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Court of Appeal No. 35261-7-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

MARCO A. ESPINOZA

Appellant.

APPEAL FROM THE YAKIMA COUNTY SUPERIOR COURT

Cause No. 14-1-01066-0

The Honorable David A. Elofson

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF THE ARGUMENT

Marco Espinoza appeals his conviction for three counts of Child Molestation in the first degree. Mr. Espinoza did not receive effective assistance of counsel. Counsel did not challenge the competency of the child witnesses, which was crucial to the outcome of the case because the State's case was wholly dependent on the children's testimony. Counsel was also deficient for failing to present a defense. He raised no meaningful challenge to the State's motion to admit the children's hearsay statements and failed to call any witnesses to challenge the credibility of the children or their version of events. The cumulative errors by defense counsel warrant remand for a new trial.

B. ASSIGNMENTS OF ERROR

1. Mr. Espinoza did not receive effective assistance of counsel.

ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Whether defense counsel was ineffective for failing to challenge the competency of the child witnesses.
2. Whether defense counsel failed to present a defense on behalf of Mr. Espinoza when he failed to call witnesses to challenge the credibility of the children and the children's statements.

3. Whether Mr. Espinoza should be granted a new trial based on the cumulative errors of counsel's deficient performance.

C. STATEMENT OF THE CASE

On a Saturday in mid-June 2014, sisters D.O., S.O., and M.O., and cousin L.M. were allegedly overheard talking about their uncle, Mr. Espinoza, touching them on their private parts. (RP 127, 212, 289, 266-68) It was D.O., S.O., and M.O.'s mother's graduation day and the children were sitting together at the siblings' home while the families were getting ready. (12/9/2016 RP 266-68) Margarito Camacho overheard the conversation. (12/9/2016 RP 268) Mr. Camacho waited until after the graduation was over to tell D.O., S.O., and M.O.'s mother, Maria del Carmen Olea ("Carmen"),¹ about the alleged statements. (12/9/2016 RP 268-70, 318) Carmen asked the children about the alleged statement and called Mr. Espinoza's partner, Maria de Los Angeles Valenzuela ("Angie"), who was also Carmen's sister. (12/9/2016 RP 270, 320, 329, 360) After speaking with Angie, Carmen called the Enumclaw police who went to Carmen's home to make a report. (12/9/2016 RP 270) L.M.'s parents, Maria Guadalupe Valenzuela ("Lupita") and Christian Madrid

¹ Ms. Olea shares the same first name as two of her sisters, who are also mentioned in this appeal. The two other sisters also share the same last name. To avoid confusion, the sisters will be referred to by their commonly called names. No disrespect is intended.

came to the house shortly after the police. (12/9/2016 RP 271, 330) At least one of the children repeated the allegation while the police were present. (12/9/2016 RP 271-72) After a brief investigation, the case was transferred to Yakima where the alleged abuse occurred. (12/7/2016 RP 48, 49)

On July 30, 2014, Mr. Espinoza was charged in Yakima County with three counts of first degree child molestation based on the statements to S.O., D.O., and L.M. (CP 1-2)

The children were interviewed about the abuse by Carolyn Webster, a child interview specialist. (12/8/16 RP 73) S.O. said in the interview that Mr. Espinoza touched her private parts, but it only happened when LM. was around. She stated that Mr. Espinoza would lay between her and L.M. and rub their private parts at the same time. She said that he did this every time she was at his house, like on holidays. She said that he only touched her on top of her clothes. She said that on one occasion, she had blood coming from her bottom after being touched by Mr. Espinoza. (Exhibit SE1)

L.M. said that Mr. Espinoza also touched her private parts outside her clothes. She said the last time it happened was after her Cousin Raul's birthday party, but revised her answer to say the last time was when she was at Mr. Espinoza's house when her mom was having a baby. She also

said that it happened when her mom was in the hospital. All of the incidents recalled by L.M. happened in Mr. Espinoza's bedroom. L.M. said that she knew it happened to S.O. because he touched them together. (Exhibit SE 1)

