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COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CARMELO HERNANDEZ SIERRA, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

The Honorable David G. Estudillo, Judge

BRIEF OF RESPONDENT

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- A. HERNANDEZ SIERRA FAILED TO PRESERVE FOR REVIEW HIS CLAIM THE TRIAL COURT VIOLATED HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION. THE COURT CONCLUDED NO COMPETENT EVIDENCE SUPPORTED HIS ER 413(A) MOTION, AND THE ASSERTED FACTS WERE BOTH SPECULATIVE AND REMOTE IN TIME. ALTHOUGH INVITED TO DO SO BY THE COURT IN ITS TENTATIVE RULING DENYING U VISA CROSS-EXAMINATION OF N.M., HERNANDEZ SIERRA DID NOT TESTIFY CONCERNING THE EVENTS DESCRIBED IN COUNSEL'S OFFER OF PROOF. DID THE TRIAL COURT ABUSE ITS DISCRETION OR DENY HERNANDEZ SIERRA'S SIXTH AMENDMENT RIGHT OF CONFRONTATION BY LIMITING THE SCOPE OF N.M.'S CROSS-EXAMINATION? (ASSIGNMENT OF ERROR No. 1)
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II. STATEMENT OF THE CASE¹

The state adopts facts as stated in Hernandez Sierra's Opening Brief, then supplements that statement of the case with additional facts relevant to the issues before this Court. RAP 10.3(b).

A. FACTS RELEVANT TO HERNANDEZ SIERRA'S ER 413(A) LIMINE MOTION AND SCOPE OF CROSS-EXAMINATION CONCERNING HIS WIFE'S U VISA APPLICATION

Hernandez Sierra moved in limine for permission to cross-examine N.M. for impeachment concerning her mother's U Visa application, arguing it was relevant to N.M.'s credibility because she would naturally want her mother to remain in the United States and concocted or embellished the story to assist her mother's immigration status. 5/30/19 RP 73, 77. Hernandez Sierra asserted his sexual activity with N.M. was consensual. 5/30/19 RP 77.

Defense counsel argued Hernandez Sierra would testify that the two of them had seen a lawyer about getting the wife a work permit or some other means of staying in the United States, and the lawyer told them "how U Visas work," although the wife denied this. 5/30/19 RP 73. The state said N.M.'s mother denied having ever gone to an immigration attorney with her husband. 5/30/19 RP 81. At the time of this alleged visit,

¹ The State follows the protocol for citation to the record used by Hernandez Sierra, i.e. (MM/DD/YY) RP ____ and to the clerk's papers, as CP ____.

N.M. was 13 years old. 5/30/19 RP 81.

Counsel argued N.M.'s mother was "getting [the U Visa] because her daughter is the alleged victim in this violent crime." 5/30/19 RP 76. Counsel asserted N.M. knew about what was said during the visit to the immigration attorney. 5/30/19 RP 73. He stated "the U visa thing" was discussed "around the house," that N.M. knew about it, understood its importance to her mother, and had every reason to embellish her story. 5/30/19 RP 76. Counsel admitted there would be no additional background on the purported conversation and that the attorney would not be identified. 5/30/19 RP 77–78. Hernandez Sierra's offer of proof consisted entirely of defense counsel's written declaration and oral statements to the court during argument; it was uncontested counsel had no first-hand knowledge. 5/30/19 RP 80.

The court said it would reserve its ruling on N.M.'s cross-examination until Hernandez Sierra or some other witness testified on the issue. 5/30/19 RP 83–84. The court stated it also wanted to consider the issue further because children under the age of 16 were not usually held to the same standards for legal knowledge as an adult. 5/30/19 RP 89–90.

The court ruled Hernandez Sierra could cross-examine the mother about her U Visa application, a copy of which could be entered into evidence. 5/30/19 RP 89. She could not be cross-examined about the

Wenatchee trip or about talking with an immigration lawyer until after Hernandez Sierra testified to the events recounted by his lawyer. 5/30/19 RP 90. The mother could be called back to the stand after Hernandez Sierra testified. 5/30/19 RP 90. Defense counsel confirmed his client would have to be the first to bring up the Wenatchee trip. 5/30/19 RP 91. The court reserved on whether Hernandez Sierra would be allowed to impeach N.M. with the asserted U Visa information. 5/30/19 RP 91, 93.

Although Hernandez Sierra had not yet testified, he raised the issue again a week later, when defense counsel argued the purported facts were valid for impeachment, providing a clear motive for N.M. to embellish her story. 6/3/19 RP 5. The court asked for “the exact facts” to which the defendant would testify. 6/3/19 RP 5–6. Counsel replied that after the Wenatchee trip, the mother and his client would joke about being able to assault one another to get a U Visa. 6/3/19 RP 6. The court asked whether Hernandez Sierra alleged he spoke with N.M. about the U Visa.” 6/3/19 RP 9. Counsel replied he was not sure who told N.M., but “they joked between them about it.” 6/3/19 RP 9. The “they” to whom counsel referred were his client and N.M. 6/3/19 RP 10. Counsel understood it was just the two of them, not the mother as far as he knew, but that voir dire of his client under oath might produce a different answer. 6/3/19 RP 10. Counsel understood this joking between them occurred on multiple occasions.

6/3/19 RP 10. The court asked whether the visa they were joking about was for the mother or the defendant. 6/3/19 RP 11. Counsel, after first supposing it was for his client and N.M., a United States citizen, argued it was the bantering that was relevant. 6/3/19 RP 11.

The court remarked N.M. would have been 13 years old at the time of the alleged Wenatchee conference. 6/3/19 RP 15. The rape occurred and was reported on September 21, 2018, when N.M. was 14; the mother's U Visa application was not submitted until February 5, 2019. 6/3/19 RP 16. The court further pointed out N.M. did not need to testify for her mother to be eligible for a U Visa. 6/3/19 RP 19.

The court also noted there was no evidence N.M. had ill will toward Hernandez Sierra before the charged incident, no evidence the mother had been in any way concerned about being deported, and no evidence a U Visa had ever been discussed with N.M. 6/3/19 RP 20.

The court again remarked Hernandez Sierra had made no offer of proof but was expected to talk about:

this alleged date of an alleged visit with an attorney for which we have no name and no specific date other than it occurred approximately one year before September 2018. The alleged victim was not present at the consultation. The alleged victim would have been approximately 13 years old at that time.

6/3/19 RP 24. The court said Hernandez Sierra wanted it to accept that he

and his wife, neither having significant experience in immigration law, were somehow able to sufficiently explain its intricacies to 13-year-old N.M. such that a year later she could come up with a plan to allege abuse. 6/3/19 RP 24. There was no detail about exactly what was said, or who said what. 6/3/19 RP 24. Hernandez Sierra acknowledged he would not offer evidence of animosity. 6/3/19 RP 25.

So for an alleged victim to go to the extreme of claiming they're a victim of a crime, that might be reasonable if you don't know the person whatsoever. It seems far less reasonable when there is no evidence of animosity that the alleged victim would point to a relative, in this case a stepfather, without, again, any evidence that there's animosity there for some reason.

6/3/19 RP 25. No evidence was anticipated indicating the mother was, or was about to be, in removal proceedings or any other proceeding requiring possible deportation. 6/3/19 RP 25. The victim herself, a United States citizen, would receive no direct immigration benefit. 6/13/19 RP 25. The court also commented the mother's U Visa application was dependant on her testimony, not that of the victim. 6/3/19 RP 25–26.

The court found the proffered impeachment evidence both speculative and remote in time from when the abuse was alleged to have occurred. 6/3/19 RP 26. Without more, prejudice to N.M. outweighed any minimal relevance. 6/3/19 RP 26. The court would not allow U Visa cross-examination of N.M., but left the issue open in case the defendant's

testimony provided “a little more background about what was happening with the immigration issues.” 6/3/19 RP 26–27. The court reiterated the evidence currently before it was too speculative. 6/3/19 RP 27.

Hernandez Sierra’s testimony did not include consulting an immigration lawyer, communication concerning U Visas within the family, or the mother’s U Visa application. 6/5/19 RP 375–403; 419–42.

