102792-3

NO: NEXU

COA # 84382-6-I

SUPREME COURT WASHINGTON STATE

STATE OF WASHINGTON

RESPONDENT

V.

NICETO AMOR CANETE

APPELANT

PETITION FOR REVIEW

RAP 13.4(B)(3)

NICETO CANETE
COYOTE RIDGE CORR. CTR.
DOC NO. 432163
POBOX 769
CONNELL, WA 99326

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B. COURT OF APPEALS DECISION

PETITIONER SEEK REVIEW OF THE COURT OF APPEALS DECISION IN CAUSE # 84382-6-I FILED ON 1-16-2024. A COPY OF THE DECISION IS ATTACHED AS APPENDIX A.

CHALLENGE AND DISPUTE TO FACTUAL FINDINGS

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FOR THE STATEMENT OF CASE SEE APPELANT OPENING BRIEF AT P. 3-16, APPENDIX B, AND THE FACTS BELOW.

ON 1-16-2024 THE COURT OF APPEALS FILED AN OPINION IN THE ABOVE ENTITLE CAUSE DENYING CANETE'S REQUEST FOR RELIEF. CANETE'S APPELATE ATTORNEY DID NOT AND WOULD NOT MOVE FOR REVIEW FOLLOWED.

E. ARGUEMENT WHY REVIEW SHOULD BE

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THE COA HELD THAT BECAUSE CANETE FAILS TO ESTABLISH THAT N.C.'S TESTIMONY IS MATERIAL, RELEVANT OR FAVORABLE, THE TRIAL COURT DID NOT VIOLATE HIS RIGHT IN DENYING HIS MOTION TO AMEND HIS WITNESS LIST. THE COA FAILS TO CONSIDER THE FACT THAT COUNSEL'S FAILURE TO INTERVIEW THIS WITNESS IMPACTED CANETE'S ABILITY TO PROVE MATERIALITY. THIS WITNESS TESTIMONY COULD HAVE BEEN USED TO ESTABLISH THAT CANETE WAS NOT AT THE LOCATION ALLEGED AT THE TIME OF THE INCIDENT. THE COA SHOULD HAVE CONSIDERED THIS FACT.

ISSUE 2. RAP 13.4 (B)(2)&(3) ALLOWS FOR REVIEW OF STATE AND FEDERAL CONSTITUTIONAL ISSUES AND COA DECISION WHICH CONFLICT SUPREME COURT DECISIONS. INNEFFECTIVE ASSISTANCE OF COUNSEL ARE "MIXED QUESTIONS OF LAW AND FACTS" THAT ARE REVIEWED DE NOVO. IN RE PERS. RESTRAINT OF FLEMING, 142 WN. 2D 253, 865, 16 P. 3D 610 (2001). SEE ALSO RCW 13.4 (B)(1)&(2), COA HAS FAILED TO FOLLOW PRECEDENT.

THE COA AGREES THAT CANETE COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS; BUT, DENIED RELIEF STATING THAT "WE DO NOT KNOW WHAT SHE MAY OR MAY NOT HAVE TESTIFIED TO." THIS IS EMBLEMATIC OF COUNSEL'S

FAILURE TO INTERVIEW THIS WITNESS. THE "CIRCULAR REASONS" OF THE COA IS THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO INTERVIEW SAID WITNESS YET FOUND THAT PREJUDICE CANNOT BE SHOWN BECAUSE COUNSEL FAILED TO INTERVIEW SAID WITNESS. THIS IS A LOGICAL FALLACY. THE COA ACKNOWLEDGE THAT THE WITNESS WAS IN A POSITION TO STATE WHETHER CANETE ENTERED THE ROOM WHERE THE ALLEGED CRIME OCCURED. THE PRIOR CASES DEALING WITH FAILURE TO INVESTIGATE AND INTERVIEW WITNESSES HAS NOT REQUIRED A PETITIONER TO PROVE WHAT THE WITNESS WOULD SAY. HAD COUNSEL INVESTIGATED AND INTERVIEWED THIS WITNESS, COUNSEL WOULD HAVE BEEN ABLE TO MAKE A STRATEGIC DECISION IN REGARDS TO THE DEFENSE. CANETE PUT FORTH THAT THE WITNESS WOULD HAVE TESTIFIED THAT CANETE DID NOT ENTER SAID ROOM AT THE TIME IN QUESTION. IN ANY EVENT, THERE IS REASONABLE PROBABILITY THAT THIS WITNESS'S TESTIMONY WAS MATERIAL TO THE DEFENCE. THE DID NOT FOLLOW THE PRECEDENT. IN STATE V. JONES, 183 WN. 2D 327, 352 P. 3D 776 (2015). REASONABLE PROBABILITY THAT TESTIMONY THAT CANETE DID NOT ENTER THE ROOM IN QUESTION WOULD HAVE CHANGED THE RESULT OF THE PROCEEDINGS. CANETE RECIEVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE WASHINGTON STATE AND U.S. CONSTITUTIONS.

ISSUE 3. RAP 13.4 (B)(3) ALLOWS FOR REVIEW OF STATE AND FEDERAL CONSTITUTIONAL ISSUES.

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RCW 9A.44.020 (1), THE NEXUS FOR THE NO-CORROBORATION JURY INSTRUCTION PLACES "UNFAIR" PRACTICES UPON ALL PROCEEDINGS INCLUDING THE COURT OF APPEALS. SINCE 1913 IN THE STATE OF WASHINGTON, THE UNCORROBORATED TESTIMONY OF THE ACCUSER HAS BEEN SUFFICIENT TO WARRANT A CONVICTION IN CASES WHERE THE ACCUSER'S STATEMENTS ARE DENIED BY THE DEFENDANT AND WHERE SUCH A DENIAL IS SUPPORTED BY CORROBORATED EVIDENCE. THIS CREATES AN UNFAIR REVIEW ON APPEAL IN ALL CASES IN VIOLATION WASH. CONST ART 1 § 22.

ISSUE 4. RAP 13.4 (B)(2)&(3) ALLOWS FOR REVIEW OF STATE AND FEDERAL CONSTITUTIONAL ISSUES AND COA

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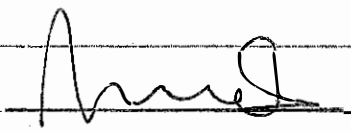
ISSUE 5. RAP 13.4 (B)(1),(2)&(3) ALLOWS FOR REVIEW OF COA DECISIONS INVOLVING STATE AND FEDERAL CONSTITUTIONAL ISSUES AND FOR REVIEW OF COA DECISIONS THAT CONFLICT WITH PRIOR DECISIONS. THE COA STATES THAT CANETE FAILED TO PROVE ANY PREJUDICE ON THE INIVIDUAL ISSUES THUS HE WAS NOT CUMMULATIVELY PREJUDICED. THIS IS NOT THE PROPER STANDARD OF REVIEW. THE COA CITES THE PROPER STANDARD, BUT DOES NOT APPLY IT. THE STANDARD DOES NOT REQUIRE CANETE TO PROVE PREJUDICE AS TO EACH INDIVIDUAL ERROR.

F. CONCLUSION

PETITIONER ASK THE COURT TO ACCEPT REVIEW FOR THE REASONS STATED ABOVE AND TO REVERSE THE COURT OF APPEALS DECISION DENYING HIS APPEAL AND TO REVERSE HIS CONVICTIONS AND TO REMAND HIS CASE TO THE SUPERIOR COURT FOR A NEW TRIAL.

DATED THIS 13TH DAY OF FEBRUARY, 2024

RESPECTFULLY SUBMITTED,



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APPENDIX A:

UNPUBLISHED OPINION FILED 1-16-2024, CASE #84362-6-I

18 PAGES

FILED
1/16/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NICETO AMOR CANETE, Appellant.	No. 84382-6-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — In August 2017, S.W. informed her mother that Niceto Canete, her stepfather, had repeatedly molested her. Canete was later charged with one count of child molestation in the first degree and one count of child rape in the second degree. Although charged in 2017, Canete's trial did not begin until March 2022. Despite this delay, Canete did not interview N.C., S.W.'s younger sister, before trial began. N.C. did not testify and Canete was convicted on both counts. On appeal, Canete raises a variety of issues. He contends that the trial court erred by (1) excluding N.C.'s testimony in violation of his right to compel witnesses and (2) improperly commenting on the evidence by providing a no-corroboration jury instruction. He also asserts that the State interfered with his ability to interview N.C. in violation of his right to counsel and that his counsel was ineffective in failing to interview N.C. before trial. In addition, Canete argues that the prosecutor committed misconduct by improperly speculating as to Canete's first-person thought process and misstating the burden of proof in

closing arguments. Finally, he asserts cumulative error. Finding his arguments without merit, we affirm.

FACTS

Niceto Canete was married to Katherine Romero, S.W.'s mother, from June 2006 to August 2017. Romero had two children prior to the marriage, S.W. and D.R., and Canete and Romero had two children together. Canete, Romero, S.W., and her two younger sisters, N.C. and B.C., lived together in Whatcom County.

Canete was a strict stepfather, who punished S.W. by grounding her, pinching her or hitting her with a yardstick. S.W. did not like having him in the home.

While living together, Canete sometimes woke S.W. up by sitting beside her on her bed. S.W. recalled on one occasion, when she was 11 or 12 years old, that Canete woke her up by putting his hands in her pants, touching her bottom and digitally penetrating her vagina. He stopped when she moved.

Another time, after N.C. told Canete that S.W. had an iPod[1] she was not supposed to have, Canete sent S.W. to her room as punishment. Later that evening, Canete entered her room while she was sleeping and digitally penetrated her. When S.W. flinched, Canete stopped, rubbed her face to put her back to sleep and left the room. S.W. eventually moved to the living room, waiting for her mother to come home.

[1] An iPod is a pocket-sized device used to play music files.

When Romero arrived, S.W. waited until Canete left the room and told her mother what he had done. Romero sent S.W. to her bedroom, asking her to lock the door, before confronting Canete. Romero ended the relationship and ordered Canete out of the house. A month later, S.W. disclosed the assault to a school counselor who, as a mandatory reporter, informed law enforcement.

In August 2017, the State charged Niceto Canete with one count of child molestation in the first degree and one count of child rape in the second degree.

Pre-Trial Motions

Although Canete was charged in 2017, his trial did not begin until five years later, in March 2022. The same attorney represented Canete from filing through trial. In the five years prior to trial, Canete's attorney completed some defense interviews in 2018, some more before the omnibus hearing in 2022, and some the week prior to trial. Canete's attorney did not indicate the need for any additional discovery. Both parties confirmed the case was ready for trial.

The week before trial, Canete's attorney interviewed E.H., a friend of S.W. to whom S.W. had disclosed the abuse. In this interview, E.H. recounted her own experience with Canete, which was similar to S.W.'s. The morning of the trial, the State moved to admit E.H.'s testimony under ER 404(b). Canete objected, arguing that the introduction of evidence was untimely. The court noted that it was a close call but agreed that the request was untimely and denied the ER 404(b) motion.

