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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JEFFREY COUNTS, RESPONDENT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. ISSUES PRESENTED**

1. Has the defendant established ineffective assistance of counsel by alleging his lawyer failed to object to statements made to a forensic nurse by the child victim and admitted at trial, whereby the defendant has not identified what, if any, statements were cumulative or prejudicial?

2. Has the defendant established any prejudice from defense counsel's delayed interview of the forensic nurse or the failure to employ a defense expert?

3. After six continuances of the trial date and an approximate sixteen-month delay, did the trial court manifestly abuse its discretion when it denied defense counsel's request for a seventh continuance of the trial date?

## **II. STATEMENT OF THE CASE**

### Procedural history.

Jeffrey Counts was charged by information in the Spokane County Superior Court with second degree child rape and second degree child molestation. CP 1. Each charge contained an aggravating factor alleging the offenses were part of an ongoing pattern of sexual abuse of the same victim. CP 1. A jury found the defendant guilty of both offenses, and of the aggravating factors. CP 142-45.

Substantive facts.

S.S. lived in Spokane with her aunt, Susan Counts and uncle, Jeffrey Counts, beginning at age eleven, and attended the sixth grade at Ridgeview Elementary.<sup>1</sup> RP 79-81, 91, 159-60.<sup>2</sup> S.S. lived with the Counts until approximately 2014, when she was twelve years old. RP 81, 160-61. S.S.'s date of birth is May 19, 2001. RP 79.<sup>3</sup> The defendant was a long-haul trucker and was at home several days during the work week and on the weekends. RP 121. Every night the defendant was at home, the defendant entered S.S.'s bedroom around two a.m. or three a.m., and attempted to have sex with her. RP 121. The defendant would ejaculate and hurriedly exit S.S.'s bedroom to avoid being noticed by Ms. Counts. RP 122.

The defendant also frequently and inappropriately touched S.S. RP 82. The first instance occurred in the winter when S.S. was in the seventh grade; the defendant entered S.S.'s bedroom, and began rubbing her back, and then her vagina. RP 84. On another occasion, in January of 2014, when she was twelve years old, the defendant forcibly put his penis into S.S.'s vagina. RP 85, 165-66. This event frightened S.S. RP 85-86. S.S. did

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<sup>1</sup> S.S. testified at trial.

<sup>2</sup> S.S. had previously been placed in several foster homes. RP 118, 159.

<sup>3</sup> At the time of trial, S.S. was sixteen years old. RP 82. The defendant's date of birth is August 24, 1960. RP 158. He was 42 years older than S.S. during commission of the crimes. RP 279-80.

not immediately inform anyone because she did not know who to contact.  
RP 86.

Ms. Counts testified that S.S. was adjusting rather well in her home, but S.S.'s behavior changed during the last six months she resided there. RP 161. Ms. Counts remarked there was a lot of "touching" between the defendant and S.S. which caused her concern. RP 161-62. On one occasion, Ms. Counts observed the defendant exiting S.S.'s bedroom during the night. Defendant claimed he was tucking S.S. into bed. RP 164. Ms. Counts told the defendant it was not appropriate as it violated an agreement with DSHS. RP 164.

During the charging period, the defendant and S.S. sent text messages to each other. RP 88-90; Ex. 2.<sup>4</sup> In pertinent part, the messages stated:

Y do i have to worry about u  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!<sup>5</sup>

Cause. Lol<sup>6</sup>

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<sup>4</sup> A supplemental designation is being filed contemporaneously with this brief.

<sup>5</sup> (I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!), an automatic electronic text signature used by S.S., referenced a music group. RP 89. The specific dates of the texts are unknown. RP 89.

<sup>6</sup> The defendant had no byname associated with his texts.

I will tell you saturday at about four am :-) []<sup>7</sup>

No dont wake me up u jerk! I wanna sleep I Love 1D!!  
Harry!! Zayn!! Niall!! Liam!! Louis!!

So now im a jerk?

Cuz ur gonna wake me up  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

I know you really want me to wake up.

No i don't i wanna sleep thank u  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

You want me rub your back.

No id rater sleep!especially on Saturdays  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

Thats too bad then

Whats too bad then  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

Well just have to see them

See what??  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

What do you think.

Idk!  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

Ok. Good night then. You better get some rest.

What r u talking about?  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

---

<sup>7</sup> Alteration from original format to separate the text messages.

What ru talking about phones? Or what?  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

Or what

What is it?  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

Ill tell you when i get home

What is it just txt m  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

No. I say it in person

Yes just txt me  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

I cant

Y not  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

Because its between you and me

Whatever  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

So can I order those phone cases online or what  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

Just wait till we get them

Y itll take like 5 days to het them here  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

Don't you hate to take a shower tonight?

Nope  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

Watcha doin  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

I wish i was there to tuck you in.

Ok.....  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

Ok what. You want me to tuck you in dont you?

Ya I guess y? So what r we doing saturday  
I Love 1D!! Harry!! Zayn!! Niall!! Liam!! Louis!!

Wait till i get home ok. I don't know whats after this next  
load.

Ex. 2.