B. FACTS RELEVANT TO PROSECUTORIAL MISCONDUCT

When the prosecutor asked Hernandez Sierra to confirm he and his attorney had gone over his testimony before coming to court, defense counsel objected on the basis that the prosecutor was asking about the subject matter of attorney-client communication. 6/5/19 RP 421–423.² Counsel did not assert the question implied coaching. *Id.* After side-bar discussion, the trial court found the objection “very technical” and the way the question was stated “technically objectionable.” 6/5/19 RP 423.

The trial court overruled counsel’s objection when the prosecutor asked Hernandez Sierra to confirm he heard defense counsel lay out the defense theory of the case in counsel’s opening statement. 6/5/19 RP 423.

Earlier in the trial, N.M. had testified in detail to being raped by

² Hernandez Sierra misstates this objection in his brief, where he asserts: “Here, defense counsel objected during Hernandez Sierra’s testimony when the prosecutor asked if he was coached by his attorney.” Br. of Appellant at 40, citing 6/5/19 RP 421–22. The prosecutor did not ask Hernandez Sierra whether he had been coached. *Id.*

Hernandez Sierra. 6/3/19 RP 91–124. She said after the rape, he apologized three times: shortly after ejaculating, 6/3/19 RP 122–23; when he used a bobby pin to open a locked bathroom door, 6/3/19 RP 125; and a final time when he joined her downstairs, where she was crying on the couch. 6/3/19 RP 128. N.M. said he sat right next to her, told her to stop crying, and said her mother would kick them both out of the house if she found out. 6/3/19 RP 128. The prosecutor asked: “Did he say anything else to you?” N.M. answered, “No.” 6/3/19 RP 128. At this point, the court interrupted to announce the lunch recess. 6/3/19 RP 128.

When trial resumed, N.M. said she had told her story to a lot of people. 6/3/19 RP 133. She separately narrated the events six or eight times before trial, to victim advocates, a therapist, law enforcement, prosecutors, and the defense. 6/3/19 RP 139. As N.M. recounted her conversation with her mother, the prosecutor asked again whether Hernandez Sierra had said anything about her mother’s reaction other than that she would throw them both out of the house. 6/3/19 RP 134–35. N.M. answered he warned her mother would kill them both, though she did not believe her mother would actually kill her. 6/3/19 RP 135. The SANE nurse testified N.M. told her Hernandez Sierra came downstairs after the rape and said, “Just quit crying and don’t tell your mom because she’ll get mad and kill us both.” 6/3/19 RP 218. Hernandez Sierra admitted he told

N.M. her mother would kill her or put her out of the house if she learned what had happened. 6/5/19 RP 437.

The first thing defense counsel asked N.M. was whether she spoke with the prosecutor during the lunch recess. 6/3/19 RP 141. N.M. said she spoke with both prosecutors “just once” before getting out of there because she did not feel well. 6/3/19 RP 141. Counsel did not ask what they discussed. 6/3/19 RP 141. Instead, he brought up the question the prosecutor asked immediately before the recess regarding whether Hernandez Sierra said anything else about what N.M.’s mother would do. 6/3/19 RP 142. Counsel purported to quote the prosecutor and stated as fact, “And then [the prosecutor] said, ‘*And did she [as stated] also tell you that- - Did he al - - Did he, Mr. Carmelo [as stated], also tell you that she would do harm to you?’* And you said, ‘No.’ Do you remember that?” 6/3/19 RP 142 (emphasis added; transcript punctuation altered). What the prosecutor asked was, “Did he say anything else to you?” 6/3/19 RP 135. There was no suggestion from the prosecutor to N.M. about what Hernandez Sierra said. 6/3/19 RP. 135.

N.M. replied, “If I said that, well, I messed up because like after going to lunch it was like if I was living the whole thing again and like I was remembering parts that I partially forgot.” 6/3/19 RP 142. Defense counsel pressed: “So that’s why after lunch and having spoke [sic] with

counsel now your answer is that ‘He said that she would kill us’, meaning your mom and meaning Carmelo; is that correct?” 6/3/19 RP 142–43.

N.M. replied: “He said that to me.” 6/3/19 RP 143.

Later, defense counsel returned to the question of what Hernandez Sierra had said, trying to get N.M. to agree his client had said only that her mother would be mad at both of them, and not that “she’d kill you.” 6/3/19 RP 155. N.M. responded, “He didn’t say it that she would be mad at both of us. He said like the exact words that I said. . . . But he just said them in Spanish.” 6/3/19 RP 156.

During Hernandez Sierra’s closing argument, counsel urged the jury to disbelieve N.M. After associating her testimony about being pushed and pulled up the stairs to a Dr. Seuss book, ridiculing her for not knowing the difference between pushing and pulling and musing perhaps Dr. Seuss was no longer shown in school, 6/6/19 RP 503–04, counsel said, “And as I’m sure each of you noticed, [N.M.] even changed her testimony on the stand, after she spoke with [the two prosecutors] during a break.” 6/5/19 RP 506. He said after the prosecutor “in a leading question,” asked N.M. whether Hernandez Sierra told her her mother would do harm to her if her mother found out, N.M. said “no.” 6/5/19 508. Counsel continued:

Well, obviously the state wasn’t satisfied with that.
Because they went out on the break and she says she talked
with them. What does she testify when she comes back?

[The prosecutor] brings the subject up again, oh, he said that my mom would kill us both.” 6/5/19 RP 507. “Which one are you going to believe? Are you going to believe the testimony she gave before she met with the state’s prosecutors, or are you going to believe the remade testimony, the changed testimony after she had that meeting with the prosecutors? I think I know. It isn’t difficult to wonder how she changed that previous - - why that previous testimony was changed, is it?

6/6/19 RP 507. Counsel did not mention his client admitted he had told N.M. her mother would kill her. 6/6/19 RP 507; 6/5/19 RP 437. He did not remark on the SANE nurse’s corroborating testimony. 6/6/19 RP 507.

During closing rebuttal, the prosecutor responded to counsel’s argument by asking the jury to “make room for the idea” that a young person on the witness stand “may not remember every single thing that happened.” 6/6/19 RP 547. “That’s why I came back and asked her that question, because the first time, she didn’t say anything about that. Not unusual to do.” 6/6/19 RP 547. He reminded the jury counsel suggested the two prosecutors had gotten N.M. to “change her testimony, so she’s a liar and not to be trusted.” 6/5/19 RP 547.

He then asked the jury to recall defense counsel had been “leading [Hernandez Sierra] the whole way. Didn’t you do this, didn’t you do that, didn’t you do this? It wasn’t Hernandez spontaneously telling his story spontaneously [sic], that he did on his own, he followed the script that [defense counsel] had worked out.” 6/6/19 RP 547–48. The prosecutor

pointed out Hernandez Sierra had been able to listen to everyone else's testimony before he testified while N.M. had not and that Hernandez Sierra "had eight, nine months to come up with his story of what happened." 6/6/19 RP 548.

The prosecutor had opened his rebuttal argument saying, "I noted one thing I wanted to say at the outset, which was [defense counsel] made a number of comments and kind of joked about things. That's very troubling. I think the hardest thing to do for anybody is to talk to human beings about sexual activity." 6/6/19 RP 545-46. He argued much of defense counsel's argument was "unreasonable," 6/6/19 RP 551, that it was "somewhat shocking" and against common sense that a woman would want to have sexual relations right after having sprained her ankle black and blue, and would go upstairs to be a seductress while her four-year-old sister ate lunch downstairs. 6/6/19 RP 549. He argued it was unreasonable to believe that as N.M. straddled the defendant, his penis rubbed between his legs such that he could get an erection and ejaculate. 6/6/19 RP 549.