D.O. said that Mr. Espinoza touched her when she visited on holidays, and it happened more than once. She only recalled two incidents in detail. Once Mr. Espinoza touched her breasts when watching TV. Angie was home at the time taking a shower. Mr. Espinoza stopped when Angie came out of the shower. In the second incident, he touched her inside her pants in the kitchen. She asked Mr. Espinoza to stop and nothing else happened. D.O. said this last incident occurred on Halloween. (SE 2)

In the joint pre-trial omnibus order filed February 6, 2016, defense counsel and the prosecutor noted that a child competency hearing and a child hearsay hearing was needed, with a motion date to be determined. (CP 3-6) At that point, Defense counsel still had not filed a witness list. (CP 6)

The State motioned the court for admission of the child hearsay statements. (CP 7) The State presented a memorandum of authorities supporting admission of the children's hearsay statements. (CP 66-74)

Defense counsel did not submit a response or a memorandum arguing against admission.²

A child hearsay hearing was held on July 7, 2016 and August 5, 2016. Ms. Webster was called by the State to testify to the statements the children made in the interview. (7/7/2016 RP 4-5) Mr. Camacho, Ms. Olea, Mr. Madrid, Ms. Valenzuela, and Officer Grant McCall were called by the State to testify to the circumstances and statements made on graduation day. (7/7/2016 RP 4-5)

The State also called the children to testify about the events and disclosure that occurred on Carmen's graduation day. (7/7/2016 RP 4-5) The children's testimony was inconsistent. (8/5/16 RP 7)

D.O. initially testified that before the graduation, when her father overheard the girls talking about Mr. Espinoza, she was at her house in Enumclaw. (7/7/16 RP 115) But on cross-examination, she testified that she was in Yakima at her Aunt Angie's house when her dad overheard her sisters. (7/7/16 RP 119) She also said that she told the police officers about what happened, but then immediately said that she told her parents

² On October 3, 2016, three months after the child hearsay hearing, defense counsel filed a motion to exclude any of the July 2, 2014 video recordings that reference M.O. The State agreed and did not show the portions of the video where statements about M.O. were made. (12/5/16 RP 12-13)

and they told the police officers. (7/7/16 RP 122-23) D.O. was also confused by the defense attorney's questions regarding the child forensic interview at the police station and the police questioning at her home. (7/7/16 RP 124-25) Finally, when asked about whether she rehearsed with her mother before the hearing and discussed past statements, she responded that her mom did not say anything. However, she later gave contradictory testimony that mom kept asking before the hearing whether Mr. Espinoza really did what he was accused of. (7/7/16 RP 126) She also said that her mom showed her a video prior to the hearing about kids testifying to sexual abuse. (7/7/16 RP 126-27)

S.O. testified next and gave equally inconsistent and inaccurate testimony. She had no recollection of being interviewed by Ms. Webster at the police department. (7/7/16 RP 132, 139) She also said that her mom had not talked to her about the allegations after graduation night, but then said that her mother showed her a movie prior to the hearing about kids being touched. (7/7/16 RP 140)

L.M. was last to testify. She stated that she was with her cousins before graduation, but was not there when the statements were overheard by Mr. Camacho. (7/7/16 RP 143-44) She said that she did not spend time talking with her cousins before the graduation. (7/7/16 RP 146) She also said that her dad asked her questions when the police came to the house,

but immediately changed her mind and said her dad did not ask her questions and she did not tell anyone that night what had happened.

(7/7/16 RP 144-45)

Defense counsel did not call any witnesses. After conclusion of testimony, the State admitted that there were some inconsistencies in the children's testimony. (8/5/16 RP 7) But the State noted that the children did not have a motive to lie and there was nothing in the record to show the children had reputations for not telling the truth. The State also argued that there was nothing presented to show precocious sexual knowledge of the children. (8/5/16 RP 10) The State admitted that the entire case rested on the hearsay testimony of the children, and the statements made to other people. (8/5/16 RP 13-14)

In its ruling, the trial court recognized that the case was dependent upon the testimony of the child witnesses. (CP 7) The trial court went through the *Ryan*³ factors and determined that the children's statements made on graduation night and to Ms. Webster were admissible. Of importance, the trial court noted the lack of evidence in four of the nine *Ryan* factors. The court found no evidence regarding the children's character was offered, no evidence that would suggest a lack of

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

consistency was offered, there was nothing at the hearing to suggest that the children's recollection of the events was faulty, and no pretrial evidence to suggest the children misrepresented Mr. Espinoza's involvement in the case. (CP 8-9) The court concluded that the children's statements were supported by sufficient indicia of reliability. (CP 9)

No challenge to the children's competency was raised. Defense counsel also did not file a witness list with the court.