Shirley Discus worked at the Department of Social Services Division in child welfare for thirty-two years and in private practice for ten years. Ms. Discus had monthly meetings with the defendant, Ms. Counts, and S.S. On November 6, 2013, Ms. Discus discussed with the Counts family about bonding with S.S. RP 136. The defendant remarked that his bonding with S.S. consisted of rubbing her back and “popping” her toes. RP 136. Ms. Discus advised that rubbing S.S.’s back was not appropriate. RP 136.

On January 15, 2014, Ms. Discus again met with the Counts family and S.S. RP 136. She observed the defendant walk past S.S., as S.S. touched the defendant’s leg with her toe. RP 137. The defendant climbed on top of

S.S. RP 138. The defendant wrestled with S.S. for a brief period, walked away and appeared embarrassed. RP 138. Ms. Discus believed this behavior was inappropriate and categorized it as “quasi-sexual.” RP 138, 154.

On January 17, 2014, Cindi Fuller, a licensed mental health therapist, had contact with the defendant regarding several parenting issues. RP 237-38. Ms. Fuller advised the defendant that he needed to stop entering S.S.’s bedroom at night to give her back rubs and he should not be alone with S.S. at any time. RP 228-29. The defendant reacted defensively and claimed that S.S. needed the back rubs and “nighttime routine.” RP 239. Ms. Fuller stated there were inappropriate boundaries between the defendant and S.S., which promoted S.S. pitting Mr. Counts against Ms. Counts, if she did not get her way. RP 244-45.

Later in 2014, S.S. lived with a foster parent and wrote her a letter advising her of the prior sexual abuse by the defendant.<sup>8</sup> RP 86, 88, 123; Ex. 1. She wrote a letter to the foster parent rather than addressing her personally because the subject matter was too uncomfortable. RP 125. Thereafter, S.S. had a physical examination in Arizona. RP 87.

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<sup>8</sup> S.S. explained her delay in reporting the abuse: “Well, I mean, like, at first, like, when things like that weren’t happening, like, the inappropriate things, like, it was good. And then even after that, like, if I told somebody I didn’t like it, I felt like they would ask me why and then I’d have to give a reason; and then I’d be taken out of there and I don’t know where I would go, and I was scared. So I just didn’t tell anyone.” RP 128.

Susann Clinton, a family nurse practitioner in Arizona, had special training in forensic pediatric nursing. RP 202-03.<sup>9</sup> On August 27, 2014, Ms. Clinton conducted a forensic medical exam on S.S., who was thirteen years old at the time. RP 206. When asked about her past medical history, S.S. was reluctant to discuss her medical history, and wished to answer only “yes/no” questions. RP 207-08. With additional prodding by Ms. Clinton, S.S. stated that the defendant was “crazy” and a “pervert.” RP 208. When asked why the defendant was a “pervert,” S.S. remarked that she did not wish to discuss it. RP 208. Ms. Clinton then asked S.S. a series of “yes/no” questions at the behest of S.S.

[Ms. Clinton]: I asked if he had touched her.

[Deputy Prosecutor]: What was her response?

[Ms. Clinton]: She said, Yeah.

[Deputy Prosecutor]: Did you ask her where she had been touched?

[Ms. Clinton]: Yes.

...

[Deputy Prosecutor]: All right. So I had asked, I believe, if you asked about where she was touched.

[Ms. Clinton]: Yes. I asked if he touched her breast.

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<sup>9</sup> Ms. Clinton had conducted between 1200 and 1300 forensic examinations at the time of her testimony. RP 204.

[Deputy Prosecutor]: What was her response?

[Ms. Clinton]: She said no.

[Deputy Prosecutor]: What did you ask next?

[Ms. Clinton]: I asked if he had touched her with his hands.

[Deputy Prosecutor]: What was her response?

[Ms. Clinton]: She said yes.

[Deputy Prosecutor]: What else did you ask her?

[Ms. Clinton]: I asked her if she -- if he touched her private part where she peed.

[Deputy Prosecutor]: And what happened then?

[Ms. Clinton]: She giggled and slapped her knee and said that she knew what her "private part" was.

[Deputy Prosecutor]: Okay. What did she say then -- or what did you ask her then?

[Ms. Clinton]: She said yes, and then I confirmed with her that he had touched her private part with his hand.

[Deputy Prosecutor]: And do you understand what she was referring to?

[Ms. Clinton]: Yes. Because I had used the expression her "private part where she peed," and she felt like that was -- that, of course -- that I didn't need to say "where she peed." But that's my way of just making sure that we're talking about the same area of her body.

[Deputy Prosecutor]: And what area were you talking about?

[Ms. Clinton]: Her genital area. Her vagina.

[Deputy Prosecutor]: All right. Did you ask her a question about whether the touching was inside or outside of her body?

[Ms. Clinton]: Yes, I did.

[Deputy Prosecutor]: What was her response?

[Ms. Clinton]: She said it went -- yes, it went inside the tissue box.

[Deputy Prosecutor]: And how did you react to that?

[Ms. Clinton]: I asked her to tell me what she meant by "tissue box."

[Deputy Prosecutor]: And what did she reply?

[Ms. Clinton]: She said that when she was in Carson City, the detective had talked with her or interviewed her about this, and he had used a tissue box to describe that part of the body.

[Deputy Prosecutor]: All right. Did she say -- make any physical demonstration with a tissue box in your exam room?

[Ms. Clinton]: Yes. There was a tissue box in the exam room, and she took her hand and she straightened out her hand and shoved her hand into the tissue box that was open. So where the tissue was coming out, she shoved her hand in there. And she said, I think we both know what part of the body this is.