After Hernandez Sierra confirmed his testimony was that N.M. called him upstairs, where he found her lying seductively on his bed and threatening to tell her mother he touched her if he refused to shave her, and that going back downstairs, N.M. called for him two or three more times, the prosecutor asked whether N.M. was devastated by what

happened, and Hernandez Sierra asked for an explanation of “devastated.” 6/5/19 RP 440. The prosecutor said, “Been forever injured or damaged and probably will never trust men again as a result of your actions; isn’t that true?” Hernandez Sierra responded, “I don’t understand, she never what?” 6/5/19 RP 440. The prosecutor replied, “[N.M.] will have to live with what you did to her on September 21st, 2018, for the rest of her life; isn’t that true?” Hernandez Sierra answered, “Yes, so will I.” 6/5/19 RP 440. The prosecutor asked, “You’re telling this jury that you’ve been devastated by this?” and Hernandez Sierra answered, “I feel bad, as well, yes.” 6/5/19 RP 440. On recross examination, the prosecutor continued: “So is it your testimony that you are telling us that you’re the victim of [N.M.]’s actions toward you on September 21st, 2018? Yes or no?” to which Hernandez Sierra replied, “Yes.” 6/5/19 RP 442.

During rebuttal closing argument, the prosecutor responded to defense counsel’s attack on N.M.’s credibility by highlighting how unbelievable Hernandez Sierra’s testimony was: that while he was fixing lunch for his four-year-old daughter, N.M. got up from the couch, went upstairs, and repeatedly demanded he join her in his bedroom to shave her vagina and have sex with her, threatening to tell her mother he touched her if he refused. 6/6/19 RP 553. No reasonable adult male in such circumstances would go back downstairs, cook a meal, then return to lie

down next to this seductive child. 6/6/19 RP 553. The prosecutor pointed out Hernandez Sierra first testified he had to hurry back to work, then said he was suddenly so tired he lay down on the bed next to N.M., but only to sleep, at which time N.M. rubbed herself on him. 6/6/19 RP 553.

In defense counsel's closing argument attack on N.M.'s credibility, he expressed amazement that N.M., at 169 pounds, could have been lifted up the staircase by her stepfather, who weighed 170 pounds. 6/6/19 RP 504–05. In rebuttal, the prosecutor argued, "common sense tells you he's probably a fairly strong individual because of his working experience, versus a 14-year-old girl who, first of all, can't believe this is happening. All trust has been destroyed." 6/6/19 RP 556. After arguing that betrayal, confusion, and disbelief explained N.M.'s apparent passivity as Hernandez Sierra lifted her up the stairs, the prosecutor asked,

Did you hear [defense counsel] ever suggest to you what this devastation has caused in this case? The devastation and belief of a 14-year-old girl that probably will never trust men again, will have to live with this every day until she lays her head down on her pillow to die, that her stepfather sexually molested, sexually assaulted her and raped her."

6/6/19 RP 556.

At the beginning of the state's closing argument, the junior prosecutor explained that the approximately 45 minutes of instructions just given to the jury contained the law they must consider when determining

whether the state met its burden of proving the elements of each crime beyond a reasonable doubt. 6/6/19 RP 482–83. Instruction number one told the jurors they “must apply the law from [the court’s] instructions to the facts they decide have been proved, and in this way decide the case.” 6/5/19 RP 451. She reminded the jury not to consider emotions, but only the evidence presented. 6/6/19 RP 482. She then went through the various elements of the charges and relevant definitions, summarizing the evidence she argued proved each element, and why lack of evidence of bruising did not weaken the state’s case. 6/6/19 RP 482–93. She talked about the holes in Hernandez Sierra’s version of events. 6/6/19 RP 492–93. She reminded the jurors they were to presume Hernandez Sierra innocent, that it was up to them to “look at the evidence and make a determination based on the charges and based on evidence.” 6/6/19 RP 483. She explained the state’s burden and the reasonable doubt instruction. 6/6/19 RP 483. She then discussed at length the elements, relevant definitions, and supporting evidence related to rape in the second degree, 6/6/19 RP 486–93, and indecent liberties, 6/6/19 RP 484–86. She later summarized the elements and evidence related to rape of a child and intimidating a witness. 6/6/19 496–97. In that summary, she said to the jury: “[N.M.] testified the defendant told her, don’t tell your mom or she’ll kick us out or she’ll kill us.” 6/6/19 RP 497. She reminded the jury the

SANE nurse was told the same thing, and Hernandez Sierra admitted he warned N.M. not to tell her mom or she would kill them. 6/6/19 RP 498.

The deputy prosecutor also discussed the portions of Hernandez Sierra's testimony that defied common sense. 6/6/19 RP 484–97. She closed her argument by telling the jury again the burden was on the state, and it was up to the jurors to determine the reliability of the evidence they received. 6/6/19 RP 498.

C. FACTS RELEVANT TO INEFFECTIVE ASSISTANCE OF COUNSEL AND HARMLESS ERROR.

1. *Hernandez Sierra's testimony*

Hernandez Sierra testified the sex act was consensual, brought about by N.M.'s combined threats and seductive persistence. 6/5/19 RP 375–403; 419–42. He said N.M. called him while he was at work and asked him to bring toilet paper home on his lunch break, so he decided to pick up some food as well. 6/5/19 RP 379. When he arrived home, N.M. was lying on the couch. 6/5/19 RP 380. He said as he was preparing the food, N.M. took a wireless telephone upstairs, then twice yelled down for him to come up. 6/5/19 R 382–83. He testified he ran upstairs because he “didn't have that much time.” 6/5/19 RP 384. According to Hernandez, N.M. was in his bedroom, lying on his bed in just a tee-shirt and underwear, asked him to shave her, and said if he did not, she would tell

her mother he had touched her. 6/5/19 RP 384. He said he took a little electric shaver out of his dresser drawer and put its battery in backward so it would not work, put the shaver back in the drawer, and went back downstairs to the kitchen to continue feeding four-year-old Carmen.

6/5/19 RP 387. Hernandez Sierra said as he fed his daughter, N.M. yelled down the stairs for him to put a movie on his phone for Carmen to watch, and to come back upstairs. 6/5/19 RP 388. He said he continued feeding Carmen, but N.M. called yet again, demanding to talk with him, so he ran upstairs, found N.M. still on the bed in her underwear, and asked her what she wanted. 6/5/19 RP 389. He did not say what her answer was, if any.

6/5/19 RP 389. He did not tell her to get out of his room and to put some clothes on because he “was very sleepy, [he] was dying from lack of sleep.” 6/5/19 RP 390. He said he did not think of anything, just lay down, stretched out his arms, and started to fall asleep, which is when N.M. climbed on top of him with her legs spread and straddled him below the belt. 6/5/19 RP 390–91. She moved seductively. 6/5/19 RP 391. He said he allowed her to continue because he felt tired and was falling asleep with his eyes closed. 6/5/19 RP 392. He admitted he raised himself up to assist N.M. as she unbuckled his belt and tried to pull his pants down, asserting he did not tell her to stop because, once again, N.M. told him not to say anything. 6/5/19 RP 392.

Hernandez Sierra admitted he knew his actions were wrong, recounting his attempts to tell N.M. she should not be doing what she was doing. 6/5/19 RP 393. He said in the midst of all this, his wife called, and N.M. interrupted her seduction to speak with her mother, after which he ejaculated between her legs. 6/5/19 RP 393–94. He said N.M. then told him to be quiet or she would tell her mother. 6/5/19 RP 396. He said he was repentant because he was the older one. 6/5/19 RP 396.

According to Hernandez Sierra, N.M. would come into his room and get into bed with him whenever her mother left the house. 6/5/19 RP 398. He testified she would hug him and put her cheek next to his. 6/5/19 RP 399. He did not claim to have resisted these previous seductions, nor did he say he discussed N.M.'s behavior with his wife. 6/5/19 RP 398–99.

Despite having just told the jury he climbed into bed with N.M. out of exhaustion and an overwhelming need for sleep, Hernandez Sierra said on cross-examination he did not have a lot of time on his lunch break and was in a hurry. 6/5/19 RP 428. He admitted saying these contradictory things. 6/5/19 RP 437–38. He said on cross-examination, his penis never got hard and that he never ejaculated, 6/5/19 RP 430, 432, then admitted it and he had. 6/5/19 RP 433–34. He claimed his semen found on a white tee-shirt was there because he used the shirt to clean himself after having sex with his wife. 6/5/19 RP 434. He later said his semen was on the tee-

shirt because N.M. used it to clean herself. 6/5/19 RP 436. After denying N.M. was crying on the bed, 6/5/19 RP 436, Hernandez Sierra admitted he told her to stop crying when she was in the bathroom because she had “one tear on this side.” 6/5/19 RP 437.

