IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 39057-8-III

STATE OF WASHINGTON, Respondent,

v.

NICHOLAS EDWARD MILLER, Petitioner.

PETITION FOR REVIEW

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AUTHORITIES CITED

Cases

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I. IDENTITY OF PETITIONER

Nicholas Miller requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on March 7, 2024, concluding that his trial attorney was not ineffective for failing to object to the admission of testimony that did not satisfy the "fact of complaint" rule. A copy of the Court of Appeals' published opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

The fact of complaint doctrine allows the State to admit evidence that the victim timely complained to someone about the assault. *State v. Ferguson*, 100 Wn.2d 131, 135-36, 667 P.2d 68 (1983), *abrogated on other grounds by State v. Crossguns*, 199 Wn.2d 282, 505 P.3d 529 (2022); *State v. DeBolt*, 61 Wn. App. 58, 63, 808 P.2d 794 (1991). However,

the doctrine is narrow; it does not permit admission of the details of the complaint, the identify of the offender, or the nature of the act, nor does it permit admission of allegations that are remote in time from the offense reported. *State v. Osborn*, 59 Wn. App. 1, 7 n. 2, 795 P.2d 1174, *review denied*, 115 Wn.2d 1032 (1990). *Id.* Here, where the State proffered prior out-of-court statements reporting sexual abuse that were later recanted as a joke or a game and were not shown to have been made close in time to the events reported, was trial counsel ineffective for failing to object to the admission of the statements?

IV. STATEMENT OF THE CASE

In February 2020, then-13-year-old K.O. told her cousins and her aunt that her mother's boyfriend, Nicholas Miller, had sexually abused her. CP 1; I RP 341-44, 346, 357, 410, 416, 458. K.O.'s aunt, Margarita Westfall, did not approve of her sister's lifestyle and had called CPS multiple times to report various allegations, but they were all determined to be

unfounded. I RP 363-64, 369-70, II RP 572-74. Shortly before visiting her aunt, K.O. got in trouble for staying up too late on Tik Tok and her phone was taken away as punishment. II RP 583-84, 590. K.O. then showed her aunt a list of reasons why she did not want to live with her mother anymore and preferred to live with her father. I RP 394-95, II RP 744-45, 747, 765, 768. The list did not mention sexual abuse; however, a short time later, K.O. voiced her accusations against Mr. Miller and the matter was reported to police. I RP 346, 348, 398, 400, 411, 434.

According to K.O., Mr. Miller began touching her vagina with his fingers while they lived at a house on Luther Street in Richland when her mother was pregnant. I RP 540-41, 544-45, II RP 708-09. K.O. was in fourth grade at the time. I RP 543-44. At first the touching was only external but eventually his fingers went inside her vagina. II RP 709, 711, 714-15. K.O. described him similarly rubbing his penis on her vagina before escalating to penetration. II RP 712, 714, 718, 726, 731. She

reported that Mr. Miller committed these acts 2-5 days per week. II RP 727. However, she could not describe Mr. Miller's penis or whether he ever ejaculated, nor did she know if his penis was erect or flaccid during penetration. II RP 772-73. Her physical examination was normal, which did not preclude abuse but was also consistent with not being abused. II RP 653, 666, 668.

Based on K.O.'s report, the State charged Mr. Miller with two counts of first degree rape of a child and one count each of first degree child molestation, second degree rape of a child, and second degree child molestation. CP 36-39. Before trial, the State moved *in limine* to admit several out-of-court statements by K.O. under the fact of complaint doctrine. CP 25; I RP 26-27. Noting that "the fact of complaint rule is well established," Mr. Miller did not object to the State's motion. I RP 31.

Subsequently, the State proffered the following hearsay statements, none of which were objected to by Mr. Miller:

- T.G., K.O.'s stepsister, said that in the summer of 2019, K.O. shared something about sexual abuse but then said she was joking. On a second occasion, in January 2020, K.O. repeated the accusation while they sat in a restaurant parking lot. II RP 638, 640, 641-42.
- M.G., a school friend of K.O.'s, testified that during the summer between 6th and 7th grades, K.O. said someone was sexually assaulting her repeatedly. II RP 675, 677-78. However, K.O. admitted that what she told M.G. was that being raped was her worst fear and that it was occurring frequently, but she also said that it was a game. II RP 769.

