Defense counsel argued that the statement opened the door to ask Wendy Scot about the prior allegation against the biological father. RP 713. The trial court read back the record of TRM’s testimony and ruled, “it is not clear to me that this witness is referencing sexual contact that the father may or may not have previously done.” RP 715. The trial court noted that there was ambiguity in the statement and the time to resolve the ambiguity was during cross examination. RP 715. The trial court ruled, “the door is not sufficiently opened for me to allow the inquiry requested.” RP 715.

TRM did make an ambiguous statement regarding what “her Dad did,” but the trial court ruled that the statement did not open the door to inquiries or discussion about prior sexual abuse committed by TRM’s biological father. Mr. Hetter attempted to walk a very fine line of discussing the evidence at trial without violating the trial court’s ruling on the motion in limine and the trial court found that the prior ruling had been violated. The decision to address the statement was strategic. Nothing about the statement prejudiced the defense.

When the trial court brought the jury back in, the trial court directed the jury to disregard the argument with regard to testimony about what references to what someone’s father and what may or may not have occurred. RP 1120. At that point, Mr. Chapman took over the closing argument and continued to question the credibility of the witnesses and the strength of the DNA evidence. RP 1121. He argued that the blanket that had Scot’s DNA on it was used by Mrs. Scot and then given to SNM. RP 1122. He then argued that continued use after it already had Mr. Scot’s DNA on it could have gotten DNA on SNM by secondary transfer and referenced his question to Ms. Kelly regarding whether SNM could have put the Y-STR DNA in her vagina with her finger or a foreign object. RP 1122-1123. He then refocused the defense back to the alibi that had been themed throughout the defense case. RP 1126.

Deficient performance occurs when counsel's performance "[falls] below an objective standard of reasonableness." State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). As the Supreme Court noted, "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. at 687. An appellant cannot rely on matters of legitimate trial strategy or tactics to establish that deficiency. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). While parts of the closing argument walked a fine line with regard to the trial court's motions in limine, the argument as a whole was tactically designed to criticize the State's evidence and put forward the defense theory of an alibi. Scot has not shown that the defense closing argument was deficient.

Even if Scot could demonstrate deficiency, he cannot demonstrate prejudice. The arguments were designed to benefit the defense theory of the case. The trial court consistently stated that the arguments were not evidence and referred the jury back to their recollections. Most of the arguments made by counsel had some connection to testimony that was elicited during trial or was made as part of an argument that the investigation did not produce sufficient evidence. Nothing about the

closing argument created a reasonable probability that the outcome would have been different if counsel had argued differently.

3. The trial court did not err by instructing the jury to disregard the defense closing argument regarding what a father may or may not have done and even if the order was erroneous, any error was harmless.

As noted in the previous section, in the context of what Scot, who was her step-father at the time, did and told her, stated, “This is what my dad used to do.” RP (5/23/19) 130. Taken in context, the statement was ambiguous and could have been referencing her biological father or her step-father Mr. Scot. “The trial judge has considerable discretion on questions of evidence, and specifically, whether the door has been opened to a line of inquiry.” Ang v. Martin, 118 Wn. App. 553, 562, 76 P.3d (2003), *aff’d*, 154 Wn.2d 477, 114 P.3d 637 (2005).

Here, the trial court acted within its discretion when it ruled that the statement was ambiguous and did not open the door to otherwise irrelevant evidence. RP 715. Additionally, when defense counsel mentioned the statement during his closing argument, he misquoted the actual testimony in a way that arguably implicated the trial court’s previous ruling that prior sexual abuse allegations were not to be introduced. Defense counsel argued, “TRM was answering a question about a description of what Mr. Scott had done to her, and at one point she blurted out, “No, that’s what my father did.”” RP 1118. The implication of

the context that was argued clearly sought to argue more than the ambiguous statement that TRM made which could have easily been referring to Mr. Scot. RP (5/23/19) 130. The trial court did not abuse its discretion by ordering that the jury disregard the improper argument.

The trial court specifically stated:

First, the jury will disregard prior comments with regards to testimony by a witness about references to someone's father and what may or may not have occurred. Additionally, I will just remind you that statements by lawyers, both legal and argument and facts, need to be supported by the evidence and my instructions. These closing arguments are merely intended to help you understand the facts and apply the law.

RP 1120.

Despite the very clear indication that the trial court was directing the jury to disregard counsel's comments, not the evidence, Scot argues that the trial court directed the jury to disregard TRM's statement. In actuality, defense counsel never referenced the actual statement made by TRM in context. The trial court properly exercised its discretion to limit the improper implication made by defense counsel's argument.