Hernandez Sierra admitted N.M. also admitted during cross-examination N.M. would have to live for the rest of her life with what he had done to her, adding he would, too. 6/5/19 RP 440. Asked whether he was telling the jury he had been devastated by what happened, Hernandez Sierra answered: “I feel bad, as well, yes.” 6/6/19 RP 440.

2. *N.M.’s testimony*

N.M. testified she did not consider Hernandez Sierra her father, and the two maintained a physical distance between them. 6/3/19 RP 78. Hernandez Sierra hugged N.M. only on her birthdays, and neither had ever tried to kiss the other. 6/3/19 RP 80–81. N.M. sprained her ankle at a high school soccer match the day before the rape. 6/3/19 RP 81–82. By the next day, September 21, 2018, her ankle was swollen and had started turning purple. 6/3/19 RP 84. Hernandez Sierra did not say anything to N.M. when he arrived home that day around 11:00 a.m. with a bag of food, but he did not seem surprised to see her home on a school day, sitting on the couch. 6/3/19 RP 87–91. He knew she had hurt her ankle. 6/3/19 RP 91. Her little sister, Carmen, was with her, watching television. 6/3/19 RP 90. Carmen

followed her father into the kitchen. 6/3/19 RP 91. N.M. stayed on the couch, covered by a blanket. 6/13/19 RP 98.

In the kitchen, Hernandez Sierra gave four-year-old Carmen his cell phone so she could watch Netflix. 6/3/19 RP 95. He returned by himself to the living room, grabbed N.M. around the waist, and started trying to pull her upstairs. 6/3/19 RP 99. N.M., confused, said nothing. 6/3/19 RP 101. Hernandez Sierra pushed her toward the stairs, then half carried her up each stair, holding her around her waist from behind. 6/3/19 RP 101–02. Although she could not speak, N.M. tried to stop the ascent, unable to focus on anything other than what was happening at that moment. 6/3/19 RP 103.

At the top of the stairs, Hernandez Sierra took N.M. to the bedroom he shared with her mother. 6/3/19 RP 105. N.M. grabbed the door jam, but Hernandez Sierra forced her into the room and pushed her backward onto the bed. 6/3/19 RP 107. N.M. tried to get up as Hernandez Sierra locked the bedroom door, but her ankle hurt too much. 6/3/19 RP 108. N.M. remained silent as Hernandez Sierra pulled off her shorts and underwear and began licking her vagina. 6/3/19 RP 111. She said she felt frozen, as though she could not feel anything, having never expected anything like this from her stepfather. 6/3/19 RP 113. Hernandez Sierra said nothing as he grabbed N.M. by her waist and thigh, turning her over.

6/3/19 RP 114. N.M. said she resisted, but ended up face down on the bed as Hernandez Sierra, now naked from the waist down, spit on his hands, his penis, and on N.M.'s buttocks, then unsuccessfully attempted to insert his penis into her anus. 6/3/19 RP 115–17. N.M. tried to pinch his arms and hands, but Hernandez Sierra did not stop, even when N.M. began to scream. 6/3/19 RP 118. N.M. continued screaming as Hernandez Sierra thrust his penis back and forth between her legs near her vagina until he ejaculated. 6/3/19 RP 118–19. Hernandez Sierra wiped himself with a shirt, then tried to clean N.M. 6/3/19 RP 120. He tried to comfort her, said he was sorry, and he would not do that again. 6/3/19 RP 122–23. He admitted what he did was a bad thing. 6/3/19 RP 124.

N.M. cried as she dressed, locked herself in the bathroom, stared into the mirror, wondering why this happened. 6/3/19 RP 124–25. Hernandez Sierra opened the bathroom door with a bobby pin, wiped her tears, told her to stop crying, and apologized again. 6/3/19 RP 125. N.M., still in pain, limped downstairs, returned to the couch, and covered herself with the blanket. 6/3/19 RP 126. Carmen sat with her. 6/3/19 RP 127. Hernandez Sierra soon joined them, sitting beside N.M. as he again apologized, told her to stop crying, and that her mother would kick them both out of the house if she found out. 6/3/19 RP 128. He grabbed his keys, told her again to stop crying, asked if he could bring her something

to eat, and left. 6/3/19 RP 128. N.M. said, from her viewpoint, she had never done or said anything to lead her stepfather to believe she was interested in having sex with him. 6/3/19 RP 127.

After Hernandez Sierra left, still crying, N.M. called her mother and said only that she needed her mother to come home. 6/3/19 RP 134. When her mother arrived, they hugged before N.M. told her, “Your husband tried to rape me.” 6/3/19 RP 134. N.M.’s mother responded that they were going to the hospital. 6/3/19 RP 135. Staff at the hospital in Quincy instructed them to go to Wenatchee. 6/3/19 RP 136.

N.M. testified she told a nurse in Wenatchee everything she had just told the jury. 6/3/19 RP 137. N.M. said she was still shocked, upset, and crying during the interview with the nurse. 6/3/19 RP 138.

3. *Testimony of the SANE nurse and investigating officer*

SANE nurse Susan LaChapelle testified N.M. reported Hernandez Sierra rubbed his penis between her legs until he ejaculated, she pinched him while he was assaulting her as she lay face down on the bed, that afterward, she locked herself in the bathroom, and while sitting next to her on the couch downstairs, he warned her not to tell her mother. 6/3/19 RP 217–18. N.M. did not let LaChapelle examine her vagina or anus, but pulled away, folded her legs, and said “no.” 6/4/19 RP 148. LaChapelle could not determine whether there was trauma to either area. 6/4/19 RP

148. She said it is uncommon to see bruising during a SANE examination because of the length of time it takes for bruises to become visible. 6/3/19 RP 223. Sexual assault is “more a rubbing than blunt force,” and there may not be bruising even when someone is held down by their arms. 6/3/19 RP 224–25. N.M. was very quiet during the examination and looked away from LaChapelle. 6/3/19 RP 227. Tears ran down her face at times. 6/3/19 RP 227. She gave an occasional big sob or sigh. 6/4/19 RP 146. After the exam, she lay on the stretcher, crying. 6/4/19 RP 146. She did not want to go home that afternoon and said she was scared. 6/3/19 RP 227.

Quincy Police Department Sergeant Julie Fuller met N.M. and her mother around 10:15 that night and testified N.M. appeared “possibly in shock, not connected, just sitting there.” 6/4/19 RP 176. Sgt. Fuller said the perineal swab taken from N.M. contained human amylase, 6/4/19 RP 293, and DNA³ from both N.M. and Hernandez Sierra. 6/4/19 RP 296. Both the semen and amylase swabbed from N.M. were contributed by Hernandez Sierra 6/4/19 RP 309–10.

III. ARGUMENT

- A. HERNANDEZ SIERRA FAILED TO PRESERVE FOR REVIEW HIS CLAIM THE TRIAL COURT VIOLATED HIS SIXTH AMENDMENT RIGHT OF CONFRONTATION. THE COURT CONCLUDED NO COMPETENT

³ Deoxyribonucleic acid

EVIDENCE SUPPORTED HIS ER 413(A) MOTION, AND THE ASSERTED FACTS WERE BOTH SPECULATIVE AND REMOTE IN TIME. ALTHOUGH INVITED TO DO SO BY THE COURT IN ITS TENTATIVE RULING DENYING U VISA CROSS-EXAMINATION OF N.M., HERNANDEZ SIERRA DID NOT TESTIFY CONCERNING THE EVENTS DESCRIBED IN COUNSEL'S OFFER OF PROOF. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR DENY HERNANDEZ SIERRA'S SIXTH AMENDMENT RIGHT OF CONFRONTATION BY LIMITING THE SCOPE OF N.M.'S CROSS-EXAMINATION.

Hernandez Sierra sought to impeach N.M. with a motive to lie with evidence of his wife's immigration status and her attempt to obtain a U Visa.