Similarly, when K.O. testified, she described writing out her accusations in a journal form before her forensic interview to assist her in talking about what happened. II RP 751-52, 773. Again, Mr. Miller's counsel did not object to admitting the journal as Exhibit 8. II RP 777.

The defense focused on discrepancies in K.O.'s accounts and her motive in wanting to live with her father instead of her mother. In December 2019, K.O.'s mother had a stroke and was hospitalized for several weeks. I RP 450-51. K.O. stayed with her father until her mother was discharged from the hospital in January 2020 and they resumed 50-50 custody at that time, shortly before K.O. made the accusations. I RP 451-52. On several occasions over the years, K.O. was questioned by CPS and always told them the home was safe. II RP 760, 763. And although K.O. claimed that the abuse often took place in the game room with other people present, nobody testified to observing anything untoward and K.O. never made

noise or said anything to her mother or her brother. II RP 591, 774-75.

The jury convicted Mr. Miller as charged and returned special verdicts finding that he used a position of trust to facilitate the crime and that the crimes were part of an ongoing pattern of sexual abuse of the same victim. II RP 878-80; CP 103-17. The trial court imposed an exceptional sentence of 378 months to life. RP (Brittingham) 27; CP 133.

On appeal, Mr. Miller contended that his attorney was ineffective for failing to object to admitting K.O.'s prior statements to T.G. and M.G. under the "fact-of-complaint" doctrine. *Opinion*, at 1. The Court of Appeals affirmed the conviction, concluding that counsel's failure to object may have been strategic. *Opinion*, at 9-10. Mr. Miller now seeks review of the Court of Appeals' decision.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted under RAP 13.4(b)(3) and (4). The decision raises questions concerning trial counsel's duty to object in order to provide constitutionally adequate representation, and the applicability of the "fact-of-complaint" doctrine presents a question of substantial public interest that will guide its application in future cases.

The Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the effective assistance of counsel. *State v. Vazquez*, 198 Wn.2d 239, 247, 494 P.3d 424 (2021); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A claim that trial counsel's performance fell below constitutionally minimum standards is reviewed *de novo*. *Vazquez*, 198 Wn.2d at 249.

In evaluating claims of ineffective assistance, the court first considers whether the attorney's performance was deficient

and, if so, whether that performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. Courts presume the representation was effective, so the defendant must show that counsel's conduct is unsupported by legitimate strategic or tactical reasons. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). While failing to object can often be a legitimate trial tactic to avoid highlighting unfavorable evidence, when the evidence is inadmissible and an objection would have been sustained, reversal is required if the inadmissible evidence likely affected the trial outcome. *See State v. Crow*, 8 Wn. App. 2d 480, 508-09, 438 P.3d 541, *review denied*, 193 Wn.2d 1038 (2019); *Vazquez*, 198 Wn.2d at 248-49.

The State proffered K.O.'s prior statements *in limine* under the fact of complaint doctrine, without objection. But the statements proffered here do not qualify under the fact of complaint doctrine for several reasons. First, the statements to which T.G. and M.G. testified were not shown to be close in time to the events reported. The first conversation T.G.

reported occurred in the summer of 2019 and the second occurred in January 2020. II RP 641-42. Similarly, M.G. reported a conversation with K.O. that took place during the summer between sixth and seventh grades, the same time frame as the conversation with T.G. II RP 552-53, 678. And the journal was not written until after K.O. had already made her accusations, in preparation for her forensic interview. II RP 751-52.

But Mr. Miller had moved out of the house where most of the abuse occurred in October 2018, almost a year before K.O.'s first statement to T.G. and her statement to M.G. II RP 545-46, 548-49; II RP 717-18. K.O. did claim that an incident of abuse occurred while Mr. Miller was living at a friend's house after moving out, which would have been sometime after January 2019. II RP 551, 553, 734-35. However, nothing in either K.O.'s description of the abuse nor the witnesses' reports of the conversations would establish that they occurred "within a short time period subsequent to" the events described.

Osborn, 59 Wn. App. at 7 n. 2. Indeed, M.G. testified that K.O. did not say whether the events took place recently or in the past. II RP 678.