Pre-trial and trial proceedings were held on December 5-9 and 12-13, 2016. The children testified at trial. Their testimony was inconsistent with prior statements. L.M. alleged for the first time that Mr. Espinoza touched her under her clothes. (12/8/16 RP 149-151) She stated that she could not remember anything specific about the time of the year that the alleged abuse occurred, other than it happened when it was summer. (12/8/16 RP 158) She also mentioned for the first time that she was with both D.O. and S.O. when the abuse occurred, rather than just S.O. (12/8/16 RP 160, 162) She expanded by saying that on several occasions, she was with either one or the other child when the abuse occurred. (12/8/16 RP 160, 62)

S.O. testified. For the first time, she said an incident occurred she was alone with Mr. Espinoza. (12/9/16 RP 221-22) Her prior interview testimony was that she was with L.M. every time the abuse occurred.

(12/9/16 RP 237) She also remembered a second time where it was just her and Mr. Espinoza, which occurred around Christmas. (12/9/16 RP 221-22) Most critical, while S.O. testified that Mr. Espinoza made her bottom bleed, she also mentioned for the first time that she has a medical condition from when she was an infant that makes her bottom bleed. (12/9/16 RP 226) She said she had been having blood for a long time before Mr. Espinoza touched her. (12/9/16 RP 238-39)

D.O. told about two times where the alleged abuse occurred. (12/9/16 RP 301) She said that Mr. Espinoza touched her when she was in the kitchen, but the reason he stopped was because Angie came out of the shower. (12/9/16 RP 291-92) In her prior interview, she said that Mr. Espinoza just stopped. (SE 2)

Mr. Espinoza's partner, Angie, was ready to present testimony in favor of Mr. Espinoza. She was present during all proceedings. (5/1/17 RP 180, 12/12/16 RP 373) At trial, defense counsel stated that she was going to be used as an impeachment witness, and would only be called if someone testified to something different about the facts. (12/5/16 RP 12) Defense counsel called Angie as its only witness for impeachment testimony only. (12/12/16 RP 372) Counsel limited its questions to information about the dates and events where the children were at Angie's house. (12/12/16 RP 359)

A jury found Mr. Espinoza guilty of all three counts of First Degree molestation. (CP 44-45) Mr. Espinoza personally motioned the court for a new trial under CR 7.5 and offered proof supporting the motion. (CP 83) Mr. Espinoza challenged Mr. Swan's representation. (See 5/1/17 RP 173) Based on this request, the court found a conflict of interest to allow Mr. Swan to continue representation until a decision on the motion. (CP 83) The court appointed Scott Bruns as new defense counsel to represent Mr. Espinoza in the motion. (CP 42) Mr. Bruns talked with Mr. Espinoza's significant other, Angie, regarding evidence that she wished to present at trial that was never presented. (RP 173) Mr. Bruns determined that Mr. Espinoza's issues were suited for an appeal and not a CR 7.5 motion. (RP 173) With this understanding, Mr. Espinoza withdrew his CR 7.5 motion. (RP 173) The court allowed Mr. Bruns to withdraw and Mr. Swan to continue with the case. (CR 55) The trial court sentenced Mr. Espinoza to 98 months incarceration for each count, to be served concurrently. (CP 46)

Mr. Espinoza appeals. His counsel did not provide effective assistance. Defense counsel failed to challenge the competency of the children. Also, counsel did not present witnesses at trial to challenge the credibility of the children or their accounts of the events. The cumulative

errors of counsel's performance prejudiced Mr. Espinoza and warrants a new trial.