1. *Hernandez Sierra failed to preserve his Sixth Amendment confrontation issue for review when he chose not to provide competent evidence supporting the offer of proof accompanying his ER 413(a) motion and failed, after testifying, to ask the court to revisit its tentative ruling.*

Hernandez Sierra failed to preserve his Sixth Amendment challenge to the trial court's tentative exclusion from N.M.'s cross-examination questions concerning her mother's U Visa application. Challenges to alleged evidentiary error are waived by failing to seek a final ruling on a limine motion. *State v. Riker*, 123 Wn.2d 351, 369, 869 P.2d 43 (1994); *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991) (citing *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 621-23, 762 P.2d 1156 (1988)), *review denied*, 120 Wn.2d 1022 (1993). During his opening statement on the ER 413(a) motion, defense counsel asserted that excluding the anticipated U Visa application evidence would be to deny

Hernandez Sierra his Sixth Amendment right of confrontation. 5/30/19 RP 78. This was his only mention of the Sixth Amendment issue.

“[W]hen a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling.” *Carlson*, 61 Wn. App. at 865. The court did not make a final ruling limiting the scope of N.M.’s cross-examination. The court made it clear it would revisit its decision should Hernandez Sierra provide “a little more background about what was happening with the immigration issues[.]” 6/3/19 RP 26–27.

Although Hernandez Sierra testified, he did not mention any of the events asserted in defense counsel’s declaration. 6/5/19 RP 375–403; 419–42. He said nothing about his wife’s U Visa application or meeting with an immigration attorney, any subsequent household bantering about family members assaulting one another to obtain a U Visa, or what N.M. had following the purported trip to Wenatchee. 6/5/19 RP 375–403; 419–42. He did not say anything about what he thought N.M. knew or believed about U Visas. *Id.* Defense counsel did not ask the court to revisit its tentative ruling after Hernandez Sierra testified. 6/5/19 RP 442. Instead, the defense rested, 6/5/19 RP 443, and the parties immediately began to discuss jury instructions. 6/5/19 RP 444. Hernandez Sierra waived his

Sixth Amendment claim when he declined to provide any testimony whatsoever regarding the events counsel asserted in his offer of proof.

2. *The trial court correctly limited the scope of N.M.'s cross-examination; Hernandez Sierra's Sixth Amendment confrontation claim lacks merit.*

a. Standard of review on the issue of Sixth Amendment right to present a defense

Even with the confrontation issue preserved for review, Hernandez Sierra's claim lacks merit. Reviewing courts engage in a two-step process to determine whether an evidentiary ruling violated a criminal defendant's Sixth Amendment right to present a defense. *State v. Arndt*, 194 Wn.2d 784, 797–98, 453 P.3d 696 (2019). Appellate courts review the constitutional question de novo, and the evidentiary ruling for abuse of discretion. *Arndt*, 194 Wn.2d at 797–98 (citing *State v. Clark*, 187 Wn.2d 641, 648–56, 389 P.3d 462 (2017)). Review of a trial court's limitation on the scope of cross-examination is for manifest abuse of discretion, abuse which occurs when the court bases its decision on untenable grounds or reasons. *State v. Lile*, 188 Wn.2d 766, 782, 398 P.3d 1052 (2017) (citing *State v. Garcia*, 179 Wash.2d 828, 844, 318 P.3d 266 (2014); *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002)).

b. The trial court did not abuse its discretion because Hernandez Sierra failed to meet the procedural requirements of ER 413(a), and the trial court found the offer of proof insufficient, lacking facts that

were reliable or relevant, and prejudicial to N.M., the witness sought to be impeached.

i. Evidence of immigration status under Evidence Rule 413

N.M.'s mother, who applied for a U Visa five months after N.M.'s alleged rape, was a trial witness. Evidence of a witness's immigration status is admissible only through the procedure outlined in Evidence Rule (ER) 413(a)⁴.

Hernandez-Sierra brought his limine motion under ER 413, which controls admissibility of the U Visa impeachment evidence he hoped to present through N.M.'s cross-examination. The rule requires affidavits stating an offer of proof of the evidence's relevance. ER 413(a)(1) and (2). The trial court must find this offer of proof sufficient. ER 413(a)(3). Here, Hernandez Sierra did not make a declaration or offer any statement of a competent witness. The only statement of an offer of proof was defense

⁴ ER 4.13(a) provides: CriminalCases; Evidence Generally Inadmissible. In any criminal matter, evidence of a party's or a witness's immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the criminal offense with which the defendant is charged, or to show bias or prejudice of a witness pursuant to ER607. The following procedure shall apply prior to any such proposed uses of immigration status evidence to show bias or prejudice of a witness: (1) A written pretrial motion shall be made that includes an offer of proof of the relevancy of the proposed evidence. (2) The written motion shall be accompanied by an affidavit or affidavits in which the offer of proof shall be stated. (3) If the court finds that the offer of proof is sufficient, the court shall order a hearing outside the presence of the jury. (4) The court may admit evidence of immigration status to show bias or prejudice if it finds that the evidence is reliable and relevant, and that its probative value outweighs the prejudicial nature of evidence of immigration status. (5) Nothing in this section shall be construed to exclude evidence that would result in the violation of a defendant's constitutional rights.

counsel's declaration made without first-hand knowledge of any of the events to which he expected his client would testify. 6/3/19 RP 11.

/counsel declared the matters stated in his declaration came from his "personal knowledge," CP at 179, and the information came from his "pretrial investigation," CP at 180, but his statement merely recounted what others had told him. He did not claim to be present for any of the conversations related in his declaration, all of which are hearsay and only one of which is attributed to an identified person. CP at 180, ¶ 6.

Counsel said his client would testify he heard N.M. and her mother joking about being victims of a crime to obtain a U Visa. 5/31/19 RP 129–30. Counsel was not entirely sure of his client's testimony on various facts, such as who might get the U Visa that was the subject of this bantering. 6/3/19 RP 11. The court concluded counsel's offer of proof contained no competent evidence for its consideration. 6/3/19 RP 24.

Had there been any competent evidence, that evidence would have been admissible only if the court found it both reliable and relevant. ER 413(a)(4). The court emphatically found neither requirement met. 6/3/19 RP 24. The court was not persuaded Hernandez Sierra and N.M.'s mother, neither of whom had significant experience in the intricacies of immigration law, could have explained U Visas to a 13-year-old with sufficient clarity that, a year later, the child could form a plan to frame her

stepfather to help her mother get a U Visa for which the mother had not yet applied. 6/3/19 RP 24. The court repeated its concern over lack of detail regarding exactly what had been said to N.M. 6/3/19 RP 24. The court was also skeptical of the alleged meeting with the unnamed Wenatchee attorney, a meeting at which N.M. was not present and for which there was no evidence of a specific date. 6/3/19 RP 24. The court further found it unreasonable to believe N.M. would claim she was the victim of a crime by her stepfather when there was no evidence of animosity between them. 6/3/19 RP 25. Finding the evidence both speculative and remote in time from the date of the alleged rape, the court held prejudice to N.M outweighed its minimal relevance. 6/3/19 RP 26.

This court should find none of the predicate conditions in ER 413(a) were satisfied by an offer of proof stating speculative “facts” about which the declarant had no personal knowledge.

- ii. Limiting the scope of N.M.’s cross-examination was not a manifest abuse of discretion when Hernandez Sierra chose not to present additional evidence to overcome the trial court’s concerns regarding reliability and relevance, the mother was cross-examined concerning her U Visa application, and the mother’s U Visa eligibility was not dependent on N.M.’s testimony.

Limitation on the scope of cross-examination is reviewed for manifest abuse of discretion. *Lile*, 188 Wn.2d at 782. The court left open its preliminary decision denying the U Visa evidence, saying it would revisit the issue if Hernandez Sierra testified to “a little more background about what was happening with the immigration issues[.]” 6/3/19 RP 26–27. Hernandez Sierra’s testimony contained nothing related to his wife’s U Visa application although the court had encouraged him to testify to details relevant to the admissibility of the evidence, including whether the mother’s residence status in the United States was in jeopardy, what N.M. knew about the U Visa application process and how the trial might assist her mother. 6/5/19 RP 375–403; 419–42.