Because there was an insufficient foundation to establish that K.O.'s statements to T.G. and M.G. and in her journal were made close in time to the events reported, they did not satisfy the requirements of the fact of complaint doctrine. Accordingly, an objection should have been sustained.

The Court of Appeals held that the statements would still be admissible as prior consistent statements to rebut an implication that K.O. fabricated the events. *Opinion*, at 9. But to be admissible for this purpose, the statements must have been made prior to events that gave rise to an inference of fabrication. *Osborn*, 59 Wn. App. at 5. This is because

> [e]vidence which counteracts a suggestion that the witness changed his story in response to some threat or scheme or bribe by showing that his story was the same prior to the external pressure is highly relevant in shedding light on the witness'

> credibility. Evidence which merely shows that the witness said the same thing on other occasions when his motive was the same does not have much probative force "for the simple reason that mere repetition does not imply veracity."

Id. at 4. Consequently, if the motive to fabricate arose before the statements were made, the statements are not admissible. *Id.* at 5.

Here, the alleged motive to fabricate was K.O.'s desire to live with her father full-time instead of her mother. Counsel elicited from K.O.'s aunt that her ability to visit with K.O. and have her over to do "fun activities" improved after she developed a better relationship with K.O.'s father. I RP 414-16. Consequently, when K.O.'s aunt learned of her accusations, she did not contact K.O.'s mother. I RP 416-17. K.O.'s father also testified that after K.O. told him the accusations, he promised her she would be able to stay with him. I RP 465. And K.O. admitted she wanted to live with her dad and made a list of reasons why that included her mother fighting with a previous boyfriend. II RP 745-47. She took those reasons to

her aunt, who had reported K.O.'s mother to CPS twice, most recently in 2018. I RP 419.

Nothing in these facts suggests that K.O.'s motive to fabricate could not have arisen earlier than the summer of 2019 when she made the out-of-court statements. In *Osborn*, the defense argued two motives to falsify, including the accuser's desire to get out of the house. 59 Wn. App. at 5. However, because that motive had not been raised at the time the evidence was proffered, the *Osborn* court held it was not an abuse of discretion to admit prior statements because the court and the jury would have inferred the motive was related to the breakdown of her mother's marriage, which occurred after the statements were made. *Id.* Here, the motive did not arise from a specific event but from the general chaos and neglect in the home after their parents' divorce. *See, e.g.*, I RP 369-70, 418.

Furthermore, the statements K.O. made to her friends in 2019 were not consistent with the accusations she made against

Mr. Miller in February 2020 because in 2019, she said that she was joking and that it was a game. II RP 638, 640, 641-42, II RP 769. Under ER 801(d)(1)(ii), the statement is not hearsay only if it is consistent with the declarant's testimony. This is because the purpose of the evidence is to discount an argument that the witness's story changed, not merely to reinforce the accuser's trial testimony. *See State v. Purdom*, 106 Wn.2d 745, 750, 725 P.2d 622 (1986). But K.O.'s account *did* change; it evolved from a joke or a game to a serious accusation. Because the statements were not consistent and because the prior statements were not made before the motive to fabricate arose, they were not admissible as prior consistent statements as an alternative to the fact of complaint justification offered at trial.

The questions of what constitutes recent disclosure and whether a statement presented as a joke or a game is consistent with a later serious disclosure are undeveloped questions concerning the "fact-of-complaint" doctrine. Because evaluating them here will assist in applying the doctrine in

future cases, the questions are of substantial public interest. Moreover, the effectiveness of counsel in failing to object to the evidence is a significant question of law under the Sixth Amendment and article I § 22. Review should be granted.

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(3) and (4) and this Court should enter a ruling that Mr. Miller's trial counsel was ineffective for failing to object to the "fact-of-complaint" evidence that should not have been admitted in the case.

This document contains 2,407 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 8 day of April, 2024.

TWO ARROWS, PLLC

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Terry J. Bloor
Benton County Prosecutor's Office
7122 W. Okanogan Pl., Ste. A230
Kennewick, WA 99336

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 8 day of April, 2024 in Kennewick, Washington.