Following denial of the motion, Canete sought an order allowing him to amend his witness list and depose N.C. Defense counsel sought an interview

with N.C. because she was present in the home the day of the second incident and could potentially provide relevant information. Neither the State nor defense counsel had N.C. on their witness list. Law enforcement never interviewed her.

In the several months leading up to trial, defense counsel sent five e-mails to the State concerning N.C.'s testimony. The first four e-mails discussed defense counsel's need to interview S.W.'s siblings. They did not specify N.C. in particular and did not explicitly request the State's help in facilitating the interviews. The fifth e-mail, sent a week before trial, specifically listed N.C. and stated that defense counsel had been seeking to interview the siblings for three years.

As N.C. was a minor, defense counsel asserted that all of the e-mails were requests for the State to help facilitate the interview. The State argued that they did not understand that Canete was seeking assistance to interview N.C. until the last e-mail, sent six days before trial began. Two days after the last e-mail, the State informed Canete that N.C.'s mother would not agree to an interview.

The court denied defense counsel's motion to amend the witness list and depose N.C., stating that the request to call N.C. as a witness was untimely, rendering compelling a deposition unnecessary.

Trial

Following S.W.'s testimony at trial, the State moved to amend the information to charge Canete with child molestation in the second degree instead of in the first degree. Defense counsel did not object.

Prior to closing, the court heard arguments on the parties' proposed jury instructions. The State proposed a no-corroboration instruction, reasoning that it was not necessary for the alleged victim's testimony to be corroborated in order for the jury to convict Canete. Defense counsel objected, arguing that the no-corroboration instruction constituted improper judicial comment on the evidence. The court proceeded with the instruction over the objection, noting that the instruction was a correct statement of the law.

During closing, the State made a few generalized statements about child sex abuse survivors and stated that its burden was to prove the case beyond a reasonable doubt as to the "material elements." The prosecutor also argued, in the first-person, what he suggested to be Canete's possible thought process while allegedly committing the crimes. Defense counsel did not object to any of these statements in closing.

Following jury deliberations, Canete was convicted of child molestation in the second degree and rape of a child in the second degree. The court imposed a standard range of 36 months for child molestation in the second degree and a minimum of 119 months for rape of a child in the second degree. Canete appeals.

ANALYSIS

Right to Present a Defense, to Compel Witnesses, and to Counsel

Canete asserts that the trial court violated his constitutional right to present a defense and compel witnesses when it denied his motion to amend his witness list and depose N.C. Canete also argues that the State violated his right

to counsel by denying him the opportunity to interview N.C. We conclude that Canete's rights were not violated both because he failed to establish that N.C.'s testimony would be material and favorable to the defense and because he had ample time to interview N.C. and failed to do so.

Whether a defendant's Sixth Amendment right has been violated presents a legal question that we review de novo. State v. Arndt, 194 Wn.2d 784, 797, 453 P.3d 696 (2019). And we review the trial court's evidentiary rulings for an abuse of discretion. Arndt, 194 Wn.2d at 797. The trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Hampton, 184 Wn.2d 656, 670, 361 P.3d 734 (2015).

The Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution provide a criminal defendant with the right to present a defense. State v. Jennings, 199 Wn.2d 53, 63, 502 P.3d 1255 (2022). This includes the right to compel witnesses at trial. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). "This right is a fundamental element of due process." Taylor v. Illinois, 484 U.S. 400, 410, 109 S. Ct. 646, 98 L. Ed. 2d 798, (1988). But this right is not absolute. State v. McCabe, 161 Wn. App. 781, 787, 251 P.3d 264 (2011). For example, defendants can only compel witnesses who are material to the defense and who offer relevant testimony. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). The defendant has the burden of showing materiality, Smith, 101 Wn. 2d at 41, and relevant evidence is evidence "having any tendency to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

More than the mere lack of testimony is necessary to establish a violation of the right. State v. Lizarraga, 191 Wn. App. 530, 552, 364 P.3d 810 (2015). To create such a violation, state conduct must impermissibly interfere with a defendant's ability to present a defense and that interference must cause the loss of material evidence, favorable to the defendant. McCabe, 161 Wn. App. at 787.

Canete asserts that the court's denial of his motion to depose N.C. and amend his witness list violated his right to compel witnesses. Because Canete fails to establish that N.C.'s testimony is material, relevant or favorable, the trial court did not violate his right in denying his motion to amend his witness list. The court's denial of Canete's motion to depose N.C. then flowed from the fact that she would not be allowed to testify. As the ability to depose a witness is simply a discovery issue, denying the request to depose a witness cannot by itself violate Canete's right to present a defense. See, e.g. State v. Mankin, 158 Wn. App. 111, 121, 241 P.3d 421 (2010) (noting that a criminal defendant is not, as a matter of right, entitled to depose prospective witnesses); CR 26 (depositions are governed by the rules of discovery).

Canete concedes that "it is difficult to determine the precise impact of N.C.'s testimony on the evidence at trial because she was never interviewed."[2] Such an interview, he continues, "*may* have produced evidence critical to the

[2] N.C. did take part in a forensic interview with Gail Tierney, a Child Forensic Interviewer from the Brigid Collins House in Whatcom County. She did not speak with the State or Defense Counsel.

defense." (Emphasis added.) Even in his briefing, Canete admits that it is only "*possibl*e that N.C.'s testimony would have had a tremendous impact on the defense's case." (Emphasis added.) Canete cannot speak to what N.C.'s testimony might be because N.C. was never interviewed by counsel or law enforcement. The only information Canete presents is his supposition as to what she saw and might say. He could not even provide hearsay statements about the likely testimony. And because he cannot speak to what N.C.'s testimony might be, Canete fails to establish materiality, relevance, or favorability. The court did not violate Canete's right to compel witnesses.

Canete also asserts that his right to counsel was violated because he was unable to interview N.C. This violation, he argues, arose from the State's refusal to facilitate an interview, which then prevented him from interviewing N.C. before trial. But Canete mischaracterizes his efforts to interview N.C.

Defense counsel's purported reason for not interviewing N.C. on his own was that it was common practice for the State to help facilitate interviews with children. Over the course of the six months leading up to trial, defense counsel sent five e-mails to the State. Each e-mail noted that defense counsel had yet to interview S.W.'s siblings. But contrary to Canete's assertions, none of the e-mails actually ask the State for help in facilitating the interviews. In fact, it is not until the fifth e-mail that defense counsel even mentions N.C. by name. Even then, the e-mail only states, "I have been seeking to interview [S.W.'s] siblings for

about 3 years."[3] And when Canete made clear that he wanted help facilitating the interviews, the State responded within two days. The record does not demonstrate that the State interfered with Canete's ability to interview N.C. Without state interference, Canete fails to establish a violation of his right to counsel.

Neither the court nor the State violated Canete's right to present a defense, right to compel witnesses, or right to counsel.

Ineffective Assistance of Counsel

Canete next argues that defense counsel's failure to interview N.C. in the five years prior to trial constitutes ineffective assistance of counsel. Because Canete does not establish that the outcome of the trial would have been different, we conclude that defense counsel's actions do not constitute ineffective assistance of counsel.

Ineffective assistance of counsel claims are "mixed questions of law and fact" that we review de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

To demonstrate ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the defendant was prejudiced by that deficient performance. In re Pers. Restraint of Crace, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012). To establish deficient performance, the defendant must show that counsel's performance fell below an objective standard of

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[3] The record before us does not show any further evidence that defense counsel had actually sought these interviews for three years.

reasonableness. State v. Goldberg, 123 Wn. App. 848, 852, 99 P.3d 924 (2004). This includes failing to interview witnesses and giving no reason for doing so. State v. Jones, 183 Wn.2d 327, 352 P.3d 776 (2015). " 'To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different.' " Goldberg, 123 Wn. App. At 852 (quoting State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)).

It is the defendant's burden to overcome the " 'strong presumption' " that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995) (quoting State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)). " 'If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.' " Goldberg, 123 Wn. App. At 852 (quoting McNeal, 145 Wn.2d at 362).

Canete contends that counsel's performance was deficient in failing to interview N.C. in the five years preceding trial. We agree.

In arguing that the State violated his right to present a defense, both Canete and the State point to five e-mails that indicate defense counsel's intent to interview N.C. While defense counsel's assertion that it is common practice for the State to arrange interviews with minors may be true, his e-mails to the State span only the six months leading up to trial and do not specifically ask for the State's help. Defense counsel had four and a half years before that to interview N.C. The State concedes that defense counsel "willfully failed to take

timely steps to interview N.C." Defense counsel had five years in which to interview N.C. and confirmed the case for trial, not having done so.

Jones is instructive here. Failing to interview a witness without real reason, rather than out of strategy, constitutes deficient performance. Jones, 183 Wn.2d at 340. Canete asserts that, as N.C. was in the home the evening of the second incident, she could have been able to testify as to whether Canete ever entered S.W.'s room. Defense counsel knew from the beginning of the case that N.C. was in the home, and given that the police did not interview her, the only way to find out what she knew would be to interview her himself. Defense counsel failed to do so. Defense counsel's conduct is analogous to Jones: in failing to interview N.C., rather than making the strategic decision not to, defense counsel's performance was deficient.

Although we agree that counsel's performance was deficient, we conclude that Canete fails to demonstrate that deficiency caused prejudice. Canete concedes that "it is difficult to determine the precise impact of N.C.'s testimony on the evidence at trial because she was never interviewed." Such an interview, Canete continues, "*may* have produced evidence critical to the defense." (Emphasis added.) As N.C. was never interviewed by the State, defense counsel or law enforcement, we do not know what she may or may not have testified to. And the possibility of unknown testimony, along with Canete's supposition as to what she might say, is not enough to establish that, but for counsel's deficient performance, the result of the proceeding would have been

different. Without providing any evidence establishing that the outcome of the trial would have been different, Canete cannot establish prejudice.

Defense counsel's actions did not constitute ineffective assistance of counsel.

Jury Instruction

Canete contends that the court made an improper judicial comment on the evidence by giving a no-corroboration instruction. We disagree.

"Whether a jury instruction is legally correct is reviewed de novo." State v. Chenoweth, 188 Wn. App. 521, 535, 354 P.3d 13 (2015). A challenge to jury instructions is reviewed in the context of all instructions given. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Article IV, section 16 of the Washington State Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A trial judge improperly comments on the evidence if it gives a jury instruction that conveys to the jury their personal attitudes toward the merits of the case. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). On the other hand, a jury instruction that does no more than accurately state the applicable law does not constitute an impermissible comment on the evidence. State v. Brush, 183 Wn.2d 550, 557, 353 P.3d 213 (2015).

RCW 9A.44.020(1)[4] provides "[i]n order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated." Washington courts have consistently upheld no-corroboration instructions as correct statements of law under RCW 9A.44.020(1) when the instruction is given in reference to an alleged victim's testimony in sex offense cases. See, e.g., Chenoweth, 188 Wn. App. At 537 (holding that corroboration is not required in sex offenses); State v. Zimmerman, 130 Wn. App. 170, 182-83, 121 P.3d 1216 (2005) (holding that a no-corroboration instruction is not reversible error).