Even if the trial court somehow improperly limited the evidence at trial, there is no likelihood that such an action affected the verdict. At worst, the trial court directed the jury to disregard a confusing and ambiguous statement that may or may not have referenced a prior incident that the trial court had already indicated was irrelevant. Such an argument

would have no effect on the verdicts rendered, therefore, any error would be harmless. “Strong policy reasons support the use of harmless error analysis. ‘A judicial system which treats every error as a basis for reversal simply could not function because, although the courts can assure a fair trial, they cannot guarantee a perfect one.’ State v. White, 72 Wn.2d 524, 531, 433 P.2d 692 (1967). A reversal should occur only when the reliability of the verdict is called into question.” State v. Neidigh, 78 Wn. App. 71, 78-79, 895 P.2d 423 (1995). An error is harmless “‘unless, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.’” State v. Smith, 106 W.2d 772, 780, 725 P.2d 951 (1986) (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)).

4. The trial court’s order to disregard counsel’s argument was not an unconstitutional comment on the evidence.

Article 4, § 16 of the Washington Constitution states that “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” A “comment on the evidence” is defined as follows:

To fall within the ban of article 4, section 16, the jury must be able to infer from the trial judge’s comments that he personally believes or disbelieves evidence relative to a disputed issue. The action of the judge must be such that it will fairly import to the jury an expression of judicial opinion relative to the credibility of some significant evidence.

Safeco Ins. Co. v. Jmg Rests., 37 Wn. App. 1, 17, 680 P.2d 409 (1984) (citing to Jankelson v. Cisel, 3 Wn. App. 139, 145-46, 473 P.2d 202 (1970)).

The purpose of this provision is to avoid influencing the jury with the judge's opinion of the evidence. State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

In keeping with this purpose, we have consistently held that this constitutional prohibition forbids only those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at the trial.

Id. This includes remarks that convey to the jury the court's personal opinion of the merits of the case or instructing it that some matter of fact has been established as law. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2005). "[A]ny remark that has the potential effect of suggesting that the jury need not consider *an element* of the offense could qualify as a judicial comment." *Id.*, emphasis added.

To determine whether the judge's words constitute a comment on the evidence, a reviewing court looks to the facts and circumstances of the case. Jacobsen, 78 Wn.2d at 495. It is clear from the context of the trial court's ruling that the trial court was not commenting on the evidence but was limiting an improper argument. The trial court repeatedly instructed

the jury that the trial court was not permitted to make comments on the evidence. In opening instructions, the trial court informed the jury:

It will be my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence which either is not admitted, or which may have been stricken by the court. The lawyers' remarks, statements, and argument are intended to help you understand the evidence and apply the law. They are not evidence, however, and you should disregard any remark, statements, or arguments which are not supported by the evidence or the law as the court gives it to you. The law does not permit me to comment on the evidence in any way, and I will not intentionally do so. By "comment on the evidence," it is meant some expression or indication from me as to my opinion on the value of the evidence or the weight of it. If it appears to you that the court comments on the evidence, you are to disregard such apparent comment entirely.

RP (5/23/19) 21. The trial court made similar remarks during its instructions on the law. RP 1048-1049. The State reiterated that the lawyers' arguments are not the evidence during its closing argument. RP 1066. The trial court repeatedly referred the jurors to the facts, indicating that the lawyer's statements were not the evidence during the defense closing argument. RP 1093, 1095, 1102, 1124. A fair reading of the trial court's remark in context reveals that it was not a comment on the evidence. The trial court was properly ruling on an objection.

If a reviewing court determines that a remark does amount to a comment on the evidence, it then undertakes a two-step analysis to determine if reversal is required. "Judicial comments are presumed to be

prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted.” Levy, 156 Wn.2d at 723. Here, if this Court deemed the trial court’s ruling to be an impermissible comment on the evidence, it is clear from the record that no prejudice could have resulted.

The trial court discussed at length why evidence of prior sexual abuse by TRM’s biological father was irrelevant and inadmissible pursuant to ER 608 and ER 403. If the trial court had directed the jury to not consider the actual statement that was made by TRM, the exclusion would have been in regard to a statement that was irrelevant to any element of the offenses charged. This was not a comment on an element of the offense like those made in cases which have been overturned based on an improper comment on the evidence. *See State v. Brush*, 183 Wn.2d 550, 559, 560, 353 P.3d 213 (2015) (finding an improper comment on the evidence where the trial court incorrectly defined a prolonged period of time as more than a few weeks); *State v. Lane*, 125 Wn.2d 825, 839, 889 P.2d 929 (1995) (trial court commenting on the reason for a witnesses early release where it was a disputed issue of fact was a comment on the evidence).