Andrea Burkhart

Court of Appeals Opinion no. 39057-8-III (filed 3/7/24)

APPENDIX

Tristen L. Worthen
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CASE # 390578
State of Washington v. Nicholas Edward Miller
BENTON COUNTY SUPERIOR COURT No. 2010029203

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:ko
Attach.
c: **Email** Hon. Jacqueline Stam
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FILED
MARCH 7, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. NICHOLAS EDWARD MILLER, Appellant.	)	No. 39057-8-III UNPUBLISHED OPINION

STAAB, J. — Nicholas Miller appeals from his convictions and sentence for two counts of first degree rape of a child, one count of first degree child molestation, one count of second degree rape of a child, and one count of second degree child molestation. He argues: (1) defense counsel was ineffective for failing to object to the admission of prior statements from KO, the victim, under the "fact-of-complaint" rule because the statements were not made close in time to the alleged abuse, and (2) the sentencing court did not apply the proper standard when it imposed conditions of community custody that violated his fundamental right to parent.

We conclude that Miller's counsel was not ineffective but remand for reconsideration of the community custody condition related to contact with his own children.

BACKGROUND

In 2014, Niki Osborn and Nicholas Miller began dating. Shortly thereafter, Miller moved in with Osborn and started watching her kids while she was at work. In 2015, Miller started sexually abusing KO, Osborn's daughter. The abuse continued for several years and occurred two to five days a week.

Miller and Osborn broke up in 2018, and Miller moved out. After they broke up, beginning in May 2019, Miller would come over and stay at Osborn's house. KO testified that the last abusive act occurred at the house where Miller was staying in the summer of 2019.[1]

In December 2019, Osborn experienced a stroke, and KO moved in with her father full time. Some time later, when Osborn was released from the hospital, Miller again moved in with her and KO, and Osborn and Miller got engaged. Following their engagement, KO revealed Miller's sexual abuse to her aunt, and police became involved.

The State charged Miller with two counts of first degree rape of a child, one count of first degree child molestation, one count of second degree rape of a child, and one count of second degree child molestation. The charging period for the second degree

[1] KO testified that this act occurred when Miller was living with his friend and KO and her family were living in the "first Thayer house" and the abuse occurred during the summer because she remembered wearing shorts. KO's mother testified that they lived in the first Thayer house in 2019.

rape of a child and second degree child molestation charges ranged from December 2018 to February 2020.

Prior to trial, the State moved in limine to admit prior statements KO had made when reporting the sexual assault to her stepsister and friend, TG and MG respectively, under the fact-of-complaint rule. The State also noted that KO's statements to TG and MG would be admissible as prior consistent statements if Miller alleged KO was lying. Defense counsel did not object to these motions, and the trial court granted them.

The case proceeded to a jury trial. During opening statements, defense counsel argued that KO had a motive to lie about Miller abusing her because she did not get along with her mom and did not like Miller because he was the "enforcer." Rep. of Proc. (RP) at 337-39. Defense counsel claimed that the rape accusations against Miller were KO's "easy way out." RP at 338.

TG, KO's stepsister, testified. She said that KO had twice shared "something about sexual abuse" with her. RP at 641. The first time was during the summer of 2019 and the second time was in January 2020. The first time KO talked to TG, she followed it up by saying that she was joking.

MG, a friend of KO, also testified. She explained that, in the summer of 2019, KO had told her that somebody had been sexually assaulting her repeatedly and had asked MG not to tell anyone. But KO subsequently told MG that "it was a game." RP at 769.

KO testified that she wrote a list of reasons why she did not want to live with her mother anymore and showed it to her aunt in February 2020. Later that same day, she told her aunt that Miller had been assaulting her.

The State also elicited testimony from KO that she had written an outline of why she reported the assaults and what had happened in a journal prior to a forensic interview to "keep[] [her] thoughts straight." RP at 751-52. Defense counsel cross-examined KO about the specific contents of the journal including whether she had made entries about sexual abuse that had occurred while she was in third, fourth, or fifth grade. On redirect, without objection from defense counsel, the State then admitted pages from the journal as an exhibit.

The jury found Miller guilty on all charges.

At sentencing, although the crime-related prohibitions were not specifically addressed by either the State or defense counsel, the court imposed conditions of community custody that restricted Miller from having direct or indirect conduct with minors under the age of 16 and preventing him from holding any position of authority or trust involving minors under the age of 16. Miller did not object to either of these conditions.

Miller appeals.