While instructing the jury, the court stated that "in order to convict a person of child molestation in the second degree or rape of a child in the second degree, it is not necessary that the testimony of the alleged victim be corroborated." (Capitalization omitted.) This is an accurate statement of the law and therefore the instruction does not constitute an impermissible comment on the evidence.[5]

Prosecutorial Misconduct

Canete raises three instances of prosecutorial misconduct, arguing that the prosecutor (1) improperly appealed to the passions and the prejudices of the jury by arguing generalizations about all child sex cases, (2) argued Canete's first-person thought process based purely on speculation and not on facts in

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[4] The chapter includes both rape of a child in the second degree and child molestation in the second degree, the charges at issue. RCW 9A.44.076, .086.

[5] Canete's counsel acknowledged the accuracy of this jury instruction during closing arguments ("[T]he State is correct and it's a correct statement of the law that testimony is evidence, and corroboration is not required.").

evidence, and (3) misstated the burden of proof. As Canete does not demonstrate a substantial likelihood that the prosecutor's statements prejudicially affected the jury's verdict or that any potential prejudice could not have been fixed by a curative instruction below, we conclude that the prosecutor's actions did not constitute prosecutorial misconduct.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's conduct was both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). To establish prejudice, the defendant must show a substantial likelihood that the error affected the jury verdict. State v. Molina, 16 Wn. App. 2d 908, 918, 485 P.3d 963 (2021). Where a defendant does not object at trial, he is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured any resulting prejudice. Emery, 174 Wn.2d at 760. Under this heightened standard, the defendant must show that (1) no curative instruction would have obviated any prejudicial effect on the jury, and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury. State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). Counsel's decision not to object or to request a curative instruction "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

We review claims of prosecutorial misconduct for an abuse of discretion, viewing the allegedly improper statements within the context of the entire case.

Molina, 16 Wn. App. 2d at 918. Here, Canete did not object to any of the three instances of alleged misconduct and therefore his claims are subject to a heightened standard of proof.

Canete first asserts that the prosecutor improperly appealed to the passions and prejudices of the jury by arguing generalizations about all child sex cases. But Canete fails to establish misconduct or prejudice. The prosecutor made two statements referencing child sex abuse survivors broadly. He stated first, "[S.W.] is a survivor of child sex abuse, and survivors of child sex abuse have no witnesses." A few minutes later he continued, "[c]hild sex abuse survivors have to find their voices." These statements, Canete argues, asked the jury to convict Canete "on behalf of all 'survivors' in 'child sex abuse cases' " rather than the facts of the case.

However, allegedly improper statements should be considered in the context of the prosecutor's entire argument. Molina, 16 Wn. App. 2d at 918. The prosecutor made these two comments, in passing, in the context of discussing details specific to this case. When viewed in the context of the prosecutor's entire closing argument, these statements were unlikely to result in substantial prejudice and any resulting prejudice could have been fixed by a curative instruction.

Canete next asserts that the prosecutor committed misconduct in arguing Canete's first-person thought process based purely on speculation and not on facts in evidence. The State concedes that this reference to Canete's first-person thought process was improper. We agree. However, the prosecutor's

statements here were limited in scope and tied closely to S.W.'s testimony and to Canete's behavior. While the prosecutor's statements of "[h]ow far can I go? . . . [h]ow far can I get with this? . . . [c]an I go a little further?" were improper, they were not the focus of the State's argument. Furthermore, those three statements were a small part of the entire closing argument. Simply pointing them out is not enough to establish that the misconduct had a substantial likelihood of affecting the jury.

Lastly, Canete argues that the prosecutor committed misconduct by misstating the burden of proof. Again, allegedly improper statements should be considered in the context of the prosecutor's entire argument. Molina, 16 Wn. App. 2d at 918. The prosecutor did misstate the burden of proof once, stating "[w]hat's important about that is that we have to prove our case beyond a reasonable doubt as to material elements of the charge okay? . . . [B]ut we don't have to prove everything about the case beyond a reasonable doubt." But he later stated the correct burden of proof, noting that "[n]ow, to convict the defendant of child molestation in the second degree, the following elements must be proved beyond a reasonable doubt, this is what I'm referring to." (Capitalization omitted.) He then listed each element as it connected to the facts of the case. He did the same for the charge of rape of a child in the second degree. Additionally, both the court and defense counsel stated the correct burden of proof. Viewed within the context of the entire closing argument, the misstatement was unlikely to result in substantial prejudice and any resulting prejudice could have been easily remedied by a curative instruction.

The prosecutor's actions did not result in prosecutorial misconduct.

Cumulative Error

Canete argues that if we are not satisfied that any of the previously discussed errors alone are enough to warrant reversal, the combined effects denied Canete a fair trial under the cumulative error doctrine. As there is little error, the combined effect is not enough to warrant a reversal.

The cumulative error doctrine applies when "several trial errors standing . . . alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). "The test to determine whether cumulative errors require reversal of a defendant's conviction is whether the totality of circumstances substantially prejudiced the defendant and denied [them] a fair trial." In re Pers. Restraint of Cross, 180 Wn.2d 664, 690, 327 P.3d 660 (2014) (abrogated on other grounds by State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018)). The defendant bears the burden of proving cumulative error. In re Pers Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994).

Here, there are only two established trial errors. The first is defense counsel's failure to interview N.C. The second is the prosecutor's improper speculation into Canete's first-person thought process. In both instances, however, Canete has failed to prove any prejudice. Because reversal under the cumulative error doctrine requires circumstances that substantially prejudiced the defendant and Canete has failed to show prejudice, reversal is not warranted.

The combined effects do not warrant a reversal under the cumulative error doctrine.

We affirm.

Smith, C.J.

WE CONCUR:

Feldman, J.

Dwyer, J.

INMATE

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APPENDIX B:

APPELANT'S OPENING BRIEF 3-15-2023, CASE #84382-6-I
79 PAGES

Court of Appeals No. 84382-6-1
Whatcom County Superior Court No. 17-1-00981-7

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

State of Washington,

Plaintiff/Appellee,

v.

Niceto Canete,

Defendant/Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Lee P. Grochmal, Judge

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

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2. Mr. Canete's right to effective assistance of counsel was violated when counsel failed to interview a key witness in the five years the case was pending prior to trial.

3. Mr. Canete's right to due process was violated when the court improperly commented on the evidence during trial by instructing the jury that no corroboration of the alleged victim's testimony was required for conviction.

4. Mr. Canete's right to a fair trial was violated when the prosecutor committed misconduct during closing argument by generalizing child sex cases, stepping into the shoes of Mr. Canete, and misstating the burden of proof.

5. Cumulative error deprived Mr. Canete of his due process right to a fair trial.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. Canete's rights to compel witnesses and to counsel under the Sixth Amendment to the United States Constitution and Article II, Section 22 of the Washington Constitution were violated when the trial court denied Mr. Canete's motion to amend the witness list and depose a key witness, and the prosecutor's actions prevented defense counsel from interviewing the witness?

2. Whether Mr. Canete's right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article 1 Section 22 of the Washington Constitution was violated when defense counsel failed to interview a key witness in the five years the case was pending prior to trial?

3. Whether the trial court violated Article IV Section 16 of the Washington Constitution when it instructed the jury that the alleged victim's testimony need not be corroborated for conviction?

4. Whether Mr. Canete's right to a fair trial was violated when the prosecutor inflamed the passions and prejudices of the jury and argued facts not in evidence during closing argument?

5. Whether cumulative error deprived Mr. Canete of his due process right to a fair trial?

III. STATEMENT OF THE CASE

On August 9, 2017, the State charged Niceto Canete in the Whatcom County Superior Court with one count of child molestation in the first degree and one count of rape of a child in the second degree based upon alleged acts of sexual abuse involving his stepdaughter, S.W. CP 1 – 2. The State alleged that the offense in count one occurred on or about the 13th day of

July, 2015 through the 12th day of July, 2016 and that the offense alleged in count two occurred on May 12, 2017. CP 1 – 2.

Mr. Canete was married to Katherine Romero from June 2006 to August 2017. RP 379, 380. When they married, Ms. Romero had two children from a previous relationship, D.R. and S.W. RP 380. Mr. Canete and Ms. Romero then had two children of their own together, N.C. and B.C. RP 380. The family of six lived together at a house on Goshen Road in Bellingham, Washington. RP 148. The charges in this case stem from allegations made by Mr. Canete's nonbiological stepdaughter, S.W., on two occasions. CP 1 – 2.

S.W. alleged that on one occasion when she was around 11 or 12 years old, Mr. Canete woke her up in the morning by sticking his hand in her pants. RP 185 – 87. Additionally, S.W. alleged that another incident occurred on May 12, 2017. RP 157. On that day, S.W. alleged that Mr. Canete made her go to her bedroom after he discovered an iPod in her backpack, which she was not supposed to have because she was grounded. RP 215.

S.W. alleged that Mr. Canete later entered her room while she was sleeping and digitally penetrated her vagina. RP 158. That day, Ms. Romero, S.W.'s mother, ordered Mr. Canete to leave the home. RP 386.

Although Mr. Canete was charged in this matter in 2017, his trial did not begin until approximately five years later, on March 21, 2022. RP 6. Mr. Canete was represented at trial by the same attorney who had represented Mr. Canete since the case was filed in 2017. RP 6, 87. The trial lasted seven days and included the introduction of testimony from numerous witnesses, including Mr. Canete. RP 6 – 11.

In preparation for trial, defense counsel worked with the State to interview the potential witnesses for the case. In particular, defense counsel requested to interview N.C., S.W.'s younger half-sister. RP 81. Defense counsel wanted to interview N.C. because she was present in the home on May 12, 2017, when the alleged incident underlying the rape charge occurred. RP 655. In particular, N.C. was the one who informed Mr.

Canete that S.W. had an iPod in her backpack, which S.W. was not supposed to have while she was grounded and led to S.W. being sent to her room. RP 656. Defense counsel believed that N.C. could provide relevant and potentially crucial information about what happened on May 12, 2017. RP 81. A forensic interview of N.C. was included in discovery provided to the defense. RP 84.

Defense counsel asked the State to assist in facilitating an interview with N.C. because N.C. was a minor, and her mother, Katherine Romero, is also S.W.'s mother. RP 82. Defense counsel informed the State of its request to interview N.C. on several occasions. CP 47 – 49. Despite defense counsel's numerous requests, and as the trial date approached, the State never responded to defense counsel's request to interview N.C. CP 47 – 49. It was not until the week prior to trial, after the parties had confirmed that they were ready for trial, that the State finally informed defense counsel that Ms. Romero, N.C.'s mother, would not agree to a defense interview of N.C. RP 82.

Defense counsel was thus left with only one mechanism for interviewing N.C., and on March 22, 2022, filed a motion to depose N.C. under CrR 4.6 and to add N.C. to the defense witness list. CP 40 – 49. The trial court heard the motion the morning of March 22, 2022. RP 80. Defense counsel argued that it is normal practice to request an interview of a child witness who is more available to the State be facilitated through the State, that he had been continuously asking the State to interview N.C. for months, and that the State had not let defense counsel know that the witness would not be made available until the week before trial. RP 88.