The court allowed Hernandez Sierra to cross-examine the mother on her U Visa application, a copy of which was admitted into evidence. 5/30/19 RP 89. The court also correctly noted the mother’s eligibility was not dependent on N.M.’s testimony, 6/3/19 RP 19, refuting Hernandez Sierra’s argument that “[w]ithout N.M.’s testimony . . . her mother would not be able to maintain her U visa application.” Br. of Appellant at 12.

At the close of Hernandez Sierra’s testimony, the court still lacked any competent evidence establishing the reliability of the evidence sought to be used to impeach N.M. Although the credibility of a complaining witness is a crucial consideration and a motive to lie is relevant, *State v.*

Lubers, 81 Wn. App. 614, 623, 915 P.2d 1157 (1996), Hernandez Sierra failed to present any evidence to lessen the court’s concerns about the speculative nature of his theory that N.M. fabricated a tale of forcible rape and would embellish her testimony to secure her mother’s continued residency in the United States.

This Court should find the trial court’s reasonable concern over the reliability of Hernandez Sierra’s proffered impeachment evidence justified its subsequent limitation on the scope of N.M.’s impeachment cross-examination and was not a manifest abuse of discretion.

B. DURING REBUTTAL CLOSING ARGUMENT, THE PROSECUTOR FAIRLY RESPONDED TO DEFENSE COUNSEL’S ATTACK ON N.M.’S CREDIBILITY, COMMENTED ON COUNSEL’S RIDICULE OF N.M. DURING CLOSING ARGUMENT, AND MADE VARIOUS COMMENTS ABOUT THE CASE BASED LARGELY ON THE EVIDENCE. THE PROSECUTOR DID NOT COMMIT PREJUDICIAL MISCONDUCT IN VIOLATION OF HERNANDEZ SIERRA’S CONSTITUTIONAL RIGHTS.

1. *Standard of review and relevant legal principles*

A prosecutor’s allegedly improper arguments are reviewed “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). A prosecutor has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Gregory*, 158 Wash.2d 759, 860, 147 P.3d 1201 (2006). Improper

comments require a new trial only if prejudicial, requiring a substantial likelihood the misconduct affected the verdict. *State v. Barrow*, 60 Wash.App. 869, 876, 809 P.2d 209, *review denied*, 118 Wash.2d 1007, 822 P.2d 288 (1991). It is the defendant's burden to prove prejudice. *Id.* The focus is on the misconduct and its impact, not on properly admitted evidence. *In re Glasmann*, 175 Wash.2d 696, 711, 286 P.3d 673 (2012).

When the defense fails to object to an improper comment, "the error is waived unless the conduct was so flagrant and ill-intentioned that it creates an enduring prejudice that could not have been neutralized by a curative instruction. *State v. Brown*, 132 Wash.2d 529, 568, 940 P.2d 546 (1997). Absence of a defense objection "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990). It also creates a heightened standard of review, where the defendant must show the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict, and no curative instruction would have obviated any prejudicial effect. *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012) (internal quotations omitted). Reviewing courts "focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." *Emery*, 174 Wn.2d at 762.

2. *The prosecutor's rebuttal closing comments were appropriate in the context of the total argument, including that of defense counsel, whose election not to object strongly indicates the comments did not appear to him to be critically prejudicial; neither were the prosecutor's comments so flagrant and ill-intentioned any prejudice could not have been forestalled by a curative instruction.*

a. Disparaging defense counsel

i. Stating or implying counsel coached the testimony of Hernandez Sierra

Defense counsel objected twice when the prosecutor asked Hernandez Sierra to confirm he had gone over his testimony with counsel before coming to court, both objections made on the basis that the question went to the subject matter of attorney-client communication. 6/5/19 RP 422–23. He did not argue the question implied coaching. 6/5/19 RP 422–23. The trial court found these objections “very technical,” and the way the second question was stated had been “technically objectionable.” 6/5/19 RP 423. Neither of the two questions implied counsel coached his client. The court later overruled an objection to the question asking Hernandez Sierra to confirm he heard counsel’s opening statement laying out facts supporting the defense theory. 6/5/19 RP 423.

Allegations of improper argument are assessed in the context of the total argument, including the evidence addressed, and of the issues in the case. *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990); *State*

v. Green, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986). “A prosecutor is entitled to make a fair response to the arguments of defense counsel.” *State v. Gauthier*, 189 Wn. App. 30, 37, 354 P.3d 900 (2015) (citing *Brown*, 132 Wash.2d at 66). The defense targeted much of its argument toward discrediting N.M.’s testimony. Counsel argued at length about N.M. changing her testimony after speaking with the two prosecutors during lunch recess. 6/5/19 RP 506. The changed testimony was N.M.’s recollection Hernandez Sierra told N.M. her mother would kill them both if she found out what had happened. 6/6/19 RP 507. Counsel argued the prosecutor “obviously” was not satisfied with N.M.’s earlier testimony and used the lunch recess to coach her into a satisfying answer. 6/6/19 RP 507. He asked the jury which version were they going to believe, the testimony she gave before the lunch recess or “the remade testimony, the changed testimony after she had that meeting with the prosecutors.” 6/6/19 RP 507. Counsel argued it was obvious why N.M.’s previous testimony was changed. 6/6/19 RP 507. But Hernandez Sierra had already admitted he told N.M. her mother would kill her. 6/5/19 RP 437. The SANE nurse had testified N.M. told her, just hours after the incident, Hernandez Sierra said after the rape, “Just quit crying and don’t tell your mom because she’ll get mad and kill us both.” 6/3/19 RP 218. Counsel ignored both corroborating statements, 6/6/19 RP 507, arguing instead the jury should

disbelieve everything N.M. said because she had recalled the “kill us both” statement only after her conversation with the prosecutors during the lunch recess. 6/6/19 RP 507. Counsel also ignored N.M.’s explanation of how she recalled the additional threat and her insistence Hernandez Sierra did make the statement, in Spanish. 6/6/19 RP 507.

The prosecutor responded by urging the jurors to “make room for the idea” that a young person on the witness stand “may not remember every single thing that happened.” 6/6/19 RP 547. He asserted such forgetting was not unusual, reminding the jurors counsel argued because N.M. changed her testimony after being coached by prosecutors, they should conclude “she’s a liar and not to be trusted.” 6/5/19 RP 547. Then he asked the jury to recall defense counsel was “leading [Hernandez Sierra] the whole way.” 6/6/19 RP 547. The prosecutor argued Hernandez Sierra did not tell a spontaneous story from memory; he “followed the script that [defense counsel] had worked out.” 6/6/19 RP 547–48. He argued Hernandez Sierra also listened to everyone else’s testimony before he testified while N.M. did not. 6/6/19 RP 548. Moreover, Hernandez Sierra “had eight, nine months to come up with his story of what happened.” 6/6/19 RP 548.

These remarks were a fair response to counsel’s attack on N.M.’s credibility, an attack based almost entirely on testimony corroborated both

by the SANE nurse and Hernandez Sierra himself. Even if these comments, standing alone, were improper, they are not grounds for reversal “if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *Gauthier*, 189 Wn. App. at 38, quoting *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (internal quotation marks omitted). Here, the remarks went fairly to the heart of a defense effort to turn N.M.’s corroborated testimony into an example of prosecutorial perfidy from which the jury was urged to disbelieve everything N.M. said.

This Court should find the prosecutor’s assertion Hernandez Sierra was coached is not grounds for reversal, but a “fair response” to defense counsel’s earlier argument. Alternatively, if this Court concludes the prosecutor’s response went outside the bounds of “fair response,” it should find a curative instruction would have negated any risk of prejudice, had counsel objected.

ii. Describing counsel’s tone as “very troubling” and counsel’s argument as “unreasonable”

Defense counsel started his closing argument by ridiculing N.M., “this highschooler,” for thinking “push” and “pull” meant the same thing. 6/6/19 RP 503. He said her testimony about being pushed and pulled up

the stairs by her stepfather made him think of a Dr. Seuss book, musing that perhaps Dr. Seuss was no longer shown in school. 6/6/19 RP 503–04. It is likely counsel was thinking of the pushmi-pullyu (pronounced “push-me-pull-you”), a fantastical two-headed animal from a series of children’s books by Hugh Lofting about the fictitious Dr. Dolittle.⁵

Regardless of what character was brought to counsel’s mind by the confusion of a bilingual child while testifying in a rape trial, the prosecutor was correct to characterize counsel’s joking as “troubling.” There is no comparison here between labeling counsel’s poor taste “troubling” and the statements found objectionable in *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 45 (2011), *State v. Warren*, 165 Wn.2d 17, 195 P.3d 940 (2008); and *State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014).