In this case, the trial court only commented on defense counsel’s argument, not the evidence. The evidence that defense counsel was

discussing was irrelevant to any element of the offenses. Moreover, the instructions provided by the trial court further mitigated any potential for prejudice. State v. Elmore, 139 Wn.2d 250, 276, 985 P.2d (1999) (similar instructions cured the error where the trial court allowed the defendant to appear in shackles during voir dire). The record demonstrates that the trial court's actions could not have prejudiced the defendant.

5. Sufficient evidence supported the jury's findings of guilt.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d. at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.

State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Count 1 was alleged to have been committed on or about October 5, 2017. CP 177. SNM testified as to the sexual assault that occurred on or about that date. RP (5/23/19) 68-69, 116. She was not married, at least 12 years old and less than 14, and it was clear from the record that Scot was at least 36 months older than her. RP (5/23/19) 42; RP 717.

Count 2 was alleged to have occurred between June 1, 2017 and October 4, 2017. CP 177. The prosecutor indicated that it was relying on the incidents that occurred in the kitchen, and indicated, this may have happened multiple times. RP 1086. SNM testified agreed that the first incident that happened in the kitchen was sometime after May of 2017. RP (5/23/19) 71. She provided great detail about the sexual assaults in the kitchen. RP (5/23/19) 71-73. She testified that there were times when the intercourse happened three to four times a week and most of the time it was in the kitchen. RP (5/23/19) 74, 76. Count 4 was also alleged to have occurred between June 1, 2017, and October 4, 2017. CP 178. SNM testified that many sexual assaults occurred during that time frame,

including on the couch as argued by the prosecutor during closing argument. RP 1087, RP (5/23/19) 76.

Count 6 was alleged to have occurred on or between December 18, 2014 and December 17, 2016, when TRM was between 12 and 14 years old. CP 178, RP (5/23/19) 120. TRM testified that the first sexual activities occurred after he'd moved into the Tolmie Cove house. RP (5/29/19) 129. Wendy Scot testified that Mr. Scot began residing with her at the end of 2014. RP 718. TRM testified to several ongoing incidents of sexual touching and sexual intercourse that would have occurred during this charged time period. RP (5/23/19) 131, 132, 136-137. Count 7 was also alleged to have occurred between December 18, 2014, and December 17, 2016, when TRM was between 12 and 14 years old. CP 179. The prosecutor argued that count 7 involved penile-vaginal intercourse during that time period. TRM's testimony supported the jury's verdict. RP (5/23/19) 132, 136-137. In a light most favorable to the State, sufficient evidence supported each conviction.

Scot asks this Court to find that "truthfulness was not established," however, credibility determinations are for the trier of fact. The evidence presented at trial supports the jury's verdicts.

6. Remand is proper to correct scrivener's errors in the judgment and sentence and warrant of commitment

Scot correctly points out that for count 6, the judgment and sentence lists the maximum term as “\$50k/Life.” CP 388. Child Molestation in the Second degree is a class B felony, and as such has a maximum term of 10 years and a \$20000 fine. RCW 9A.44.086, RCW 9A.20.021(1)(b). Scot further correctly points out that the child molestation in the second-degree charge from count 6 is listed as child molestation in the first degree on the warrant of commitment. CP 399. The proper remedy to correct a scrivener’s error. In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005). The State does not oppose remanding the matter for entry of an order correcting the errors.

7. The appellant is not entitled to relief under the doctrine of cumulative error.

The cumulative error doctrine “is limited to instances where 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. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The cumulative error doctrine does not apply where there are few errors which have little, if any, effect on the result of the trial. State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007). “The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary.” State v. Yarbrough, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009). “Where no prejudicial error is

shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial.” The doctrine does not apply in the absence of prejudicial error. State v. Price, 126 Wn. App. 617, 655, 109 P.3d 27 (2005).

For all of the reasons set forth in the previous sections of this brief, Scot has not demonstrated prejudicial error or an accumulation of error of sufficient magnitude that a retrial is necessary. He is not entitled to relief under the doctrine of cumulative error.

D. CONCLUSION.

For the reasons set forth herein, the State respectfully requests that this Court affirm Scot’s convictions and sentence, but remand for the sole purpose of correcting the scrivener’s errors.

Respectfully submitted this 21st day of August, 2020.



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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: August 21, 2020

Signature: _____

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

August 21, 2020 - 11:46 AM

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