Defense counsel explained that having worked in Whatcom County for some time and having developed a relationship with the prosecutor's office, he believed that the best way to interview N.C. would be through the State:

> . . . we have a relationship in this case. A small town, we know each other, and my experience as I indicated that Mr. Cockern pointed out, if I want to interview a child of, of a sibling of the

> victim in this case, a child of the household, the right thing to do is to go through the state.

RP 88. Defense counsel further explained his frustration with the State's behavior to the court:

> When I finally confronted him during the interview last week . . ., I said when are we going to do these interviews with these siblings, and that's when he finally told me that the mother, Katherine, was not in support of that, and she was not going to allow that, and so the State was not going to facilitate that. So literally, I've been asking to interview these witnesses for months. My experience with Mr. Corkern is he's pretty straightforward, and he doesn't hide the ball, but in this case, I can't help but feeling that he's done that.

RP 82. Had the State communicated its position to defense counsel earlier, defense counsel argued that he would have filed the CrR 4.6 motion much sooner than the day of trial. RP 83.

Additionally, defense counsel argued that counsel for the State was aware for months before trial that defense wanted to interview N.C. and that defense counsel agreed to state they

were ready for trial although the parties still had several interviews to complete given the age of the case. RP 90. In fact, many of the witness interviews were not conducted until the week before trial in this case, after the parties had confirmed for trial on February 23, 2022. RP 90.

In response, the State did not deny that it knew defense counsel wanted to interview N.C., but argued that because N.C. was not listed on the State's witness list, the State had no obligation to facilitate an interview with N.C. RP 86.

The trial court acknowledged that it was a difficult situation given the witness was a child witness available to the State:

> I appreciate that it's difficult when it's a child witness, and you know, you try to go through the state, and I think the state wants you to try to go through them to arrange an interview like that, rather than trying to do it without them there. So I do appreciate that it is a difficult position to be in . . .

RP 86.

However, the court ultimately denied the defense motion to depose N.C. and add her to the defense witness list. RP 92. The trial court reasoned that it was too late in the process for defense counsel to amend its witness list and that defense counsel should have added N.C. to its list and asked for deposition at an earlier date, particularly prior to the parties confirming for trial. RP 89. Defense counsel admitted that he should have made his CrR 4.6 request sooner in the case, since the case had been pending for almost five years, stating, "Should I have done things differently? Yes, I think everything in this case could have been done differently." RP 89. As a result, N.C. was never interviewed by the defense and did not testify at trial.

During its case in chief, the State presented the testimony of several witnesses, including S.W., Katherine Romero, various CPS workers, a forensic interviewer, S.W.'s school counselor, Detective Ken Gates, and two of S.W.'s cousins. RP 145. After the State presented its case in chief but before resting, the State

moved to amend the information to charge Mr. Canete with child molestation in the second degree instead of the first degree, also amending the charging date period due to testimony from S.W. about her age at the time of alleged incident. RP 644.

During the defense case in chief, Mr. Canete testified on his own behalf, denying all allegations. RP 652. The defense also called Detective Ken Gates during its case in chief, to testify to prior consistent statements made by Mr. Canete during his pre-arrest interview in this case. RP 774.

On March 30, 2022, the trial court heard argument on the parties' proposed jury instructions. RP 710. The defense submitted two objections to the State's proposed instructions. The defense's first objection was that instruction 13, a limiting instruction, should have been given at the time the testimony was heard rather than at the conclusion of the testimony. RP 710. Defense counsel's second objection was to instruction number 9, which provided that "In order to convict a person of Child Molestation in the Second Degree or Rape of a Child in the

Second Degree, it is not necessary that the testimony of the alleged victim be corroborated." CP 67.

Defense counsel argued that the no-corroboration instruction was not necessary because there is no Washington Pattern Jury Instruction (WPIC) on the issue and that the instruction constituted a judicial comment on the evidence. RP 718. The State argued that because the trial court has given the same instruction in a past case, and that the past case had not been appealed on that issue, the court should allow the instruction in this case. RP 719. The trial court and the State proceeded to discuss a past case in which they were both involved, but Mr. Canete's defense attorney was not involved. RP 719. While acknowledging that "Mr. Brodsky wasn't here for that case, so it's a bit unfair –," the court heard the State's argument as to why they believed the instruction was proper in past cases, and in this case. RP 719.

Defense counsel countered the State's argument, arguing that the no-corroboration instruction coming from the court,

rather than from the State as argument, is an improper comment on the evidence. RP 722 – 23. Specifically, the defense argued that: "The State seems to want to be relieved of having to argue this to the jury. The State can certainly argue this to the jury, but when they hear it from the court, it is a comment on the evidence here." RP 722. After hearing argument, the court decided to give the no-corroboration instruction, stating that the court is not bound by the WPICs and that the instruction seemed to be a correct statement of the law. RP 723.

During its closing argument, the State argued it had met its burden of proof on both charges through the testimony of S.W. RP 825. The State additionally made several arguments generalizing proof issues in child sex cases:

> She is a survivor of child sex abuse, and survivors of child sex abuse have no witnesses. They have to tell their story. They have to find the courage and the voice to tell their story because there are no witnesses.

RP 811. The prosecutor continued to argue:

> Child sex abuse victims don't have a – they have to do it on their own.

RP 827. In rebuttal, counsel again stated:

> It's a child sex case. In a child sex case, we don't have witnesses. In a child sex case, we didn't have DNA.

RP 849.

Additionally, while arguing that Mr. Canete was guilty of the crimes charged, the prosecutor argued what he thought to be the first-person thought process of Mr. Canete while allegedly committing the crimes:

> He comes into the room, lays in her bed, lays next to her, probably just feeling it out. He lays there. She is not awake. How far can I go? That's what he's done before, right? . . . He's feeling it out. Is she awake? How far can I get with this? Is she going to respond? Can I go a little further?
>
> . . .
>
> It's what he did before. How far can I get? How far can I go? Guess what? You put your fingers in her vagina, it's too far.

RP 815 – 16.

In its closing argument, defense counsel argued that the State had not met their burden of proof on either count. RP 846. Specifically, the defense argued that S.W. did not like Mr. Canete's parenting, and as a result, did anything she could to get him out of the house, including fabricating the allegations against him. RP 834. Defense counsel additionally argued that the case was not adequately investigated, because several witnesses were not interviewed by Detective Gates. RP 830.

On March 31, 2022, the jury began deliberating. RP 856. The jury ultimately convicted Mr. Canete on both counts. RP 856 – 57.

Mr. Canete's sentencing took place on August 9, 2022. RP 863. The State recommended that the court sentence Mr. Canete to the high end of the standard range for both counts, while the defense recommended that the court sentence Mr. Canete to the low end of the standard range on both counts. RP 863, 871. The court ultimately sentenced Mr. Canete to a sentence in the middle

of the standard range on both counts, 36 months of confinement on the child molestation count and an indeterminate sentence of 119 months to life on the rape of a child in the second degree count. CP 115. Mr. Canete timely appealed his conviction. CP 135--36.

IV. ARGUMENT

A. The Trial Court Violated Mr. Canete's Right to Compel Witnesses and his Right to Counsel when it Denied his Motion to Amend the Defense Witness List and to Depose N.C.

The Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington State Constitution guarantee accused persons in criminal cases the right to compel witnesses on their own behalf and the right to counsel. Additionally, the Due Process Clause of the Fourteenth Amendment guarantees that an accused person has a meaningful opportunity to present a complete defense. Holmes v. South Carolina, 547 U.S. 319, 324, 64 L. Ed. 2d 503, 126 S. Ct. 1727 (2006).

i. Mr. Canete's right to compel witnesses was violated when his request to amend the witness list and to depose N.C was denied and he was prevented from interviewing N.C.

A defendant's right to compulsory process includes the right to interview witnesses necessary to his or her defense prior to trial. State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976).

The United States Supreme Court made clear that:

> The right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense . . . Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

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

"[C]riminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 4 L. Ed. 2d 40, 107 S. Ct. 989 (1987). Courts have held, however, that a

defendant's right to compel witness is not absolute: "The Compulsory Process Clause cannot be invoked without the prior planning and affirmative conduct of the defendant . . . The burden of identifying them in advance of trial adds little to these routine demands of trial preparation." See Taylor v. Illinois, 484 U.S. 400, 415, 98 L. Ed. 2d 798, 108 S. Ct. 646 (1988). For example, CrR 4.7 requires parties to submit witness lists to opposing counsel "no later than the omnibus hearing."

A court's decision to exclude evidence at trial is reviewed for an abuse of discretion. State v. Yates, 161 Wn.2d 714, 762 (2007).

In Taylor v. Illinois, the United States Supreme Court examined whether the trial court's exclusion of a defense witness as a remedy for the defense's late disclosure of the witness constituted a Sixth Amendment violation of the right to compel witnesses. 484 U.S. 400 (1988). In that case, the defendant made a motion to "amend discovery" on the second day of trial, after two State witnesses had already testified, to add a witness to its

witness list. Id. at 404. After the defense made an offer of proof about what the witness would testify to and the court briefly examined the witness, the trial court stated that it had a "great deal of doubt" about the truthfulness of the witness's testimony and also found that the defense's violation of the discovery rules was "willful" considering that defense counsel had contacted and interviewed the witness the week prior to trial without informing the state. Id. at 405. For these reasons, the trial court denied the defense's request, excluding the witness's testimony. Id. The defendant appealed, arguing that exclusion of the witness altogether was too harsh of a penalty and violated his Sixth Amendment right to compel witnesses. Id. at 406. The Supreme Court held that exclusion of the witness testimony altogether under these particular circumstances did not violate the defendant's Sixth Amendment right to compel witnesses. Id. at 417.

Under Washington law, a failure to produce evidence or identify witnesses in a timely manner is appropriately remedied

by continuing trial to give the nonviolating party time to interview the witness or prepare to address the evidence. State v. Hutchinson, 135 Wn.2d 863, 881, 959 P.2d 1061 (1998). Excluding evidence altogether is an "extraordinary remedy" that should be applied narrowly. State v. Venegas, 155 Wn. App. 507, 521, 228 P.3d 813 (2010). A court deciding whether to exclude evidence must consider (1) the effectiveness of less severe sanctions, (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the witness's testimony will surprise or prejudice the other party, and (4) whether the violation was willful or in bad faith. Hutchinson, 135 Wn.2d at 883.

In Hutchinson, the Washington Supreme Court upheld the trial court's decision to exclude the defense's expert witnesses relating to a diminished capacity defense at trial. Id. The Court held that the above four factors weighed in favor of exclusion of the witnesses. Id. Specifically, the Court held that a continuance or other less severe remedy would not have been effective,

because the reason the witnesses were excluded was due to the defendant's refusal to submit to an evaluation by the State's expert. Id. Although the excluded expert testimony would have been significant, exclusion of the witnesses was proper because a continuance would not have changed anything, unless the defendant decided to submit to the mental examination in the meantime, and because the defendant's discovery violation was willful. Id.