[Deputy Prosecutor]: Did [S.S.] at that point talk about what happened to her?

[Ms. Clinton]: Yes. She -- I asked some more follow-up questions and then she told me more about what happened to her.

[Deputy Prosecutor]: What did she say?

[Ms. Clinton]: I asked her if she -- if he had touched her with another part of his body, with his private part, and she said yes.

[Deputy Prosecutor]: Okay. Did you ask her about anything -- if he put anything on his private part?

[Ms. Clinton]: Yes, I did.

[Deputy Prosecutor]: And what were you trying to get at there?

[Ms. Clinton]: I wanted to see if -- if he had used any protection on his genital -- on his private part in terms of her risk for pregnancy or a transmitted infection.

[Deputy Prosecutor]: Did you ask if anything had come out of Mr. Counts or Jeffrey's private part?

[Ms. Clinton]: Yes, I did.

[Deputy Prosecutor]: What was her response?

[Ms. Clinton]: She said that she hadn't had to answer that question before, and that, yes, something had come out.

[Deputy Prosecutor]: Did she give you more description of that?

[Ms. Clinton]: Yes. I asked a follow-up question of how she knew something had come out of his private part, and she said because she could feel it.

[Deputy Prosecutor]: Okay. Did you ask if there was anything different about her private part when this happened?

[Ms. Clinton]: Yes, I did.

[Deputy Prosecutor]: What were you trying to get at there?

[Ms. Clinton]: It's common when children are sexually abused that they have -- there's something different about the --

MS. CADY: Objection.

THE COURT: I'm sorry, just one moment, please.

[The Court]: Ms. Cady.

[DEFENSE CO-COUNSEL]: MS. CADY: Nonresponsive, Your Honor.

THE COURT: Mr. Hay, you may respond.

[Deputy Prosecutor]: Your Honor, I asked her for the reason for asking that question, and she is explaining what she was trying to get at and why.

THE COURT: The Court would overrule the objection. The witness may answer -- continue to answer.

[Deputy Prosecutor]: Ms. Clinton --

[Ms. Clinton]: Thank you.

So I asked her that question because when that part of your body -- there's irritations of that part of your body for penetration, it can be hurt. Later there can be blood, there can be pain with urination.

[Deputy Prosecutor]: All right. How did she reply to your question?

[Ms. Clinton]: She said that it was sore afterward, it was really sore.

[Deputy Prosecutor]: Okay. Did you ask about whether she had bled?

[Ms. Clinton]: Yes, I did.

[Deputy Prosecutor]: What was her response?

[Ms. Clinton]: She said that there was blood -- at first she said two months, and then she said it was longer than two months that she had bleeding afterwards.

[Deputy Prosecutor]: Did you ask how old Samantha was when this had happened?

[Ms. Clinton]: Yes, I did.

[Deputy Prosecutor]: What was her response?

[Ms. Clinton]: She said she was 12.

[Deputy Prosecutor]: Did you ask when it had happened?

[Ms. Clinton]: Yes.

[Deputy Prosecutor]: What was her response?

[Ms. Clinton]: She said it started when she was 12 years old.

[Deputy Prosecutor]: All right. Did you ask about -- this is my word, but did you ask the frequency of this?

[Ms. Clinton]: Yes, I did.

[Deputy Prosecutor]: What was her response?

[Ms. Clinton]: She said that it was, at first, two to three times a week and then on Saturdays.

[Deputy Prosecutor]: Okay. Did you perform a physical exam -- a complete physical exam of [S.S.]?

[Ms. Clinton]: Yes, I did.

[Deputy Prosecutor]: All right. Could you describe that for the jury, please.

[Ms. Clinton]: Yes. The physical exam is a head-to-toe examination gathered by the medical history provided by the patient. So in this situation I started with her head and went through all the systems of her body, but I paid particular attention to her anal-genital examination.

[Deputy Prosecutor]: Okay. Can you tell the jury and the Court what you found.

[Ms. Clinton]: She had a normal exam head to toe, and her anal-genital exam was also normal.

[Deputy Prosecutor]: Okay. Does that confirm or negate, either one, whether there was sexual abuse?

[Ms. Clinton]: An exam that's normal or an exam that there is no acute or chronic findings of sexual abuse of the genitalia of a child is very common --

[The court interrupts the proceedings regarding hearing the witness]

[Ms. Clinton]: It's very common with child sexual abuse that the child's anal-genital examination does not show any findings of acute or chronic trauma.

[Deputy Prosecutor]: And that seems kind of contrary to common understanding. Can you explain how that is.

[Ms. Clinton]: Yes. That part of our body, all of our bodies, heals very quickly, similar to the healing of -- time frame of an injury to your mouth. So if you had something that's too hot to drink and your mouth gets a sore in it, it usually goes away within a few hours or within a day or so. And that part of your body can heal very rapidly. The anal-genital area can heal very rapidly, similar to the mucus membranes of your mouth.

[Deputy Prosecutor]: Okay.

[Ms. Clinton]: Additionally, if it's been a long time -- if it's been -- time has passed since the abuse occurred, that allows even more healing to occur.

RP 209-16.

The witness then described the various areas of the female reproductive system. RP 216-17.