D. ARGUMENT

1. Mr. Espinoza received ineffective assistance of counsel

This court reviews claims for ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). “To prevail on a claim of ineffective assistance of counsel, counsel's representation must have been deficient, and the deficient representation must have prejudiced the defendant.” *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). “To establish ineffective representation, the defendant must show that counsel's performance fell below an objective standard of reasonableness. To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different.” *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (citation omitted). Failure to establish either prong of the test is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700.

Deficient performance: “[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of

reasonableness.” *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). “The defendant alleging ineffective assistance of counsel ‘must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.’” *In re Pers. Restraint of Hutchinson*, 147 Wn.2d 197, 206, 53 P.3d 17 (2002). “In this regard, the court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel’s conduct constituted sound trial strategy.” *In re Personal Restraint of Rice*, 118 Wn.2d 87, 888-89, 828 P.2d 1086 (1992).

Prejudice: Prejudice occurs if “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. A reasonable probability of a different result exists where counsel’s deficient performance “undermine[s] confidence in the outcome.” *Id.* The defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Id.* at 693. Instead, the defendant “has ... the burden of showing that the decision reached would reasonably likely have been different absent the errors.” *Id.* at 696. This standard requires evaluating the totality of the record. *Id.* at 695.

The appropriate remedy for a trial conducted with the ineffective assistance of counsel is for the case to be remanded for a new trial with

new counsel. *See State v. Estes*, 193 Wn. App. 479, 495, 372 P.3d 163 (2016).

a. Failure to challenge child competency

Defense counsel's failure to challenge the competency of the child witnesses was defective. The children's incompetency would have made them unavailable to testify and would have more than likely changed the outcome of the trial.

Anyone who is incapable of receiving just impressions of the facts or relating them truly is not competent to testify. RCW 5.60.050(2); CrR 6.12(c); *State v. S.J.W.*, 170 Wn.2d 92, 100, 239 P.3d 568 (2010).

Although a child's age is not determinative of her capacity as a witness, five factors must be found before a child can be declared competent to testify:

- (1) an understanding of the obligation to speak the truth on the witness stand;
- (2) the mental capacity at the time of the occurrence concerning which [she] is to testify, to receive an accurate impression of it;
- (3) a memory sufficient to retain an independent recollection of the occurrence;
- (4) the capacity to express in words [her] memory of the occurrence; and
- (5) the capacity to understand simple questions about it.

In re Dependency of A.E.P., 135 Wn.2d 208, 223, 956 P.2d 297 (1998) (quoting *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967)).

Defense counsel's performance fell below an objective standard of reasonableness. The State's case depended on admission of the children's alleged statements of abuse. It is crucial to the defense to challenge the competency of the witnesses due to the nature of child molestation cases where there is no physical evidence, no witnesses, and the children are of a young age. The failure to challenge is not supported by a strategic or tactical reason.

A challenge to the children's competency had merit. During both times when the children were called to testify in court, they were incapable of relating the facts of the occurrences. The children gave inconsistent statements between the interview and at trial, which indicates they did not have the memory sufficient to retain an independent recollection of the occurrence. The children gave inconsistent accounts of who was there when the alleged abuse occurred, what kind of touching occurred, and when it occurred.

Most importantly, at the child hearsay hearing, each child showed a lack of capacity to express in words her memory of the occurrence, and a lack of capacity to understand simple questions about it, especially when called to testify. At the hearsay hearing, D.O. said she was at her house

when the disclosure was made, and then said she was in Yakima. She was also confused between the interview that occurred with Ms. Webster and the police questioning at her home. S.O. couldn't even recall her interview with Ms. Webster. L.M. couldn't give an accurate statement as to whether she was present when the disclosure was made in front of Mr. Camacho. She also could not express whether she told her parents about the abuse on the night of the disclosure or not.

The children's ability to relate the facts at trial should have been challenged at trial, especially after witnessing the children's difficulties when testifying at the child hearsay hearing. There was no legitimate trial strategy for wanting the children to testify when their statements, both in court and out-of-court, were the very foundation of the State's case and the children were not competent to testify to the alleged occurrences.

Prejudice: There is a reasonable probability that, but for counsel's failure to challenge the competency of the children, the result of the trial would have been different. A challenge to the children's competency would more likely than not have altered the outcome in the case because it would have affected the general admissibility of the child hearsay statements. If the children were unavailable to testify, the State would need to put forth other evidence corroborating the act in order to have the

hearsay statements admitted under RCW 9A.44.120. There was no other corroborating evidence in this case.