In Mr. Canete's case, the trial court abused its discretion and violated Mr. Canete's Sixth Amendment and Article I, section 22 right to compel witnesses to testify on his behalf when it denied his motion to amend its witness list and depose N.C.

Applying the first factor from Hutchinson to Mr. Canete's case, it appears that the trial court in this case did not believe that lesser sanctions other than denial of the witness's testimony would be effective. RP 92. Defense counsel suggested that the interview with N.C. could take place within a few days, but the court denied the request, stating that the State will have already

put on most of their case by that time. RP 85. It does not appear that the Court ever considered whether a short continuance would remedy the witness issue in this case. This is not a situation like in Hutchinson, where nothing would have changed if a short continuance were granted. Rather, in Mr. Canete's case, the defense only needed a few days to coordinate and conduct an interview with N.C. RP 85. Denying the defense request to interview N.C. and exclusion of N.C.'s testimony seems to be a severe remedy in light of the other options the court had, either granting the motion and allowing the defense a few days to interview N.C., or allowing a short continuance.

In analyzing the second factor, it is difficult to determine the precise impact of N.C.'s testimony on the evidence at trial because she was never interviewed. However, an interview with N.C. may have produced evidence critical to the defense as far as the May 12, 2017, incident, since she was allegedly in the home at the time of the incident. Because S.W. testified that Mr. Canete entered her room and Mr. Canete testified that he did not,

it is possible that N.C. could have been able to provide additional information about that critical disputed fact. RP 158, 659. N.C. could have also testified about the dispute between S.W. and Mr. Canete before S.W. was sent to her room that day. Therefore, it is possible that N.C.'s testimony would have had a tremendous impact on the defense's case, the credibility of S.W., and the outcome of trial.

In regard to the third factor, as in Hutchinson, the State certainly cannot claim that the defense's wanting to add N.C. as a witness would be a surprise, considering they had knowledge of the defense's request to interview N.C. for at least several months prior to trial. CP 47 – 49. Additionally, it is unclear how the State would be prejudiced by the defense's interviewing or adding N.C. to its witness list.

Mr. Canete acknowledges that N.C. was not listed on the State's witness list provided pursuant to CrR 4.7. RP 83. However, this is not a situation where the defense brings a surprise witness on the day of trial and expects the court to allow

them to testify. Rather, the circumstances of Mr. Canete's case show that the State was aware of the defense's request to interview N.C., and the State never informed defense counsel that they would not assist in facilitating the interview until the week prior to trial. Additionally, N.C. is a sibling of S.W and N.C.'s forensic interview was included in discovery to the defense. RP 84. It was certainly no surprise that defense counsel wanted to interview N.C. prior to trial. Given that it was the State's belief that N.C. would have no relevant information to provide, it does not appear that the State would be prejudiced by her testimony. RP 87.

Finally, defense counsel's failure to include N.C. on the defense witness list at an earlier date was not willful or done in bad faith. Rather, defense counsel's failure to include N.C. on their witness list at an earlier date was largely due to waiting to hear back from the State about scheduling an interview with N.C. Defense counsel believed that the State, in good faith, would assist in arranging the interview. When the State informed

defense counsel the week prior to trial that they would not assist, defense counsel felt his only option was to make the CrR 4.6 motion.

Therefore, it appears that the first, third, and fourth factors weigh against the trial court's decision to exclude S.W.'s testimony in this case. Because exclusion of the testimony altogether is an "extraordinary remedy," the trial court abused its discretion by preventing N.C. from testifying in this case.

Furthermore, Mr. Canete's case is distinguishable from the facts of Taylor, showing that a sanction less severe than exclusion of testimony altogether is appropriate. Defense counsel's actions in Taylor were egregious compared to defense counsel's actions here. In Taylor, defense counsel waited until the second day of trial after two key state witnesses had already testified to motion the court to include a new, previously undisclosed witness. 484 U.S. at 403. Additionally, defense counsel in Taylor interviewed the witness the week prior to trial and did not inform the State until the second day of trial. Id.

417. In contrast, in Mr. Canete's case, defense counsel brought the motion to amend the witness list during oral argument on motions in limine, prior to jury selection, when the trial could have easily been continued. RP 80. Unlike in Taylor, the State had advance notice on multiple occasions that this was a witness that the defense wanted to interview for trial. CP 47 – 49. Where the court's decision to exclude the witness in Taylor relied on the willful nature of the defense counsel's behavior, that same willfulness is not present in Mr. Canete's case. 484 U.S. at 417. While the exclusion of the witness may have been an appropriate remedy in Taylor, defense counsel's conduct in Mr. Canete's case does not warrant complete exclusion of N.C.'s testimony.

Additionally, there are substantial differences in the nature of the witness testimony sought by the defendant in Taylor and Mr. Canete. The defendant in Taylor sought the testimony of a witness who was not an eyewitness to the incident, and who the court had a strong suspicion may be fabricating his testimony. Id. at 405. Unlike Taylor, in Mr. Canete's case, N.C., because

she was present in the home where the May 12, 2017, incident allegedly occurred, was an eyewitness to the happenings in the home that day. She could also provide critical testimony as to the relationship between S.W. and Mr. Canete. The testimony of N.C. in Mr. Canete's case is far more critical than the testimony that was excluded in Taylor. Therefore, the circumstances of Mr. Canete's case support a far less severe sanction than exclusion of the witness altogether.

Therefore, based on the above factors, the trial court abused its discretion and violated Mr. Canete's right to compel witnesses by excluding the testimony of S.W. altogether in Mr. Canete's case. Mr. Canete's convictions should be reversed.

ii. Mr. Canete's Sixth Amendment right to counsel was violated when the prosecutor's actions denied his counsel the opportunity to interview N.C.

The Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington State Constitution guarantee a defendant a right to counsel. A fair trial contemplates that the defendant will not be prejudiced by the

denial of the right to counsel. Burri, 87 Wn.2d at 180. A defendant is denied the right to counsel where the actions of the prosecution deny the defendant's attorney the opportunity to prepare for trial. Id. Such preparation includes the right to make a full investigation of the facts and law applicable to the case. Id. Counsel has a duty to make a "full and complete investigation of both the facts and the law in order to advise his client and prepare adequately and efficiently to present any defenses he might have to the charges against him." State v. Hartwig, 36 Wn.2d 598, 601, 219 P.2d 564 (1950).

The prosecutor's actions and omissions in this case effectively denied Mr. Canete the right to counsel by preventing him from interviewing N.C. in advance of trial. Early in the case, and well before the case being confirmed for trial, defense counsel communicated to the State that he wanted to interview N.C., the sister of S.W., prior to trial. RP 81. Defense counsel communicated that the reason he wanted to interview N.C. was because she was present in the home when the May 2017

incident, the incident underlying the rape of a child charge, allegedly took place. RP 81. Defense counsel asked the State about an interview with N.C. at least five times over the course of several months. CP 47 – 49. Defense counsel believed that, based on the norms of criminal practice, and in good faith, the State would assist in facilitating the interview, since N.C. was S.W.'s stepsister and the daughter of Katherine Romero, who were both witnesses for the State. RP 7. Despite the numerous requests, the State continued to ignore the requests completely.

Additionally, despite the numerous requests, the State never informed defense counsel that they would not assist in facilitating an interview with N.C. prior to the week before trial. Had the State informed defense counsel at any time prior to the week before trial that they would not facilitate the interview, defense counsel could have added N.C. to the defense witness list and made the CrR 4.6 deposition request well in advance of trial. While it is true that N.C. was not listed on the defense witness list at the time of trial, it is also clear that the State had

notice several months prior to trial of the defense's interest in interviewing N.C. It was therefore due to the actions and omissions of the State, and the belief by defense counsel that the State would, in good faith, either arrange the interview or let defense counsel know in advance they would not be assisting, that N.C. was never interviewed. In other words, the State's failure to timely respond to defense counsel's requests to interview N.C. denied Mr. Canete the opportunity to interview N.C. altogether. The State's actions denied Mr. Canete's right to counsel in this case because defense counsel was prevented from making a "full and complete investigation into the facts . . ." Hartwig, 36 Wn.2d at 601.

Therefore, the prosecutor's actions in this case, and the trial court's denial of Mr. Canete's motion to amend the witness list and depose N.C. violated Mr. Canete's right to counsel by preventing him from interviewing N.C. and using her testimony at trial.

iii. The court's violations of Mr. Canete's right to compulsory process and right to counsel were not harmless.

Error of constitutional magnitude is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). Violation of the defendant's constitutional right to compulsory process and right to counsel is assumed to be prejudicial, and the State has the burden of showing the error was harmless. Burri, 87 Wn.2d at 181 – 82.

Here, the State cannot show that violation of Mr. Canete's Sixth Amendment right to compulsory process or his Sixth Amendment right to counsel in this case was harmless. The State's proving the elements of the charges in this case hinged directly on the testimony of S.W. The defense attempted to attack S.W.'s credibility, arguing that S.W.'s dislike of Mr. Canete led to her doing whatever it takes to remove Mr. Canete from her life. RP 834. N.C., because she was present in the home

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on May 12, 2017, and allegedly was the one who told Mr. Canete that S.W. had violated the terms of her grounding by possessing an iPod in her backpack, would likely have relevant eyewitness information as to the events that occurred that day. However, because she was never interviewed, it is unknown what N.C.'s testimony would be. It is entirely possible that N.C. could corroborate Mr. Canete's assertion that he did not enter S.W.'s bedroom on May 12, 2017. Such testimony would have had severe impacts on the credibility of S.W. and likely changed the outcome of the trial. Therefore, the State cannot show that the result of trial would be the same if N.C. had been called to testify and cannot show that these errors were harmless.

B. Mr. Canete Received Ineffective Assistance of Counsel when Counsel Failed to Interview N.C. During the Almost Five-year Period when the Case was Pending Trial.

In the alternative, Mr. Canete's counsel violated his right to effective assistance of counsel by failing to interview N.C. prior to trial. The Sixth Amendment to the United States

Constitution and Article I, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, the defendant must establish both that the defense attorney's conduct falls below a minimum objective standard of reasonable attorney conduct, and there is a reasonable probability that the outcome would be different but for the attorney's conduct. Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Defense counsel's failure to interview identified and easily accessible witnesses before trial constitutes deficient performance. State v. Jones, 183 Wn.2d 327, 331, 352 P.3d 776 (2015). A claim that counsel was ineffective is a mixed question of law and fact that the appellate court reviews de novo. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

In Jones, the Washington Supreme Court held that defense counsel's performance fell below a reasonable standard of conduct when defense counsel failed to interview three witnesses

who were clearly identified in police reports and where defense [illegible] police counsel gave "no reason" for not interviewing the witnesses prior [illegible] for not interviewing to trial. Id. at 332. The Court reasoned that: "We can certainly [illegible] The Court reasoned defer to a trial lawyer's decision against calling witnesses if that [illegible] decision against lawyer investigated the case and made an informed and [illegible] the case and reasonable decision against conducting a particular interview or [illegible] calling a particular witness." Id. at 340. However, the Court held [illegible] that counsel's failure to interview the witnesses could not be [illegible] to interview classified as a "strategic decision" because "[C]ounsel can hardly [illegible] be said to have made a strategic choice when s/he has not yet [illegible] obtained the facts on which a decision could be made." Id. at [illegible] 341 (quoting Sanders v. Ratelle, 21 F.3d 1446, 1457 (9th Cir. [illegible] 2002). Importantly, the testimony of the three witnesses not [illegible] interviewed in Jones would have supported the defendant's [illegible] theory of the case, which was that the defendant acted in self- [illegible] defense. Id. at 334.