Defense counsel cross-examined Ms. Clinton regarding asking S.S. "yes/no" questions as opposed to using open-ended questions, suggesting S.S.'s answers to the questions were not authentic and that Ms. Clinton may have suggested to S.S. how to answer the questions. RP 224-28. Defense counsel also questioned the witness regarding several topics testified to that had not been fully discussed with S.S. RP 228-30. Defense counsel also explored the lack of physical evidence or injuries to support the claim of sexual abuse. RP 231-35.

### III. ARGUMENT

#### A. THE DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FAILS AS HE DOES NOT IDENTIFY OR ESTABLISH WHICH STATEMENTS MADE BY THE CHILD VICTIM TO A NURSE DURING A MEDICAL EXAMINATION WERE CUMULATIVE OR HOW THEY WERE INADMISSIBLE. MOREOVER, EVEN IF DEFENSE COUNSEL SHOULD HAVE OBJECTED TO THE TESTIMONY, THE DEFENDANT HAS NOT ESTABLISHED ANY PREJUDICE.

The defendant first argues that his counsel was ineffective by not objecting to alleged, cumulative hearsay statements made to Ms. Clinton by S.S., for purposes of Ms. Clinton's physical examination of S.S., alleging it was an attempt to bolster S.S.'s credibility.

Although not identifying which "hearsay" statements were cumulative, the defendant asserts a blanket generalization that such statements were cumulative. Without identifying in the record, which of S.S.'s statements were cumulative as testified to by Ms. Clinton, the defendant cannot establish an objection would have been sustained by the trial court or that he was prejudiced.

#### Standard of review.

An appellate court reviews ineffective assistance of counsel claims de novo. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). To prevail on an ineffective assistance claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *Id.* at 457-58. Representation is

deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *Id.* at 458. There is a strong presumption that counsel's performance was reasonable. *Id.*

Counsel's conduct is not deficient if it was based on what can be characterized as legitimate trial strategy or tactics. *Id.* Prejudice exists if there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have been different. *Id.* To show prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). Failure to establish either deficient performance or prejudice resulting from a deficiency precludes an ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 700, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Where a claim of ineffective assistance of counsel is based on defense counsel's failure to object, the defendant must show that the objection likely would have been sustained. *State v. Fortun-Cebada*, 158 Wn. App. 158, 172, 241 P.3d 800 (2010). Decisions on whether and when to object are "classic example[s] of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002

(1989). Only in egregious circumstances will a failure to object constitute deficient performance. *Id.* at 763.

ER 803(a)(4) provides a hearsay exception for “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.” This exception applies to statements reasonably pertinent to diagnosis or treatment.<sup>10</sup> *State v. Doerflinger*, 170 Wn. App. 650, 664, 285 P.3d 217 (2012). A statement is reasonably pertinent to diagnosis or treatment when (1) the declarant’s motive in making the statement is to promote treatment and (2) the medical professional reasonably relies on the statement for purposes of treatment. *Id.* at 664. A declarant’s statement to a treatment provider does not have to be solely related to medical diagnosis or treatment; it may be for a combination of purposes, including medical and forensic purposes. *State v. Williams*, 137 Wn. App. 736, 746, 154 P.3d 322 (2007).<sup>11</sup> Here, S.S.’s

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<sup>10</sup> For the purposes of ER 803(a)(4), the term “medical” applies to both physical and mental health, including therapy for sexual abuse. *In re Pers. Restraint of Grasso*, 151 Wn.2d 1, 19, 84 P.3d 859 (2004); *State v. Woods*, 143 Wn.2d 561, 602-03, 23 P.3d 1046 (2001); *In re Dependency of M.P.*, 76 Wn. App. 87, 92-93, 882 P.2d 1180 (1994).

<sup>11</sup> Although not applicable here, a child’s statements, when under the age of ten, describing sexual contact or physical abuse, are admissible at trial if certain statutory criteria are met. *See* RCW 9A.44.120. Statements under the hearsay statute are subject to analysis under ER 403, which permits exclusion of evidence

statements to Ms. Clinton aided the nurse in determining the necessary course of treatment, Ms. Clinton's examination, and any potential medical issues of S.S. *See* RP 207. Thus, S.S.'s statements were admissible through the medical treatment exception to the hearsay rule. ER 803(a)(4).

In a conclusory and unsupported manner, the defendant argues that S.S.'s statements to Ms. Clinton were needlessly cumulative and more prejudicial than probative. Without identifying which of S.S.'s statements to Ms. Clinton were cumulative, the defendant cannot establish an objection would have been sustained by the trial court as to any particular statement.

Moreover, evidence is not cumulative if it presents different views or perspectives on the evidence. For example, in *State v. Dunn*, 125 Wn. App. 582, 105 P.3d 1022 (2005), the State charged Dunn with multiple counts of rape of a child and child molestation. The child victim testified in detail about the abuse. Additionally, everyone to whom the child had disclosed the abuse, including her parents, a police investigator, and a medical professional, testified and related her statements to the jury. The defendant argued that the admission of a victim's statements to various

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if the "probative value is substantially outweighed by the danger of unfair prejudice ... or needless presentation of cumulative evidence." *See State v. Bedker*, 74 Wn. App. 87, 93, 871 P.2d 673, *review denied*, 125 Wn.2d 1004 (1994).

adults was repetitive and cumulative and overemphasized the victim's trial testimony. *Id.* at 587-88.