ANALYSIS

1. INEFFECTIVE ASSISTANCE OF COUNSEL

Miller argues that defense counsel was ineffective for failing to object to prior statements by KO under the fact-of-complaint rule. He contends that an objection would have been sustained because the prior statements were inadmissible. We disagree.

Criminal defendants have a constitutionally guaranteed right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018). A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Claims of ineffective assistance of counsel are reviewed de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

A defendant bears the burden of showing (1) that his counsel's performance "fell below an objective standard of reasonableness based on consideration of all the circumstances;" and, if so, (2) that "there is a reasonable probability that, except for counsel's [poor performance], the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "If either element . . . is not satisfied, the inquiry ends." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

In reviewing the record for deficiencies, there is a strong presumption that counsel's performance was reasonable. *McFarland*, 127 Wn.2d at 335. "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation." *McFarland*, 127 Wn.2d at 335. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

"When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Kyllo*, 166 Wn.2d at 863. Whether to object or not is a "classic example of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). In the context of objections, courts presume "that the failure to object was the product of legitimate trial strategy." *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007).

Moreover, in order to show deficient performance on a claim of ineffective assistance of "counsel [based] on . . . failure to object, then "'the defendant must show that the objection would likely have succeeded.'" *State v. Vazquez*, 198 Wn.2d 239, 248, 494 P.3d 424 (2021) (quoting *State v. Crow*, 8 Wn. App. 2d 480, 508, 438 P.3d 541 (2019)). "'Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.'" *Id.* (quoting *Crow*, 8 Wn. App. 2d at 508).

Miller argues that his defense counsel was ineffective for failing to object to the admission of prior statements made by KO to MG and TG under the fact-of-complaint doctrine.[2]

"The fact-of-complaint or 'hue and cry' doctrine is a case law exception to the hearsay rule allowing the State to introduce evidence in its case in chief that a rape victim has made a timely complaint." *State v. DeBolt*, 61 Wn. App. 58, 63, 808 P.2d 794 (1991). "Details of the complaint and the identity of the offender are not permitted." *Id.* The testimony is only admissible to rebut an inference that a complaining witness was silent after an attack and not admissible to prove the truth of the matter asserted. *State v. Martinez*, 196 Wn.2d 605, 611, 476 P.3d 189 (2020).

To be admissible under the fact-of-complaint rule, the complaint must be timely made. *Id.* at 614. "A complaint is timely if it is made when there is an 'opportunity to complain.'" *Martinez*, 196 Wn.2d at 614 (quoting *State v. Griffin*, 43 Wn. 591, 597, 86 P. 951 (1906)) (internal quotation marks omitted). "We leave it in the able hands of the trial court to determine what constitutes a timely complaint based on the surrounding

[2] Although he does not assign error to it, Miller also appears to argue that defense counsel was ineffective for failing to object to the admission of an excerpt from KO's journal under the fact-of-complaint rule. However, the State did not request to admit the excerpt under the fact-of-complaint rule but rather it was admitted on the State's redirect of KO after defense counsel opened the door to it by asking her specific questions about it on cross examination. Moreover, as this exhibit was not designated as part of the record on appeal, the contents of the journal are unknown. Accordingly, we decline to address this issue.

circumstances." *Id.* at 614-15 (trial court did not abuse its discretion in finding statements admissible under fact-of-complaint doctrine where child was living with abuser and abuse was still ongoing, even though reports were made outside charging period); *State v. Ackerman*, 90 Wn. App. 477, 480-82, 953 P.2d 816 (1998) (trial court did not abuse its discretion in finding prior statement admissible under fact-of-complaint where minor made statements reporting abuse both during and shortly after charging period).

TG and MG both testified about complaints made by KO that did not identify the offender or give details of the complaint. Still, Miller contends that the complaints were inadmissible because the record fails to establish that KO's complaints were timely made. We reject this argument for several reasons.

First, Miller cannot overcome the lack of objection by arguing that the record is undeveloped and did not support admission of the evidence. The purpose of an objection is to correct an error, prevent it from reoccurring, and to prevent abuse of the appellate process. *State v. Emery*, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012). Had Miller objected to the evidence, the State may have supplemented the record with additional facts to show the temporal relation between the complaint and the abuse.