Additionally, the Court in Jones held that the defendant [illegible] the Court in Jones was prejudiced by his counsel's failure to interview the witnesses [illegible] by his counsel's failu

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prior to trial. Id. at 344. The Court reasoned that the case involved a "credibility contest between the State's witnesses and Jones's witnesses" and that the testimony of the three witnesses could have had a substantial impact on the outcome of trial, because their testimony would have supported the defense theory of the case and called the credibility of State witnesses into question. Id.

In contrast, Division One of the Court of Appeals held that a defense counsel did not act unreasonably by failing to interview a witness who was not identified in police reports, who was not an eyewitness to the incident, and whose location and contact information were not readily available to the defense. State v. Wood, 19 Wn. App. 2d 743, 780, 498 P.3d 968 (2021). Unlike in Jones, the court in Wood stated that counsel's decision not to interview the witness was a "reasonable strategic move" because defense counsel chose to direct their case theory in another direction. Id.

In Mr. Canete's case, defense counsel acted unreasonably by failing to interview N.C. prior to trial. Defense counsel expressed interest in interviewing N.C. because he believed she had relevant information about the May 12, 2017, incident. RP 81. Defense counsel's interest in N.C.'s testimony is also shown through his several requests to interview her months in advance of trial. RP 81. Defense counsel should have, at a much earlier date in the almost five years the case was pending trial, when the State was not responding to his requests to interview N.C., attempted to arrange an interview with N.C. himself or moved the court for an order for deposition under CrR 4.6. However, despite the fact that N.C. had not been interviewed, and counsel had not heard from the State as to whether they would assist in facilitating that interview, defense counsel chose to confirm the case as ready for trial on February 23, 2022. RP 89. Overall, defense counsel's decision not to seek an interview with N.C. himself or to ask the court to depose N.C. at an earlier date during

the five-year time period the case was pending was not [illegible] reasonable.

The actions of Mr. Canete's defense counsel are similar to [illegible] defense counsel's actions in Jones. Like in Jones, N.C. was [illegible] identified in the discovery provided to defense counsel, as a [illegible] forensic interview with her was included in discovery. RP. 84. [illegible] Additionally, defense counsel was aware at early stages in the [illegible] case that N.C. was present in the home on May 12, 2017, when [illegible] the alleged incident underlying the rape charge occurred. RP. 81. [illegible] Like the witnesses in Jones, who supported the defense's theory [illegible] of the case, it possible that N.C.'s version of events would have [illegible] supported Mr. Canete's defense and would damage the [illegible] credibility of the State's witnesses. However, despite having this [illegible] knowledge for an almost five-year period prior to trial, defense [illegible] counsel never interviewed the witness. Thus, defense counsel's [illegible] actions in Mr. Canete's case, like in Jones, were not reasonable.

Furthermore, unlike defense counsel in Wood, defense [illegible] counsel's failure to interview N.C. in Mr. Canete's case cannot [illegible]

be classified as a strategic decision. Mr. Canete was charged in this case in 2017, and his trial was not until 2022, five years later. Mr. Canete's defense counsel was involved in Mr. Canete's case from the time it was filed in 2017 to the end of trial. RP 87. Defense counsel had five years to arrange an interview with N.C. or ask the court for a deposition under CrR 4.6. In fact, Mr. Canete's counsel even admitted when making his motion to depose N.C. that he probably made a mistake in not making the CrR 4.6 request sooner, stating "Should I have done things differently? Yes, I think everything in this case could have been done differently." RP 89. Therefore, Mr. Canete's defense counsel's decisions that led to N.C. not being interviewed or called to testify cannot be classified as strategic decisions.

Additionally, Mr. Canete was prejudiced by defense counsel's failure to interview N.C. N.C. is Mr. Canete's biological daughter. RP 380. She is the half-sister of S.W. and lived in the house with both Mr. Canete and S.W. RP 380. A forensic interview of N.C. was included in the discovery

provided to defense counsel. RP 84. According to Mr. Canete, N.C. was present at the home on May 12, 2017, when the incident underlying the child rape charge against Mr. Canete occurred. RP 217. At the very least, N.C. would provide relevant information about the relationship dynamics between S.W. and N.C. because she lived in the home with them. It is possible she could provide relevant details surrounding the alleged May 12, 2017, incident. In particular, N.C. may have relevant information about whether Mr. Canete entered S.W.'s bedroom on May 12, 2017. Had, for example, N.C. testified that she never saw Mr. Canete enter S.W.'s bedroom, S.W.'s credibility would have been extremely damaged. N.C. could have also testified about the fight over S.W.'s iPod between S.W. and Mr. Canete on the date in question, lending additional support to Mr. Canete's theory that S.W. was making false allegations against him because he was a tough disciplinarian. This testimony could have significantly altered the outcome of trial. Therefore, there

is a reasonable probability that the outcome of trial would have been different had defense counsel acted diligently in this case.

Because counsel's failure to interview N.C. over the course of five years was unreasonable and prejudicial to Mr. Canete's case, Mr. Canete right to effective assistance of counsel was violated by counsel's deficient performance and his convictions should be reversed.

C. **The Trial Court Erred by Instructing the Jury that Corroboration of S.W.'s Testimony was Not Required for Conviction in Violation of Article IV, Section 16 of the Washington Constitution and in Violation of Mr. Canete's Due Process Right to a Fair Trial.**

The due process clauses of both the State and Federal Constitutions declare that no person shall be deprived of life, liberty, or property without due process of law. Due process includes the guarantee of a fair trial. State v. Scherner, 153 Wn. App. 621, 651, 225 P.3d 248 (2009).

Article IV, section 16 of the Washington Constitution states, "Judges shall not charge juries with respect to matters of

fact, nor comment thereon, but shall declare the law." A trial court makes an improper comment on the evidence if it gives a jury instruction that conveys to the jury his or her personal attitude on the merits of the case. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). The constitution mandates that juries are sole individuals responsible for determining the credibility of witnesses, not the court. State v. Davis, 20 Wn.2d 443, 147 P.2d 940 (1944). To determine whether the trial court improperly commented on the evidence, appellate courts review instructions de novo. Id. at 721.

In cases involving allegations of sex crimes, some courts have given a "no-corroboration instruction" based on RCW 9A.44.020(1). That statute, in relevant part, reads "[i]n order to convict a person of any crime defined in this chapter, it shall not be necessary that the testimony of the alleged victim be corroborated." RCW 9A.44.020(1). Washington courts hold that a jury instruction that does no more than accurately convey the

law is a proper instruction. See State v. Brush, 183 Wn.2d 550, 557, 353 P.3d 213 (2015).

Washington courts have upheld no-corroboration instructions as valid, correct statements of law under RCW 9A.44.020(1) in cases where the instruction is given in reference to an alleged victim's testimony in sex offense cases. See State v. Chenoweth, 118 Wn. App. 521, 537, 354 P.3d 13 (2015); State v. Zimmerman, 130 Wn. App. 170, 182 – 83, 121 P.3d 1216 (2005). These decisions all follow the holding of State v. Clayton, a 73-year-old Washington Supreme Court case, where the defendant argued that a no-corroboration instruction constitutes an improper judicial comment on the evidence in violation of Article IV, section 16 of the Washington Constitution. 32 Wn.2d 571, 2020 P.2d 922 (1949). The Court in Clayton held that the no-corroboration instruction was not an improper comment on the evidence because the instruction was a correct statement of the law. Id. at 572.

Importantly, despite Clayton's holding, the Washington Pattern Criminal Jury Instructions (WPICs) do not propose a no-corroboration instruction. Rather, the WPICs, by comment, explicitly recommend against giving such an instruction:

> The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this subject would be a negative instruction. The proving or disproving of such a charge is a factual problem, not a legal problem. Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel.

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 45.02 cmt. at 1004 (5th ed. 2021).

However, recently, all three divisions of the Court of Appeals, as well as other jurisdictions, have questioned the use of no-corroboration instructions. With one judge going as far as to assert that if the no-corroboration instruction were an issue of first impression, they would hold that it is "a comment on the

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evidence and reverse the conviction." Chenoweth, 188 Wn. App. at 538 (Becker, J., concurring).

In Chenoweth, Division One of the Court of Appeals ultimately upheld a no-corroboration instruction, stating that it was bound by Clayton's holding, but noting that "[w]hile we are concerned with the use of such an instruction even in sex crimes, we do not conclude that its use in this case was a comment on the evidence." Id. However, in the concurring opinion, Judge Becker noted that, ". . . the matter of corroboration is really a matter of sufficiency of the evidence. Many correct statements of the law are not appropriate to give as instructions." Id.

Additionally, in Zimmerman, Division Two of the Court Appeals held that it was bound by Clayton when faced with a challenge to a no-corroboration instruction, but again implied disapproval of the instruction, stating that "[a]lthough we share the [Washington Supreme Court Committee on Jury Instructions] misgivings, we are bound by Clayton." 130 Wn. App. at 182-83.

Most recently, in State v. Amador, Division Two of the Court of Appeals again expressed concerns about no-corroboration instructions as a violation of due process, as "they seem to favor the alleged victim's testimony over the defendant's testimony." 2022 Wn. App. LEXIS 604 at *22 (Wash. Ct. App., Mar. 22, 2022) (unreported). Further, the Court in Amador stated: "There is no need for a no corroboration instruction, and the better course is for trial courts not to give one." Id. at *23. Although the court ultimately decided it was bound by Clayton and upheld the no corroboration instruction in Amador, the Court urged the Washington Supreme Court to address the issue. Id.

Additionally, Division Three of the Court of Appeals in State v. Steenhard examined the use of a no-corroboration instruction in a sex offense case, expressing concern about Clayton's holding. 2019 Wn. App. LEXIS 1898 (Wash. Ct. App. 2019) (unpublished). The Steenhard court stated:

> Despite affirming the validity of a noncorroboration jury instruction, we hold the same misgivings over the

> instruction expressed by this court in State v. Zimmerman, by Judge Becker concurring in State v. Chenoweth, and by other jurisdictions.