This Court upheld the admission of the victim's statements to each of these witnesses, as well as a videotape of the victim's interview with a detective, even though the evidence overlapped and the victim testified at trial. This Court found that the video-taped interview provided jurors with the victim's demeanor, voice inflections, and there was additional information provided during the interviews to law enforcement not previously revealed by the victim.

Similarly, in *State v. Smith*, 82 Wn. App. 327, 333, 917 P.2d 1108 (1996), *review denied*, 130 Wn.2d 1023 (1997), *overruled on other grounds by Portuondo v. Agard*, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000), a rape victim testified at trial, in addition to the trial court admitting statements the victim made to a friend, a tape of a 911 call, and statements made to a police officer. *Id.* at 331. The defendant argued on appeal that the statements made by the victim to others after the crime should have been excluded because it served to bolster the victim's credibility. *Id.*

Division One found the statements were not needlessly cumulative, holding that "evidence relating to a material issue is not needlessly cumulative ... simply because it comes in through several witnesses whose accounts are consistent," and the court noted that the challenged statements

were not identical and that “each witness had a perspective that helped the State, in different ways, to rebut [the defendant’s assertion] that the sex was consensual.” *Id.* at 333.

Likewise, in *Bedker*, 74 Wn. App. at 92, the defendant complained that admission of the prior statements of the child victim to several adults who testified were inadmissible because the statements served only to bolster the child’s testimony. Division One held that the multiple child hearsay statements were not cumulative because some statements covered additional information not contained in the victim’s initial statement or testimony.<sup>12</sup> *Id.* at 93.

Here, Ms. Clinton’s testimony was not impermissibly cumulative; while similarities existed, Ms. Clinton’s testimony was not identical and provided much more detail and was different from what the victim testified to at the time of trial. As expected under the circumstance, the victim was

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<sup>12</sup> The defendant’s reliance on *State v. Kilgore*, 107 Wn. App. 160, 177, 26 P.3d 308 (2001), *affirmed*, 147 Wn.2d 288 (2002), is of no avail. In that case, Kilgore argued that evidence that a relative had been previously convicted of digitally penetrating the victim would have provided an alternate explanation for the deterioration of a victim’s hymen and an alternate source for her sexual knowledge. *Id.* at 177, 180. Weighing the probative value and potential unfair prejudice under ER 403, the reviewing court held that the evidence was “highly relevant and admissible,” that its exclusion was prejudicial, and it denied Kilgore his right of confrontation. *Id.* at 178-79.

Here, the defendant’s attempt to compare this case to *Kilgore* is far afield of the constitutional confrontation claim argued and established by the defendant in *Kilgore*.

apprehensive and reluctant when testifying and provided minimal detail concerning the crimes. The probative value of Ms. Clinton's testimony was logical to convey the sequence and timing of the events; to show interactions S.S. had with the defendant and her aunt, and to demonstrate the pressures that may have prompted S.S.'s reluctance to testify to any detail at the time of trial, including S.S.'s comfort level when discussing the sexual contact with the defendant in the courtroom. The probative value of S.S.'s answers to Ms. Clinton was high and outweighed any potential prejudicial effect. *See State v. Todd*, 78 Wn.2d 362, 372, 474 P.2d 542 (1970) (“[t]he admission of evidence which is merely cumulative is not prejudicial error”); *State v. Johnson*, 35 Wn. App. 380, 386, 666 P.2d 950 (1983) (the erroneous admission of a hearsay statement that is ‘merely repetitive’ of other properly admitted evidence is harmless). Here, as in *Dunn*, *Smith* and *Bedker*, the challenged hearsay testimony provided different perspectives and information about the order of events, the crimes committed, and S.S.'s reluctance to testify in detail at the time of trial.

In addition to the above analysis, defense counsel may not have objected to Ms. Clinton's testimony to avoid drawing attention to the testimony or risk alienating the jury by challenging the statements. Not objecting to avoid drawing further attention to the testimony is a legitimate trial tactic. *State v. Gladden*, 116 Wn. App. 561, 568, 66 P.3d 1095 (2003).

Even if counsel had objected to Ms. Clinton's testimony about S.S.'s statements, the court likely would not have sustained the objection as her testimony explained the lack of any physical injuries, S.S.'s reluctance to discuss defendant's inappropriate contact, and S.S.'s additional information to Ms. Clinton. Accordingly, the trial outcome would not have been materially different. There was no ineffective assistance of counsel for trial counsel's decision to not object to Ms. Clinton's testimony. This claim fails.

**B. THE DEFENDANT FAILS TO ESTABLISH AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BECAUSE HE CANNOT ESTABLISH HE WAS PREJUDICED BY THE BELATED INTERVIEW OF THE FORENSIC NURSE OR HOW A DEFENSE EXPERT WITNESS WOULD HAVE CONTRADICTED THE FORENSIC NURSE'S TESTIMONY.**

The defendant next asserts that defense counsel was ineffective for belatedly interviewing Ms. Clinton and for failing to call an expert witness to counter Ms. Clinton's testimony.