There is also no comparison between the offensive comments in these cases and the prosecutor’s comment that much of defense counsel’s closing argument was unreasonable. Hernandez Sierra neglects to mention the prosecutor also said some of counsel’s argument *was* reasonable. 6/6/19 RP 550–51. Discussing the “unreasonable” bits, the prosecutor argued it was “somewhat shocking” and against common sense that N.M.

⁵ https://en.wikipedia.org/wiki/Doctor_Dolittle (last visited 9 August 2020). Note that the illustration from the title page of *The Story of Dr. Dolittle* shows the good doctor’s portrait resting on the back of the pushmi-pullyu.

would want to have sexual relations the day after having sprained her ankle black and blue and that she would go upstairs to be her reluctant stepfather's seductress while her four-year-old sister was downstairs eating lunch. 6/6/19 RP 549. More graphically, he argued it was unreasonable to believe the defendant's story that N.M. was straddling him as his penis was rubbing between his legs, causing him to get an erection and ejaculate. 6/6/19 RP 549. These are legitimate arguments and cannot be compared to characterizing a defense case as "bogus" or "sleight of hand." *Thorgerson*, 172 Wn.2d at 450–52. It comes nowhere near arguing the defense was twisting facts and hoping the jury was not smart enough to figure it out. *Warren*, 165 Wn.2d at 29. Pointing out the lack of common sense in counsel's closing argument is a long way from calling it a "crock." *Lindsay*, 180 Wn.2d at 433–34.

This Court should find no misconduct in these rebuttal comments.

- b. Reference to "the innocence of children" did not, in the context of the state's total closing argument, mischaracterize the reasonable doubt standard; any resulting prejudice could have been neutralized by an admonition or curative instruction.

Hernandez Sierra argues the prosecutor's statement that everyone has an abiding belief in the innocence of children mischaracterized reasonable doubt by analogizing to a "universal" example from everyday life, and also served to bolster N.M.'s credibility. Br. of Appellant at 34–

35. He also argues the comment improperly bolstered N.M.'s credibility and inflamed the passions and prejudices of the jury. Br. of Appellant at 35. The defense did not object to this statement, nor to any of the other three statements about which Hernandez Sierra complains. Hernandez Sierra, therefore, must prove the statement was "so flagrant and ill-intentioned that it was inherently prejudicial." *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995). To the extent it was improper for the prosecutor to refer obliquely to N.M.'s lost innocence, Hernandez Sierra waived his claim by not objecting. To go forward, he must also prove the resulting prejudice was "so marked and enduring that corrective instructions or admonitions could not neutralize its effect." *Swan*, 114 Wn.2d at 661. The focus here is "less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." *State v. Emery*, 174 Wn.2d at 762.

While arguably improper, the comment was not so flagrant and ill-intentioned that a stern admonition from the court followed by a corrective instruction could not have neutralized whatever slight risk of prejudice it bore. *See, e.g., State v. Jones*, 71 Wn. App. 798, 806, 808, 863 P.2d 85 (1993) (prosecutors closing statement the case was about society's concern for our children was curable misconduct and thus did not require

reversal), *review denied*, 124 Wn.2d 1018 (1994).

- c. Arguing N.M. will “never trust men again” and “will have to live with this until she lays her head down on her pillow to die” was a fair rebuttal to Hernandez Sierra’s attack on N.M.’s credibility and is a reasonable inference drawn from his admission of her devastation. The statements, grounded in evidence, were not improper.

Defense counsel’s attack on N.M.’s credibility included incredulity that Hernandez Sierra could have lifted her up the stairs. 6/6/19 RP 504–05. It was fair rebuttal for the prosecutor to note both that Hernandez Sierra, a laborer, was probably fairly strong and that N.M., age 14, could “not believe all this is happening. All trust has been destroyed.” 6/6/19 RP 556. The prosecutor argued betrayal, confusion, and disbelief explained N.M.’s apparent passivity she was being lifted up the stairs and asked, “Did you hear [defense counsel] ever suggest to you what this devastation has caused in this case? The devastation and belief of a 14-year-old girl that probably will never trust men again, will have to live with this every day until she lays her head down on her pillow to die, that her stepfather sexually molested, sexually assaulted her and raped her.” 6/6/19 RP 556.

While N.M. had not testified to her devastation, Hernandez Sierra did. 6/5/19 RP 440. After learning “devastated” meant “[beeing] forever injured or damaged and probably will never trust men again,” Hernandez Sierra agreed N.M. had been devastated. 6/5/19 RP 440. That evidence

was properly in the record. Although comments intended to inflame did jurors' passions are improper, prosecutors are accorded reasonable latitude to draw inferences from trial evidence. *State v. Brett*, 126 Wash.2d 136, 180, 892 P.2d 29 (1995), *cert. denied*, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996). "A prosecutor is not muted because the acts committed arouse natural indignation." *State v. Fleetwood*, 75 Wash.2d 80, 84, 448 P.2d 502 (1968). This did not exhort the jury to send a message to society. *State v. Bautista-Caldera*, 56 Wn. App. 186, 195, 783 P.2d 116 (1989). Error in argument targeting "passion and prejudice" occurs when jurors are encouraged to consider evidence of matters outside the record. *State v. Pierce*, 169 Wash. App. 533, 553, 280 P.3d 1158 (2012). "[A]ppeals to the jury's passion and prejudice are often based on matters outside the record," and the verdict must be based on reason. *Id.* (citing *State v. Clafin*, 38 Wash.App. at 847, 849–50, 690 P.2d 1186 (1984)). In *Pierce*, the outside facts included a fanciful first-person narrative of the defendant's thoughts leading up to the crime and a fabricated description of the murders, highlighted by tear-inducing, invented acts of a husband and wife as they lay together before being shot. *Pierce*, 169 Wn. App. at 553.

Here, the jurors heard Hernandez Sierra agree N.M. was devastated by their encounter after the word "devastated" was defined as meaning

forever injured or damaged and probably unable to ever again trust men. 6/5/19 RP 440. Arguments evoking an emotional response are appropriate if restricted to the circumstances of the crime. *Brett*, 126 Wn.2d at 214 (referencing *State v. Rice*, 110 Wash.2d 577, 608–09, 757 P.2d 889 (1988), *cert. denied*, 491 U.S. 910, 109 S.Ct. 3200, 105 L.Ed.2d 707 (1989)). In response to the attack on N.M.’s credibility, it was not misconduct to argue jurors should not expect N.M. to have fought back as Hernandez Sierra lifted her up the stairs and should not expect her to remember on the witness stand every detail of a traumatizing event that happened months before. The argument was a fair response to counsel’s contentions, was based on properly admitted evidence, and not overly dwelt upon. It does not compare to a poem with vivid imagery describing the emotional effect of rape on its victims, as in *Clafin*, 38 Wash.App. at 850. Nor was it delivered from N.M.’s first-person perspective, as in *Hawthorne v. United States*, 476 A.2d 164 (D.C. 1984) and *Pierce*, 169 Wash. App. at 553.

This Court should find the prosecutor’s comments, while likely provoking an emotional response, were grounded in trial evidence, fairly responded to defense counsel’s attack on N.M.’s credibility, and were not improper. There was no misconduct.

- d. Telling the jurors the case was in their hands, in the context of the state's total closing argument, did not misstate the jury's duty to determine whether the state proved its case beyond a reasonable doubt.

Hernandez Sierra does not explain how the prosecutor's fable about the old man, the boy, and the bird implies the jury has a duty to solve a case or find the truth. The fable teaches that control over whether the bird lives or dies lies with the person holding the bird. The fable does not imply the jurors were to improperly "search for the truth." *State v. Emery*, 174 Wn. at 760; *Lindsay*, 180 Wn.2d at 437. The fable did not encourage "filling in the blanks" or tell the jury it had to articulate reasonable doubt, as happened in *State v. Walker*, 164 Wn. App. 724, 731, 265 P.3d 191 (2011).