2019 Wn. App. LEXIS at *23 (citations omitted).

The courts in Amador and in Steenhard also noted that numerous other jurisdictions have disapproved of giving no corroboration instructions, including South Carolina, Florida, and Indiana. See, e.g., State v. Stukes, 416 S.C. 493, 499 – 500, 787 S.E.2d 480 (2016); Gutierrez v. State, 177 So.3d 226, 230 – 34 (Fla. 2015); Ludy v. State, 784 N.E.2d 459, 461-63 (Ind. 2003). Specifically, in Gutierrez, the Florida Supreme Court reversed a conviction where a no-corroboration instruction was given based on a statute similar to RCW 9A.44.020(1). 177 So.3d at 230 – 34. The Florida court held that the no-corroboration instruction in that case "effectively placed the judge's thumb on the scale to lend an extra element of weight to the victim's testimony." Id. at 231 – 32. In Ludy, the Indiana Supreme Court held that no-corroboration instructions are

misleading because "Jurors may interpret this instruction to mean that baseless testimony should be given credit and that they should ignore inconsistencies . . ." 784 N.E.2d 459, 462 (Ind. 2003).

Jury Instruction number 9 in this case provides: "In order to convict a person of Child Molestation in the Second Degree or Rape of a Child in the Second Degree, it is not necessary that the testimony of the alleged victim be corroborated." CP 67. Defense counsel objected to inclusion of the instruction, arguing that "The State seems to want to be relieved of having to argue this to the jury. The State can certainly argue this to the jury, but when they hear it from the court, it is a comment on the evidence here." RP 722. Additionally, defense counsel argued that inclusion of the instruction improperly precludes defense counsel from arguing that there's not enough evidence to convict in this case. RP 722.

The trial court erred in Mr. Canete's case by giving jury instruction number 9, which provided that the testimony of S.W.

need not be corroborated for Mr. Canete to be convicted. CP 67. Mr. Canete recognizes that despite the concerns raised by each division of the Washington Court of Appeals, the Washington Supreme Court has not recently addressed the issue of corroboration instructions, and thus, courts feel they are bound by Clayton.

However, Mr. Canete maintains that the court's decision to include the no-corroboration instruction in his case is improper as an improper judicial comment on the evidence and a violation of his due process right to a fair trial. Both S.W. and Mr. Canete testified at trial. By instructing the jury that S.W.'s testimony need not be corroborated, the court effectively placed his "thumb on the scale" in "lending an extra element of weight" to S.W.'s testimony. See Gutierrez, 177 So.3d at 231 – 32. It also suggested to the jury that it could disregard any inconsistencies in S.W.'s testimony and accept her testimony at trial without scrutinizing it. 784 N.E.2d at 462.

Jury instruction 9 in Mr. Canete's case constituted an improper comment on the evidence in violation of Article IV, section 16 of the Washington Constitution and violated Mr. Canete's due process right to a fair trial. Further, given that Mr. Canete's case was largely a credibility contest between Mr. Canete and S.W., the State will be unable to prove that the trial court's use of the instruction was harmless beyond a reasonable doubt. State v. Rhoden, 189 Wn. App. 193, 202 – 03, 356 P.2d 242 (2015). Mr. Canete's convictions should therefore be reversed.

D. Mr. Canete's Right to a Fair Trial was Violated when the Prosecutor Committed Misconduct by Appealing to the Passions and Prejudices of the Jury, Argued Evidence Outside the Record, and Misstated the Burden of Proof During Closing Argument.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's conduct was improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Where a defendant does not object at trial,

he is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured any resulting prejudice. Id. at 760. Under this heightened standard, the defendant must show that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict. State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011).

i. The prosecutor committed misconduct by arguing generalizations about all child sex cases during closing argument in Mr. Canete's case, improperly appealing to the passions and prejudices of the jury.

Prosecutors commit misconduct when they use arguments designed to arouse the passions or prejudices of the jury. State v. Ramos, 164 Wn. App. 327, 338, 263 P.3d 1268 (2011). Proper argument "stays within the bounds of the evidence and the instructions given." State v. Smiley, 195 Wn. App. 185, 194, 379 P.3d 149 (2016). Prosecutors have wide latitude to argue inferences from the evidence. State v. Gregory, 158 Wn.2d 759,

841, 147 P.3d 1201 (2006). However, prosecutors improperly appeal to the passions and prejudices of the jury when they argue the "threatened impact on other cases, or society in general, rather than the merits of the State's case." State v. Thierry, 190 Wn. App. 680, 691, 360 P.3d 940 (2015). Additionally, prosecutors improperly appeal to the passions and prejudices of the jury when they base their argument on facts outside the evidence. State v. Clafin, 38 Wn. App. 847, 849, 690 P.2d 1186 (1984).

In Thierry, the prosecutor made several statements in closing argument implying that the jury must convict the defendant to ensure that the testimony of all child victims is believed in child sex cases to protect all future victims from such abuse. Id. In that case, where the State alleged that the defendant raped and molested his eight-year-old son, the prosecutor specifically argued, "[Defense counsel] wants you to basically disregard everything [the alleged victim] has said. If that argument has any merit, then the State may as well just give up

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prosecuting these cases, and the law might as well say that 'The word of a child is not enough.'" Id. at 688. Additionally, the prosecutor stated that there is often no corroborating evidence in child sex cases "because people don't rape children in front of other people." Id. at 685. Division Two held that the "implication" of the prosecutor's argument was that the jury convict the defendant to "send a message" and to protect children, which was improper. Id. at 691.

Additionally, comments during closing argument were improper where the prosecutor argued that "the system" did not require corroborating evidence and called on jurors to imagine a "system" where corroborating evidence was required. Smiley, 195 Wn. App. at 194. The prosecutor specifically argued that "If the system did work that way, kids would have to be told, we're sorry, we can't prosecute your case, we can't hold your abuser responsible because all we have is your word, and that's not enough . . . We don't do that. That's not how the system works." Id. Division One held these comments were improper because

the argument did not "stay[] within the bounds of the evidence" and that this argument improperly asked the jury to align themselves with "the system" in deciding what the quantum of proof should be from a public policy perspective. Id. at 195.

Similarly, in State v. Harris, this Court held that a prosecutor's comments were improper when he argued that "there is almost never proof. This is not unusual" and that this case "is like so many others where there is no corroborating evidence." 2017 Wn. App. LEXIS 299 at *24 (Wash. Ct. App. 2017) (unreported). In Harris, the prosecutor also argued that "the law does not require corroboration . . . We don't want it to. Because then you could prosecute maybe one percent of the crimes." Id. at *19. Division Two held that these statements were similar to the problematic statements in Smiley, and that the prosecutor improperly appealed to the passions and prejudices of the jury when making these statements. Id. at *20.

The prosecutor's comments during his closing argument in Mr. Canete's case improperly appealed to the passions of the

jury when the prosecutor made generalized arguments about child sex crime cases unrelated to the specific evidence in Mr. Canete's case. At the beginning of the prosecutor's closing argument, he stated that, "survivors of child sex abuse have no witnesses. They have to tell their story. They have to find the courage and the voice to tell their story because there are no witnesses." RP 811. Later in the argument, the prosecutor stated, "Child sex abuse victims don't have a – they have to do it on their own." RP 827. Finally, in rebuttal, the prosecutor stated "It's a child sex case. In a child sex case we don't have witnesses. In a child sex case, we didn't have DNA." RP 849.

Not only are these statements false, they also improperly imply to the jury that they should convict Mr. Canete on behalf of "survivors" in all sex abuse cases because these cases "have no witnesses," rather than based on the specific evidence presented in Mr. Canete's case. The prosecutor's generalizations about all child sex cases in Mr. Canete's case are strikingly similar to the statements made by prosecutors held to be

improper in Thierry, Smiley, and Harris. Specifically, the prosecutor's statement that "child sex abuse cases have no witnesses," like the arguments in Thierry, Smiley, and Harris improperly implied to the jury that they should convict Mr. Canete on behalf of all "survivors" in "child sex abuse cases" because the way the system works is that there are never witnesses. RP 812. The prosecutor, for example, did not argue that *some* or *many* child sex cases do not have witnesses, he instead argued generally that *all* child sex cases have no witnesses or DNA evidence. RP 811.

The prosecutor's generalized comments about child sex cases inflamed the passions and prejudices of the jury against Mr. Canete by making the jury believe that because this "child sex case" is like all other child sex cases, where "there are no witnesses," the jury should convict Mr. Canete on behalf of all "survivors" of sexual abuse. Therefore, the prosecutor's many comments generalizing child sex cases were improper, and constituted prosecutorial misconduct.

ii. The prosecutor committed misconduct by arguing Mr. Canete's thought process in first-person based purely on speculation and not on facts in evidence, improperly inflaming the passions and prejudices of the jury.

The prosecutor's argument in closing was also improper because the prosecutor argued the first-person thought process of Mr. Canete, which was outside the evidence. In State v. Pierce, Division Two held that a prosecutor commits misconduct when he or she argues the defendant's first-person thought process while allegedly committing the crime. 169 Wn. App. 533, 554, 280 P.3d 1158 (2012). Specifically, in Pierce, the prosecutor argued the defendant's thought process before allegedly committing felony murder, burglary, robbery, arson, and theft:

> So he's thinking, "Alright. Who do I know in Quilcene that has money?" Okay. Well, we know he knows Tommy Boyd, and we know that he knows Mike Donahue, and we know they don't have any money, okay? "But who do I know in Quilcene that has money? Well, the Yarrs. I know they got money. And they have cash, because they paid me in cash. I can go up there and get some money. But

> there's one problem: I don't want to work for it. I want my meth now. I don't want to work for it and then go get it; I want my meth now, so that is a problem. And I'm pretty sure Pat's just not going to give it to me without me working for it. So, hmm, I've got to get some money. He's not going to give it to me, so I need a gun, but I don't know anybody that has a gun."

Id. at 542. The court held that this first-person argument was improper because "it is [] improper for the prosecutor to step into the defendant's shoes" and that the argument "served no purpose but to inflame the jury's prejudice against [the defendant.]" Id. at 554. Further, the court reasoned that while prosecutor could ask the jury to infer facts about the defendant from the evidence, the prosecutor could not testify about what thoughts the defendant must have had in his head because that was a matter outside the evidence. Id. at 554 – 55. Ascribing repugnant and amoral thoughts to the defendant based on speculation is improper and prejudicial. Id. at 554.

In Mr. Canete's trial, the prosecutor committed misconduct when he argued what he thought Mr. Canete's first-person thought process must have been while allegedly committing the crimes. Specifically, the prosecutor committed misconduct by arguing:

> He comes into the room, lays in her bed, lays next to her, probably just feeling it out. He lays there. She is not awake. How far can I go? That's what he's done before, right? . . . He's feeling it out. Is she awake? How far can I get with this? Is she going to respond? Can I go a little further? . . .

RP 815 – 16. The prosecutor continued to argue:

> It's what he did before. How far can I get? How far can I go? Guess what? You put your fingers in her vagina, it's too far.

RP 816.