At the commencement of trial on June 7, 2017, defense counsel advised the lower court that his investigator was going to attempt to interview Ms. Clinton. RP 16. The lower court instructed the parties before any witness was called to testify, both counsel must be given the opportunity to interview the witness. RP 17, 22, 31. Defense counsel had all discovery pertaining to Ms. Clinton prior to trial, presumably including police reports and medical reports containing the interview of S.S. RP 32. A full week

later, Ms. Clinton testified at trial. RP 200. The record is silent as to when Ms. Clinton was interviewed by defense counsel. It can be presumed that if there had been a difficulty in interviewing Ms. Clinton, defense counsel would have brought it to the trial court's attention.

Competency of counsel is determined based upon the entire record. *McFarland*, 127 Wn.2d at 335. There is a strong presumption that the representation was reasonable and not deficient. *Id.*; *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). In addition, there is no ineffective assistance if "the actions of counsel complained of goes to the theory of the case or to trial tactics." *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Standard of review.

To provide effective assistance, defense counsel must investigate the case, including investigation of witnesses. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). The duty to investigate does not necessarily require that every witness be interviewed, but defense counsel has an obligation to provide factual support for the defense where it is available. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 759, 101 P.3d 1 (2004).

"Failure to investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis upon

which a claim of ineffective assistance of counsel may rest.” *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991). The strong presumption of effective representation can be overcome “by showing counsel failed to conduct appropriate investigations to determine what defenses were available, adequately prepare for trial, or subpoena necessary witnesses.” *In re Davis*, 152 Wn.2d at 742. Therefore, failure to interview a specific witness may constitute deficient performance. *Jones*, 183 Wn.2d at 340. But deficient performance may hinge on the reason for such failure to interview.

*Id.* As the *Davis* court stated:

[A] defendant seeking relief under a “failure to investigate” theory must show a reasonable likelihood that the investigation would have produced useful information not already known to defendant’s trial counsel. And even if a defendant can show that exculpatory evidence unknown to trial counsel would have been uncovered by further investigation or interview, the court must still consider whether counsel’s deficient performance prejudiced the defendant. In evaluating prejudice, ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government’s case.

*Id.* at 739 (internal citations omitted).

Here, the defendant cannot establish that his counsel failed to interview Ms. Clinton. Defense counsel had a full week to do so before Ms. Clinton testified. Moreover, the defendant fails to establish that any expert witness would have testified contrary to Ms. Clinton’s testimony or that there is a reasonable likelihood that a pretrial interview, as opposed to

defense counsel's interview, would have produced any additional, useful information. *See, Davis*, 152 Wn.2d at 739. The defendant offers nothing, but speculation, regarding what defense counsel knew or did not know after interviewing Ms. Clinton or how this diminished defense counsel's trial strategy or effectiveness. In that regard, our Supreme Court has held that hindsight has no place in an effective assistance of counsel analysis. *Grier*, 171 Wn.2d at 43. The defendant cannot overcome the strong presumption that defense counsel was effective.

To the extent that defense counsel may have erred by failing to interview Ms. Clinton sooner, defendant cannot establish that he was prejudiced. As discussed earlier, defense counsel had all discovery pertaining to Ms. Clinton prior to trial, presumably including police reports and medical reports containing the interview of S.S. RP 32. The defendant's blanket, unsupported assertion that defense counsel was unaware of Ms. Clinton's proposed testimony is without any citation to the record and is purely conjecture. Moreover, the defendant fails to identify what, if anything, was different when comparing Ms. Clinton's testimony to the information already contained in the medical records and reports previously obtained by defense counsel.

The defendant further asserts that if Ms. Clinton had been interviewed earlier, defense counsel could have objected to the "yes/no"

question format used by Ms. Clinton with S.S., showing such a format was unreliable and could have altered the outcome of trial. In that regard, however, Ms. Clinton did not express any assertion of past facts to S.S. during the interview; cross-examination of S.S. and Ms. Clinton did not establish any lack of knowledge or that S.S.'s recollection of the events was faulty; or that S.S.'s answers to Ms. Clinton were an attempt to misrepresent the defendant's actions during commission of the crimes.

Again, there is no citation to the record suggesting that defense counsel was unaware of the questioning format used by Ms. Clinton, in advance of her testimony. The defendant has not provided any authority that such a questioning procedure was unreliable or how the outcome of the trial would have been different. Certainly, the jury heard the details of why Ms. Clinton used the "yes/no" format and could assess the credibility and reliability of that evidence.

Resulting prejudice must also occur and an appellant must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 335. Other than the defendant's postulation of prejudice, the record contains no evidence that defense counsel was deficient, underperformed, or that the defendant was prejudiced by any delay in interviewing Ms. Clinton.

Failure to call a defense expert witness.

A lawyer's decision whether to call a particular witness is a matter subject to differences of opinion and therefore, is presumed to be a matter of legitimate trial tactics, *Davis*, 152 Wn.2d at 742, and ordinarily will not support a claim of ineffective assistance of counsel, *State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995). Reviewing courts must make "every effort to eliminate the distorting effects of hindsight." *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

Courts defer to a trial lawyer's decision against calling witnesses if that lawyer investigated the case and made an informed and reasonable decision against conducting a particular interview or calling a particular witness. *Jones*, 183 Wn.2d at 340.