The junior prosecutor's closing argument covered the state's burden and the jury's duty to consider only the evidence, base its decision on whether the state's evidence proved the charges beyond a reasonable doubt, and not be swayed by emotion. 6/6/19 RP 482–83. She argued the persuasiveness of the evidence supporting each element of three charges.. 6/6/19 RP 484–97. Viewed in the context of the junior prosecutor's earlier argument, nothing in the prosecutor's "case is in your hands" comment was an appeal to decide the case on an improper basis. It is not improper to say a "defendant will be set free or held to account by a jury's decision;

that is indeed the jury's responsibility and function." *State v. McNallie*, 64 Wn. App. 101, 111, 823 P.2d 1122 (1992), *aff'd*, 120 Wn.2d 925, 846 P.2d 1358 (1993).

Prosecutorial misconduct requires reversal only if the defendant demonstrates prejudice. *Glasman*, 175 Wn.2d at 704. The inquiry is not whether there was sufficient evidence to convict. Rather, the question is whether the prosecutor's comments deliberately appealed to the jury's passion and prejudice and encouraged the jury to base its verdict on the improper argument rather than on properly admitted evidence. *Id.* at 711.; *State v. Salas*, 408 P.3d 383, 392 (Wash. Ct. App. 2018), *review denied*, 190 Wn.2d 1016, 415 P.3d 1200 (2018). Here, only one of the four comments complained of—"the innocence of children"—is arguably misconduct. In the context of the trial evidence and the state's entire closing argument, it did not encourage the jury Greto punish Hernandez Sierra for violating N.M.'s innocence, nor did it unduly vouch for her credibility. The evidence demonstrated N.M.'s version of events was consistent from the time she first reported the rape, through pretrial interviews, and during trial.

This Court should conclude that in the context of the state's entire closing argument, the "in your hands" comment could not have improperly misled the jury as to its duty, and thus was not misconduct.

C. HERNANDEZ SIERRA’S VERSION OF HIS ADMITTED SEXUAL ENCOUNTER WITH N.M. WAS UNBELIEVABLE, UNREASONABLE, AND SELF-CONTRADICTED. ALTHOUGH PREJUDICE FROM AN IMPROPER REMARK COULD HAVE BEEN NEUTRALIZED BY AN ADMONITION OR CURATIVE INSTRUCTION, PREJUDICIAL IMPACT WAS NEGLIGIBLE BECAUSE THE OUTCOME OF THE TRIAL WOULD NOT HAVE CHANGED. DEFENSE COUNSEL’S FAILURE TO OBJECT TO ANY IMPROPER COMMENT DURING THE PROSECUTOR’S REBUTTAL IS HARMLESS ERROR.

1. *Standard of review and legal principles*

Courts review de novo claims of ineffective assistance of counsel. *State v. Castro*, 141 Wn. App. 485, 492, 170 P.3d 78 (2007). Review of counsel’s performance is highly deferential, carrying a strong presumption of reasonableness. *State v. Day*, 51 Wash.App. 544, 553, 754 P.2d 1021 (1988). If counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim of ineffective assistance. *Day*, 51 Wash.App. at 553, 754 P.2d 1021. Reviewing courts strongly presume counsel’s conduct constituted sound trial strategy and avoid the “distorting effects of hindsight.” *Rice*, 118 Wn.2d at 888–89.

2. *Only one of the prosecutor’s closing remarks was arguably improper, and deciding not to object was within the category of strategic or tactical trial decisions; regardless of whether counsel’s performance was deficient, the result of the trial would not have changed.*

“Counsel’s decisions regarding whether and when to object [to a prosecutor’s remarks] fall firmly within the category of strategic or tactical

decisions.” *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007).

“ ‘Only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal.’ ” *Johnston*, 143 Wash.App. at 19, 177 P.3d 1127 (quoting *State v. Madison*, 53 Wash.App. 754, 763, 770 P.2d 662 (1989)).

The prosecutor’s statement to the jury that everyone could believe in the abiding innocence of children could not have critically prejudiced Hernandez Sierra, considering the inconsistent and unreasonable testimony he offered in his defense.

Here, a sympathetic teenage witness had recounted her confusion, terror, and despair at being raped by her stepfather less than 24 hours after spraining her ankle badly enough it was swollen and turning purple, 6/3/19 RP 84, and she had to stay home from school. 6/3/19 RP 91. She had told the jury she felt frozen, that she never expected this from her stepfather. 6/3/19 RP 113. Resistance was futile. 6/3/19 RP 114, 118. The SANE nurse testified tears ran down N.M.’s face during the sexual assault examination, that she turned and looked away from LaChapelle. 6/3/19 RP 227. N.M. would not let LaCapelle examine her anus or vagina. 6/4/19 RP 148. After the exam, she lay on a stretcher, crying. 6/4/19 RP 148. Quincy Police Sergeant Fuller described N.M. as “possibly in shock, not connected, just sitting there.” 6/4/19 RP 176.

Declining to object to a statement about “the innocence of children” was a reasonable strategic decision when considering the possible ill-will it could have provoked among some of the jurors. Without a long legal explanation, it could have appeared counsel objected to the idea children were innocent. If that were the case, an objection could have hurt Hernandez Sierra, regardless of a curative instruction or admonition.

Regardless of whether counsel’s performance was deficient, he cannot show prejudice—the result of the trial would not have changed. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Hernandez Sierra’s version of his admitted sexual encounter with N.M. was implausible and self-contradicted. As the state argued in closing, it was beyond belief Hernandez Sierra had innocently returned upstairs after a narrow escape from his first bedroom encounter with N.M., the one in which he said she threatened to tell her mother he touched her if he refused to shave her. 6/6/19 RP 492. Although he testified he had to get back to work and his time was limited, Hernandez Sierra said when he returned to the bedroom in which the semi-nude N.M. awaited, he was suddenly so tired he lay down on the bed just go to sleep. 6/5/19 RP 390. The jurors could not have believed that as he was sprawled out on his back, innocently falling asleep, N.M. straddled him, flirted with him, and seduced him. 6/5/19 RP 390–91. The prosecutor reminded the jury

Hernandez Sierra testified on direct examination he had an erection, but on cross-examination claimed he did not. 6/6/19 RP 493. In rebuttal closing argument, the prosecutor argued it was unreasonable to believe N.M. would want to seduce her stepfather when she had just sprained her ankle, and her four-year-old sister was downstairs. 6/6/19 RP 549.

The jury likely did not believe Hernandez Sierra was afraid to countermand his stepdaughter when she told him to just be quiet and do as she demanded. 6/5/19 RP 391. It is also likely that at least a few jurors would have wondered why, if N.M. regularly kissed and snuggled with him on the bed whenever his wife left the house, he never told his wife. 6/5/19 RP 399. The jury could, and likely did, conclude N.M.'s behavior and demeanor during her SANE exam and with Sgt. Fuller was not that of a seductive little temptress who orchestrated a fling with her stepfather to get her mother a U Visa. They could, and likely did, logically conclude the evidence established she was a traumatized child who suffered forcible rape. In that case, multiple objections from defense counsel during the prosecutor's rebuttal closing argument risked offending and irritating the jurors. Failure to object was not only harmless error. It was wise trial strategy.

This Court should conclude defense counsel based his decision not to object on legitimate trial tactics, and that, regardless of an objection, the

outcome of the trial would not have changed. There was no ineffective assistance of counsel.

IV. CONCLUSION

This Court should affirm Hernandez Sierra's convictions.

DATED this 17th day of August, 2020.

Respectfully submitted,

GARTH DANO
Grant County Prosecuting Attorney

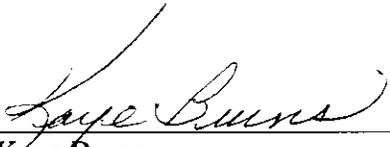
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CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

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Dated: August 17, 2020.



Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

August 17, 2020 - 10:36 AM

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