Just as in Pierce, Mr. Canete's thought process was not presented as evidence during trial. The prosecutor in Mr. Canete's case did not ask the jury to infer Mr. Canete's thought process from the evidence. The prosecutor instead "stepped into

the shoes" of Mr. Canete and argued in first-person what he believed was Mr. Canete's thought process. The prosecutor's comments were substantially similar to the improper comments made in Pierce, and like in Pierce, served no purpose but to "inflame the jury's prejudice" against Mr. Canete. By arguing Mr. Canete's alleged thought process, the prosecutor ascribed amoral and repugnant thoughts to Mr. Canete based on his own speculation rather than the evidence.

In fact, the first-person statements made in Mr. Canete's case appear even more prejudicial than the statements in Pierce due to the nature of Mr. Canete's charges. In Pierce, where the defendant faced felony murder, burglary, robbery, and arson charges, the prosecutor described the defendant's thought process as a drug addict who "want[ed] [his] meth now." Id. at 554. Undoubtedly, the defendant in Pierce faced very serious charges. However, Pierce faced no charges of a sexual nature or charges involving children. In contrast, Mr. Canete faced multiple charges of child sex crimes, charges that are already

highly inflammatory by their nature. By stepping into the shoes of Mr. Canete and ascribing the thought process of a sexual predator meticulously planning his crimes to Mr. Canete, the prosecutor's argument had a highly inflammatory effect on the passions and prejudices of the jury against Mr. Canete based on pure speculation rather than facts in evidence.

Therefore, the prosecutor committed misconduct by improperly appealing to the passions and prejudices of the jury by ascribing an inflammatory first-person thought process to Mr. Canete that was not in evidence.

iii. The prosecutor committed misconduct by misstating the burden of proof when arguing that that the State only has to prove the "material elements" of the charge beyond a reasonable doubt, but not "everything" beyond a reasonable doubt.

Additionally, arguments by the prosecutor that shift, trivialize, or misstate the State's burden to prove the defendant's guilt beyond a reasonable doubt constitute misconduct. State v. Gregory, 158 Wn.2d at 859. Due process requires the prosecution to prove, beyond a reasonable doubt, every element

necessary to constitute the crime with which the defendant is charged. In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Courts, for example, have held that arguments comparing the reasonable doubt standard to everyday decision making improperly minimizes the gravity of the State's burden. State v. Lindsay, 180 Wn.2d 423, 436, 326 P.3d 125 (2014). Specifically, in Lindsay, the prosecutor's comments were improper where he argued that reasonable doubt is like walking across a crosswalk when a car is stopped at a red light and the pedestrian has a walk symbol because the pedestrian knows beyond a reasonable doubt that they would not get hit by the car. Id.

The prosecutor in Mr. Canete's case engaged in misconduct when he misled the jury by trivializing the State's burden of proof. Counsel stated, "What's important is that we have to prove our case beyond a reasonable doubt as to *material elements* of the charge okay? . . . but we don't have to prove everything about the case beyond a reasonable doubt." RP 824.

The prosecutor's statement about how the State does not have to prove "everything" in the case beyond a reasonable doubt, but only has to prove the "material elements" misstates the burden of proof as written in the jury instructions. In order to convict Mr. Canete, the jury instructions state that the prosecution must prove the "elements" of the crimes beyond a reasonable doubt. CP 63, 65. The instructions do not refer to "material" elements and the prosecutor never clarified for the jury what constitutes a "material element." The prosecutor's statement about "material elements" implies that there are elements of the crime that are not material, and thus those elements do not have to be proven beyond a reasonable doubt.

Additionally, the prosecutor's argument that they do not have to prove "everything about the case" beyond a reasonable doubt minimizes the burden of proof by implying the prosecutor's burden of proof is less of a stringent standard than it is. Similar to prosecutor's comparing reasonable doubt to everyday decision-making in Lindsay, this statement trivializes

the gravity of the State's burden by implying the burden is not difficult for the State to meet because the State need not prove "everything." Overall, the comments about proving "material elements" and not having to prove "everything about the case" were confusing for the jury and misstated the State's burden of proving every element beyond a reasonable doubt.

iv. No curative instruction would have obviated the prejudicial impact of the prosecutor's improper arguments on the jury.

Where defense counsel does not object to the State's closing argument, the defendant must show that a curative instruction could not have obviated any prejudicial impact on the jury. State v. Thorgerson, 172 Wn.2d at 455 (2011). The prosecutor's misconduct in Mr. Canete's case affected the outcome of his case and could not have been cured with a proper instruction.

In Smiley, the court held that a curative instruction could have remedied the prejudicial impact of the prosecutor's comments asking jurors to imagine a "system" where

corroboration was required to hold "abusers accountable" during closing argument because the prosecutor made the comments at the beginning of the argument, when the court could have "decisively derailed" the argument by instructing the jury to disregard the comments had the defense objected and where the defense used the argument in its own closing argument. 195 Wn. App. at 197.

In Pierce, on the other hand, the court held that the prejudice caused in the context of the entire closing argument could not be cured with a jury instruction. Pierce, 169 Wn. App. at 556. Specifically, the prosecutor's comments caused prejudice incurable by a jury instruction where the prosecutor, in addition to making other improper arguments, stepped into the defendant's shoes and argued his thought process during closing argument. Id. The Court reasoned that "Because the prosecutor focused on how shocking and unexpected the crimes were . . . in conjunction with the prosecutor's other improper and highly

inflammatory arguments," a jury instruction could not cure any prejudice in the minds of the jury. Id.

Mr. Canete's case is distinguishable from Smiley and is more akin to Pierce. Smiley did not involve the prosecutor "stepping into the shoes" of the defendant and arguing the defendant's thought process in first person, like in Mr. Canete's case. As in Pierce, a curative instruction could not have cured the prejudice caused by the prosecutor's arguing Mr. Canete's thought process in first person, combined with the prejudice caused by the generalizations about child sex cases and misstating the burden.

The prosecutor's arguments in the context of the entire closing argument prejudiced the jury against Mr. Canete to such a degree that no instruction could have remedied the prejudice. The improper arguments painted Mr. Canete as a child predator who meticulously planned his crimes and called upon the jury to convict him on behalf of all survivors of child sexual abuse.

v. The prosecutor's improper arguments had a substantial likelihood of affecting the jury verdict.

Additionally, the improper arguments made by the prosecution during closing argument had a substantial likelihood of affecting the jury verdict. In Pierce, the court held that the prosecutor's improper statements in closing argument, including the prosecutor's comments about the defendant's supposed first-person thought process, along with other statements made to inflame the passions of the jury, had a substantial likelihood of affecting the verdict. 169 Wn. App. at 556. The court held that the prosecutor's comments warranted reversal of the defendant's convictions. Id.

In Mr. Canete's case, the prosecutor's improper comments in closing argument, including the arguments generalizing the nature of child sex crimes, the arguments about Mr. Canete's thought process, as well as the prosecutor's misstating the burden of proof, had a substantial likelihood of affecting the jury verdict. Like in Pierce, the prosecutor's comments in Mr. Canete's case

regarding Mr. Canete's first person thought process, which were drawn purely from the prosecutor's own speculation and not from the evidence, served no purpose but to paint Mr. Canete as a sexual predator who meticulously planned the crimes against S.W. Instead of asking the jury to infer facts from the evidence, the prosecutor instead left the jury, right before deliberations, with a prejudicial picture of Mr. Canete thoughtfully planning the crimes he was charged with. This was one of the last things the jury heard about Mr. Canete before going into deliberations.

Additionally, the prosecutor's statements about how child sex crimes "have no witnesses" also had a substantial likelihood of affecting the jury verdict. Going into deliberations, the jury was left with the belief that all child sex cases do not have witnesses and that it is their duty to help "survivors" of child sex abuse "find their voices." RP 811, 812. These arguments improperly suggested to the jury that it was their duty in the deliberation room to render a verdict for all survivors of child sex abuse by convicting Mr. Canete. There is no doubt that these

arguments inflamed the passions and prejudices of the jury enough to affect the verdict in this case. Rather than focus on the evidence present in this particular case, the jury was left to ponder the effect of their decision on all survivors of child sex abuse. The jury was also left with the incorrect assumption that all child sex cases have no witnesses rather than contemplating the specific reasons why there may be no corroborating evidence in this case. The prosecutor's improper arguments had a substantial likelihood of affecting the verdict in this case.

Because the prosecution's closing arguments were improper, flagrantly inflammatory, and could not be cured by jury instruction had defense counsel timely objected, and because there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict in this case, Mr. Canete's convictions should be reversed. Pierce, 169 Wn. App. at 551.

E. Cumulative Error Deprived Mr. Canete of his Due Process Right to a Fair Trial.

The Court of Appeals may reverse a conviction when "there have been several errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Grieff, 141 Wn.2d 910, 929, 10P.3d 390 (2000).

If the court is not satisfied that any of the previously discussed errors alone warrant reversal, the combined effects of the above errors denied Mr. Canete a fair trial. Therefore, Mr. Canete's convictions require reversal due to cumulative error.

V. CONCLUSION

For the foregoing reasons the Court should reverse Mr. Canete's convictions and the case should be remanded for a new trial.

DATED this 15th day of March, 2023.

Respectfully submitted,

BLACK & ASKEROV, PLLC

I hereby certify in compliance with RAP 18.17 that this brief contains 11,994 words.

s/Teymur Askerov
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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing on:

Niceto Canete
DOC No. 432163
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

DATED this 15th day of March, 2023.

Respectfully submitted,

BLACK & ASKEROV, PLLC

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APPENDIX C:

PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION DATE: JANUARY 16, 2024 RE: DECISION, WASHINGTON COURT OF APPEALS DIVISION I CASE #84382-6-I

1 PAGE

January 16, 2024

Via U.S. Mail

PRIVILEGED AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

Niceto Canete
Coyote Ridge Corrections Center
DOC No. 432163
P.O. Box 769
Connell, WA 99326

RE: *Decision, Washington Court of Appeals Division I, Case No. 84382-6*

Dear Niceto:

I regret to inform you that the Court of Appeals has affirmed your conviction and denied your appeal. I have enclosed a copy of the Court of Appeals opinion. We now have 20 days to file a motion for reconsideration in the Court of Appeals or 30 days to file a petition for review in the Washington Supreme Court. If you do not take action in the allotted time, then the Court of Appeals will issue its mandate terminating the direct appeal and you will not be able to further pursue your claims on direct appeal in the Court of Appeals or the Supreme Court.

Our representation agreement did not cover representation on a motion for reconsideration in the Court of Appeals or representation on a petition for review in the Supreme Court. We would be happy to continue to represent you, but will need to execute a separate representation agreement if you decide to pursue one of these courses of action. If we are not retained to represent you further we will not be taking any further action in the case. Importantly, if you choose to take no action and a mandate is issued, you will have one year to file a collateral attack. We will send you a copy of the mandate when we receive it.

We did everything we could to present your claims for relief in the Court of Appeals, and I am sorry, again, to deliver the bad news. Please give me a call as soon as possible so that we can discuss next steps. Thank you.

Sincerely yours,

BLACK & ASKEROV, PLLC

s/Teymur Askerov
Teymur Askerov
Attorney at Law

INMATE

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