Here, defense counsel's decision not to call an expert did not deprive the defendant of the ability to question Ms. Clinton regarding her physical examination of S.S., the manner of and questions asked by Ms. Clinton, and the format utilized. A defense expert was not necessary to raise these issues with Ms. Clinton. In fact, it is unknown if counsel contacted a medical professional during trial and whether such testimony would have been cumulative or unhelpful to the defense. *See State v. Van Tuyl*, 132 Wn. App. 750, 760, 133 P.3d 955 (2006) (in a domestic violence case, this Court held that it presumed defense counsel did not call additional

witnesses regarding the incident because that testimony would have been unhelpful or cumulative under the evidence rules). Finally, although defense counsel remarked on the eve of trial that he was considering calling a medical professional as a rebuttal witness,<sup>13</sup> it does not discount the possibility that defense counsel had previously consulted with a potential expert witness, but decided not to call the witness to testify at trial because the witness would not have provided any evidence favorable to the defense.

During closing argument, defense counsel argued to the jury that the defendant may have exhibited poor parenting skills and behavior toward S.S., but there was no evidence of a rape or molestation. RP 335-36. Specifically, defense counsel argued that S.S. was a needy, emotional child, who necessitated hugging and had to be held. RP 341. S.S. was argumentative and bonded more with the defendant than with Ms. Counts. RP 341. Ms. Counts never heard any tantrums or screaming from S.S.'s bedroom. RP 342. Defense counsel argued S.S. did not disclose the abuse until she left the Counts' home and highlighted what he believed to be S.S.'s inconsistent demeanor and testimony. RP 342-43. Regarding Ms. Clinton's testimony, defense counsel stressed her testimony confirmed there were no

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<sup>13</sup> See RP 16.

physical indicators of abuse. RP 344-45. When discussing Ms. Clinton's question format, defense counsel argued:

I also found it interesting and somewhat perplexing. When [S.S.] was describing having sex with Jeff -- or was describing when Jeff had sexual intercourse with her, she started out by referring to her vagina as a "tissue box" because that was how it was discussed in a prior interview with another detective. And then Susann Clinton appeared to take the clue that [S.S.] didn't want to be direct about terms and then attempted to discuss whether or not Mr. Counts ever had anal sex with [S.S.] and started talking about the area where you poop, and [S.S.] just used the term "anal sex." The dichotomy between these two descriptors is curious to me. [S.S.] was unable to use the word "vagina," but she was able to use the term "anal sex"; that contrasting descriptions seem odd, they seem inconsistent.

RP 345.

Considering defense counsel's argument to the jury and apparent tactical choice not to object to Ms. Clinton's testimony concerning S.S., there is nothing in the record to support the defendant's claim that consultation with or testimony from an independent medical expert would have provided information beneficial to defense counsel's cross-examination of Ms. Clinton. Moreover, the defendant does not offer any substance or any suggestion of how Ms. Clinton's testimony would have been impeached or minimized with the addition of a defense expert. Finally, defendant's assertion that a defense medical expert would have assisted his theory of the case is, at best, speculative, and does not create a reasonable

likelihood that absence of a defense expert had a reasonable likelihood of affecting the jury's verdict. Without any support in the record, the defendant fails to demonstrate that defense counsel was deficient or that any prejudice resulted, both of which are required to establish ineffective assistance of counsel.

**C. THE TRIAL COURT DID NOT COMMIT MANIFEST ABUSE OF DISCRETION WHEN IT DENIED THE DEFENSE'S LAST MINUTE REQUEST FOR A CONTINUANCE OF THE TRIAL DATE, AFTER AN APPROXIMATE 16-MONTH DELAY IN COMMENCING TRIAL.**

The defendant next contends the trial court abused its discretion when it denied his request for a seventh continuance on the eve of trial.

Standard of review.

The decision to grant or deny a motion for continuance of the trial date rests within the sound discretion of the trial court. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004); *State v. Brown*, 40 Wn. App. 91, 94-95, 697 P.2d 583 (1985), *review denied*, 103 Wn.2d 1041 (1985). The decision to grant or deny a motion to continue will not be disturbed absent a showing that it was manifestly unreasonable or based on untenable grounds or reasons. *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009).

In the present case, the defendant was charged in the superior court on February 2, 2016. CP 1-2. Defense counsel, Mark Lorenz, entered a

notice of appearance on February 12, 2016 and remained counsel of record through trial. CP 203 (Sub. #6).<sup>14</sup> The defendant was arraigned on February 17, 2016, and an initial trial date was set for April 22, 2016. CP 204 (Sub. #12). A continuance of the trial was granted by the trial court and moved to July 11, 2016. CP 205 (Sub. #14). A second continuance was granted and the trial date was moved to September 26, 2016. CP 206 (Sub. #15). A third continuance was granted and the trial date was moved to November 21, 2016. CP 207 (Sub. #16). A fourth continuance was granted and the trial date was moved to January 30, 2017. CP 208 (Sub. #17). On January 11, 2017, the superior court preassigned the case. CP 209 (Sub. #20). A fifth continuance was granted and the trial was set for May 1, 2017. CP 210 (Sub. #21). A sixth continuance was granted by the preassigned judge, the Honorable Linda Thompkins, and a trial date was set for June 12, 2017. CP 211 (Sub. #28).