In addition, Miller does not demonstrate that an objection would have been sustained. TG and MG testified that KO disclosed a generalized complaint of sexual abuse in the summer of 2019. KO testified that Miller's last act of abuse occurred in the

summer of 2019. The trial court has discretion to decide if a complaint introduced under this hearsay exception is timely. On this record, Miller cannot show that an objection would have been sustained.

Next, as the State points out, KO's statements were also admissible as prior consistent statements under ER 801(d)(1)(ii). The rule provides that a statement is not inadmissible as hearsay if it is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." During opening statements, defense counsel attacked KO's credibility and argued she had a motive to lie, mainly that she did not want to continue living with her mother, and that this motive was evidenced by the list she presented to her aunt in February 2020. KO's statements to both TG and MG were made prior to her presenting the list to her aunt and prior to her bringing the abuse accusations to her aunt. Further, though she said she was joking and referred to her statements as a game, they were still consistent with the accusations she made in February 2020. Given defense counsel's attack on her credibility, these statements were admissible as prior consistent statements.

Recognizing that the complaints to TG and MG would likely be admitted under one or both hearsay exceptions, defense counsel's failure to object may have been strategic. Both TG and MG testified that KO admitted that her complaint was a joke or a

game. These comments by KO tend to discredit later complaints that the allegations are true. Thus, it is possible that defense counsel wanted the jury to hear these comments.

In sum, Miller has failed to demonstrate his counsel was deficient for failing to object to complaints made by KO to TG and MG. Because Miller fails to show deficient performance, we need not address the issue of prejudice.

2. CONDITIONS OF COMMUNITY CUSTODY

Miller argues that the sentencing court abused its discretion in imposing conditions of community custody that deprive him of relationships with his biological children without considering the necessity of the conditions. We agree.

Pursuant to RCW 9.94A.505(9), a trial court may impose "crime-related prohibitions" as a sentencing condition. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Generally, a trial court's imposition of a sentencing condition is reviewed for an abuse of discretion. *State v. Torres*, 198 Wn. App. 685, 689, 393 P.3d 894 (2017). However, "we more carefully review conditions that interfere with a fundamental constitutional right, such as the fundamental right to the care, custody, and companionship of one's children." *Rainey*, 168 Wn.2d at 374 (internal citation omitted). "Sentencing conditions that interfere with a fundamental right must be sensitively imposed so that they are 'reasonably necessary to accomplish the essential needs of the State and public order.'" *Howard*, 182 Wn. App. at 101 (quoting *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008)). A court can impose a condition on a criminal

defendant that restricts the fundamental right to parent as long as "the condition is reasonably necessary to prevent harm to the child[ ]." *State v. Ancira*, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001).

Whether "a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny." *Rainey*, 168 Wn.2d at 374. However, given the fact-specific nature of imposing crime-related prohibitions and the fact that they are largely based on the sentencing court's appraisal of the trial and defendant, abuse of discretion is still the proper standard of review. *Rainey*, 168 Wn.2d at 374-75. "A court abuses its discretion if, when imposing a crime-related prohibition, it applies the wrong legal standard." *Rainey*, 168 Wn.2d at 375.

Miller challenges the community custody condition precluding him from having any direct or indirect contact with minors under the age of 16. The sentencing court did not consider whether the condition was reasonably necessary to protect Miller's children from harm. The State concedes that this community custody condition is improper and suggests it be amended to allow Miller to have supervised contact with children. We accept the State's concession in part, but we remand for the trial court to reconsider the condition in light of the proper standard.

Miller also objects to the condition of community custody that precludes him from "hold[ing] any position of authority or trust involving minors under the age of 16." Clerk's Papers at 154. The State argues that such a condition is justified because it

allows Miller to parent his children but restricts him from assuming a position of authority or trust over any minor. However, this argument ignores the fact that the fundamental right to parent includes the right to care, custody, and companionship of one's children, which inherently creates a position of authority or trust. Consequently, this condition restricts Miller's fundamental right to parent. As the sentencing court did not consider whether the condition was reasonably necessary to protect Miller's children from harm, we remand for the trial court to consider the condition in light of the correct legal standard.

We affirm Miller's conviction but remand for the trial court to reconsider the community custody condition related to his own children under the proper standard. Unpublished. A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Fearing, C.J.

Pennell, J.

BURKHART & BURKHART, PLLC

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