According to RCW 9A.44.120, child hearsay for a child under the age of ten describing sexual contact is admissible in criminal proceedings if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120. The statute requires a trial court to make separate determinations of reliability and corroboration before admitting a hearsay statement when the child is unavailable to testify. *State v. Swan*, 114 Wn.2d 613, 615, 790 P.2d 610 (1990). The plain language of the child hearsay statute contemplates consideration of the reliability of each individual statement. *State v. Stevens*, 58 Wn. App. 478, 486–87, 794 P.2d 38 (1990).

As here, if the children were not found to be competent to testify, their hearsay statements that were basis for the sexual abuse allegations would have needed to be corroborated in order to be admitted at trial. *See State v. C.J.*, 158 Wn.2d 672, 686, 63 P.3d 765(2003).

“In the context of RCW 9A.44.120(2)(b) corroborative evidence is that which would support a logical and reasonable inference that the act of abuse described in the hearsay statement occurred.” *C.J.*, 1548 Wn.2d at 687. “In many child sex abuse cases, there is no physical evidence of harm, nor any eyewitnesses, so the corroboration requirement may be satisfied by both direct and indirect evidence.” *Id.* Each act described in the hearsay statement sought to be admitted under the statute must be separately corroborated. *State v. Jones*, 112 Wn.2d 488, 496, 772 P.2d 496 (1989).

While parallel disclosure can be corroborative evidence, it alone is not enough to render hearsay statements admissible. *See Swan*, 114 Wn.2d at 640-41. Moreover, the children making the parallel disclosure must describe in detail similar sexual acts in order to be corroborative. *Id.* at 114 Wn.2d at 631. A child’s disclosure is not corroborative if they claim being to be present with another child during the acts but cannot describe in detail what was happening to the other child. *Id.* at 114 Wn.2d at 631.

Here, there was no direct evidence that corroborated the abuse. There was no eye witness accounts of the abuse occurring by any of the persons competent to testify. Nor was there medical evidence supporting abuse. The only evidence of the abuse were the children's inconsistent statements.

The children's parallel disclosures is not corroborative evidence. The children's accounts were not similar—S.O. stated that it happened in the kitchen and living room and that he touched her under her clothes; D.O. stated that it always happened with L.M.; and L.M. said that it happened in the bedroom. Even if L.M. and S.O. were present when the other was abused, there was no detailed account as to what happened to the other child, and with Mr. Espinoza allegedly in the middle, it would be difficult to have an eyewitness account.

Thus, there is a reasonable probability that, but for counsel's unprofessional error in failing to challenge competency of the children, the result of the proceeding would have been different. Based on the evidence in the case, the children were not competent to testify and there was no evidence corroborating the hearsay statements. The children's hearsay statements would not be admissible. As a result, the State would have no evidence on which to support its conviction of Mr. Espinoza.

b. Failure to present argument against hearsay

RCW 9A.44.120 provides for the admission of child hearsay statements when (1) the statements describe sexual abuse of the child; (2) the trial court finds, in a hearing conducted outside the jury's presence, that the time, content, and circumstances of the statements provide sufficient indicia of reliability; and (3) the child either testifies at the proceedings or is unavailable as a witness. *State v. Woods*, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005) (plurality opinion).

In *State v. Ryan*, 103 Wn.2d at 173-77, our Supreme Court set forth nine factors for the trial court to consider in determining whether child hearsay statements have sufficient indicia of reliability:

(1) whether there was an apparent motive to lie, (2) the declarant's general character, (3) whether more than one person heard the statements, (4) the statements' spontaneity, (5) the declaration's timing and the relationship between the declarant and the witness, (6) whether the statements contained express assertions of past fact, (7) whether cross-examination could show the declarant's lack of knowledge, (8) the remoteness of the possibility of the declarant's recollection being faulty, and (9) whether the surrounding

circumstances suggested the declarant misrepresented the defendant's involvement.

Id. at 173–77. Not every factor need be satisfied; it is enough that the factors are “substantially met.” *Woods*, 154 Wn.2d at 624.