On the eve of trial, the defense attorney requested another continuance of the trial, claiming generally there were additional “avenues that we need to explore.” RP 8. There was no written motion or certificate

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<sup>14</sup> See fn 4.

accompanying this verbal request, nor any other specificity. The State had no objection to the request. RP 11. The trial court denied the motion, ruling:

THE COURT: Under the circumstances, the Court has recognized on six prior occasions the need for continuances. This matter was filed February 2016. There are others that are involved in this matter: the victim, the need for resolution of a matter that involves folks, other people that have allegedly and are being incorporated through the prosecutor's charges, with harms, and the recognition that, from interviews of witnesses, other avenues have opened up, is recognized. And I don't discount that whatsoever. But the interviews of these witnesses, it couldn't have been a surprise that we are going to trial. And I can't speak to why the witnesses just now were being interviewed when this is a long-term process. So I must deny the request for a continuance. The matter will move forward.

It's very difficult for me to do this because I'm not discounting the incredible workload and the incredible process of preparing for a trial and the incredible importance of this trial. We will take the matter systematically. And to the extent that counsel can accommodate each other, I am hopeful that that may happen here. If there are some activities that may need to be ongoing, I understand, and hopefully that could be part of the process of being good advocates for each of your clients but yet realizing that trials are, to a certain extent, spontaneous, even the week before trial. So I am offering that.

[The deputy prosecutor] has not seriously contested any of these later requests for continuance, and I understand that that's an important part of the give and take of practicing law in Spokane as well. But the Court must hold the parties to the trial date.

This has a number one priority, and the Court will commit to all of you to use my best efforts to provide a very prepared

judge at day one and will not contribute to any delays as we move forward.

RP 11-12.

Factors that may be considered by the appellate court include surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure. *Downing*, 151 Wn.2d at 273. Here, the defendant has not established the trial court's denial of his request for a seventh continuance, 16-months after he was charged, was manifestly unreasonable or exercised on untenable grounds, or for untenable reasons. The trial date had been continued six previous times for a total of 16 months, generally for the stated purpose of interviewing witnesses and additional investigation. Regarding the *Downing* factors, each will be reviewed in turn.

*1. Surprise.*

Appellate counsel has not identified any element of surprise which would have weighed in favor of a continuance. As stated previously, there is nothing in the record to suggest that defense counsel did not have all of the discovery, including that of Ms. Clinton, well in advance of trial.

*2. Diligence.*

Although the defendant's counsel stated that he spoke with witness Ms. Counts before trial, and claimed there were "records" he needed to obtain, diligence did not weigh in favor of granting the continuance. Defense counsel did not provide an offer of proof or a declaration regarding

the nature or the exculpatory value of the unidentified “records,” or what benefit the “records” would have provided to the defense theory of the case.

3. *Materiality.*

Defense counsel never proffered an offer of proof as to what avenues needed to be explored and what records needed to be obtained. An offer of proof should inform the trial court of the legal theory under which the offered evidence is admissible, inform the trial judge of the specific nature of the offered evidence so the trial court can judge its admissibility, and create a record adequate for appellate review. *Ray*, 116 Wn.2d at 538; *State v. Tatum*, 74 Wn. App. 81, 86, 871 P.2d 1123, *review denied*, 125 Wn.2d 1002 (1994) (regarding the compulsory process, court would reverse only upon a showing that the defendant was prejudiced by the denial or that the result of the trial would likely have been different if the trial court had granted the continuance). Furthermore, the lack of an offer of proof failed to provide the nature of the “other avenues” of investigation or any specificity of any additional required testimony or records. There was no offer of proof or argument how the defense theory of the case was impacted or that a different defense would have been offered had the continuance been granted. Accordingly, the defendant fails to outline the nature of the evidence to establish its materiality, which did not weigh in favor of his seventh request for a continuance.

4. *Maintenance of orderly procedure.*

The maintenance of orderly procedure weighed against granting defense counsel's request for an additional continuance. Here, the trial court emphasized there were additional participants involved in the trial and the need to have the trial resolved after 16 months of continuances. The trial court stated it would affirmatively accommodate any last-minute occurrences should they arise at trial. When weighed against the unidentified need for further investigation and records, the trial court did not err when it concluded that the balance weighed in favor of maintaining orderly procedure and proceeding with trial as planned after 16 months.

5. *Due process.*

A trial court's denial of a continuance motion may infringe on a defendant's federal Sixth Amendment right to compulsory process and right to present a defense "if the denial prevents the defendant from presenting a witness material to his defense." *Downing*, 151 Wn.2d at 275.

As discussed above, the defendant has failed to establish that a broad assertion of an investigation of "other avenues" and locating unidentified records was material to his defense. Furthermore, he fails to establish that he was prevented from presenting his theory of the case, by the absence of this purported evidence. The trial court's denial of his request for a

continuance did not infringe on his due process rights, and due process did not weigh in favor of granting the continuance.

Based on these considerations, the trial court's reasoning rests on factors that trial courts are explicitly allowed to consider when denying a continuance. *Id.* at 273. Accordingly, the trial court based its denial of the continuance motion on tenable grounds and did not abuse its discretion. *Id.* at 272.

#### IV. CONCLUSION

For these reasons, the State requests this Court affirm the judgment and sentence.

Dated this 5 day of June, 2018.

LAWRENCE H. HASKELL  
Prosecuting Attorney



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Deputy Prosecuting Attorney  
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**SPOKANE COUNTY PROSECUTOR**

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