Defense counsel’s effort in challenging the child hearsay was deficient. Defense counsel failed to brief the issue, call witnesses, or present evidence at critical stages of the proceedings. At the child hearsay hearing, the court found that no evidence regarding the children’s character was offered, no evidence that would suggest a lack of consistency was offered, there was nothing at the hearing to suggest that the children’s recollection of the events was faulty, and there was no pretrial evidence to suggest the children misrepresented Mr. Espinoza’s involvement in the case. (CP 8-9)

Defense counsel did not ask about the character of the children, whether they had sexual knowledge that would allow them to fictionalize the events, and whether they had other motives for accusing Mr. Espinoza. Nor did defense counsel present an expert to analyze the interviews by Ms. Webster or address the impact the children’s mother had by discussing the case with the children. Defense counsel failed to present a meaningful challenge to admissibility. There is no strategic or tactical

reasons for failing to put forth a legitimate effort to block the admission of this crucial evidence.

Prejudice can be established simply because of the lack of any challenge to this critical evidence and the importance of having it excluded. Again, without the children's hearsay statements, the State would not have evidence to convict Mr. Espinoza. It is prejudice to Mr. Espinoza not to put some evidence forth addressing the *Ryan* factors. Furthermore, as discussed below, the cumulative effect of deficient performance is prejudicial to Mr. Espinoza, as it violated his right to present a meaningful defense to the charges against him.

c. Failure to present a defense

Mr. Espinoza's counsel was ineffective because he failed to present a meaningful defense to refute the allegations against him. A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992).

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

Mr. Espinoza was denied his right to present a defense to the allegations against him. In addition to counsel's deficiencies in failing to challenge critical witnesses and evidence, defense counsel failed to call any witnesses to challenge the credibility of the children. Prior to trial, Mr. Espinoza gave counsel a list of witnesses who could provide testimony negating the children's timeline of the alleged acts, the truthfulness of the children, and specific instances where the children acted out sexually. One witness was another sister of Angie and the other was a friend familiar with L.M.'s family. Angie also wanted to testify to these points. She had reputable information on these subjects because of

her close relationship with the family. By not presenting a meaningful defense on behalf of Mr. Espinoza, defense counsel's representation fell below an objective standard of reasonableness.

These cumulative errors of counsel prejudiced Mr. Espinoza. The cumulative error doctrine applies where a combination of trial errors denies the accused a fair trial even where any one of the errors, taken individually, may not justify reversal. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). 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) (citing *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, 870 P.2d 964). But the doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

Each claim for ineffective assistance must be analyzed separately to determine whether counsel was deficient, but prejudice may result from the cumulative impact of multiple deficiencies. *Boyde v. Brown*, 404 F.3d 1159, 1176 (9th Cir. 2005).

Here, counsel's failure to challenge the competency of the children, offer any witnesses or argument retarding the admissibility of the child hearsay statements at the pre-trial hearing, or to call witnesses at trial

who could have challenged the credibility of the children's statements, amounted to a failure to present any real defense on the defendant's behalf. There was no rational reason presented for such failures. Counsel's conduct fell below an objective standard of reasonableness. There is a reasonable probability that, but for counsel's cumulative unprofessional errors, the result of the proceeding would have been different.

The error here is not being raised for the first time on appeal. Mr. Espinoza recognized that his defense counsel's performance was deficient and requested a new trial. He was persuaded by Mr. Bruns to address the issue on appeal. Mr. Espinoza should be granted a new trial with counsel that provides effective assistance.

E. CONCLUSION

As the trial court recognized, the State's entire case rested on the testimony and hearsay from the children. The cumulative failures of defense counsel to challenge the competency of the children, the admissibility of the child hearsay statements, and present a meaningful defense prejudiced Mr. Espinoza. The remedy is to remand for a new trial.

Respectfully submitted this 5th day of December, 2017.

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CERTIFICATE OF SERVICE

The undersigned states the following under penalty of perjury under the laws of the State of Washington. On the date below, I personally e-filed and emailed and/or placed in the United States Mail the foregoing Appellant's Opening Brief with postage paid to the indicated parties:

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