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Court of Appeals
Division I
State of Washington

Supreme Court No. 91075-8
(COA No. 70443-5-1)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES FEY,

Petitioner.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Petitioner James Fey asks this Court to accept review of the Court of Appeals decision terminating review dated November 3, 2014, a copy of which is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. ER 803(a)(4) permits courts to admit a patient's statements if made for "medical" diagnosis or treatment. This Court has never extended this rule to court-mandated psychotherapy sessions or addressed how courts should consider a child's statements made during a court-ordered counseling session when the child does not view these sessions as for treatment purposes. Should this Court grant review to decide whether a child's statements made during a court-ordered counseling session that the child does not want to attend or view as for her treatment benefit are excluded from the hearsay rules, as several Court of Appeals decisions have implied?

2. The cumulative effect of multiple trial court errors may deny a person the right to a fair trial. The court admitted evidence showing the child complainant was removed from her home due to her allegations against Mr. Fey, which had no bearing on whether her allegations were true when made but engendered tremendous sympathy for her. It let the

prosecutor elicit out of court allegations to bolster the complainant's credibility, permitted testimony that the complainant had a vague "medical condition" as an excuse for her lack of detail about the incident, and let the prosecutor attack the complainant's mother for not being sufficiently loving and supportive. Should this Court grant review when a host of evidentiary decisions denied Mr. Fey a fair trial?

3. The right to effective assistance of counsel guarantees that an attorney understands the law and makes objectively reasonable strategic decisions. Mr. Fey's attorney stipulated to admitting an otherwise inadmissible videotaped interview made by the complainant for its truth even though it contained multiple allegations that were not otherwise admitted into evidence and any conceivable impeachment of the complaint did not require admitting the interview for its truth. The stipulation let the State seek a verdict on evidence that only arose in the video. Should this Court grant review to decide whether it is unreasonable and prejudicial for defense counsel to seek admission of multiple allegations against his client for their truth when this evidence would not be admissible?

4. A sentencing court may not prohibit a parent from having contact with his biological child without first finding the conditions are reasonably necessary in scope and duration to prevent harm to the child.

The sentencing court did not acknowledge Mr. Fey's parental rights before imposing blanket community custody conditions that limiting his contact with minors, which includes his own children. Does the court's failure to acknowledge Mr. Fey's parental rights require a new sentencing hearing before the court restricts his access to his own children?

C. STATEMENT OF THE CASE

One day KR's elementary school showed a play that encouraged children to tell adults when inappropriately touched in a sexual fashion. 2RP 229-31. KR, who was in fourth grade, told an actress that she enjoyed the play, asked if they would do another play because they were funny, and said her father did that to her. 2RP 197. The actress told a school counselor. 2RP 231-32; 3RP 274. Detective Michael Thomas took KR to the hospital for a sexual assault examination and arranged a taped interview between KR and forensic child interview specialist, Gina Coslett. 2RP 249; 3RP 296-97; Ex. 33. KR's allegations were notably similar to the script of the school play.

The State immediately put KR in a foster home. CP 59-60; 1RP 163, 176. KR stayed there at the State's insistence and had little contact with her mother or three sisters. 1RP 176-77. KR had lived with her mother, Cynthia, stepfather James Fey, 17-year-old sister Ashley, and her

six-year old twin sisters Hailey and Ember. 2RP 134-35. Mr. Fey had raised KR since she was young. 2RP 135; 4RP 465.

At Mr. Fey's trial for one count of child molestation in the first degree, KR said one night she was watching a movie with her father and he touched her vagina. 2RP 156. She did not recall how long it lasted or how his hand moved. 2RP 158. She said it happened other times but could not remember them. 2RP 155, 220. She said that once, Mr. Fey took her hand and had her touch "his nuts" but did not recall if it was over his clothes. 2RP 165. Mr. Fey denied the allegations and said he was hurt and confused by them. 4RP 571-72, 603.

Due to a dependency action filed by the State, KR was court-ordered to attend weekly counseling sessions with psychotherapist Jo Jordan. 1RP 18; 3RP 328, 354-55. KR did not want to go and was "very reluctant to talk" to Ms. Jordan. 3RP 337, 354-55. KR only spoke about the incident one time, and the counselor testified to those details over objection. 3RP 344-45, 352. KR mostly said she was lonely and missed her family. 3RP 362-63. Ms. Jordan diagnosed KR with a mental health condition affecting her memory and trustfulness. 3RP 342-43. Most of Mr. Jordan's testimony was admitted over Mr. Fey's objection. 1RP 36-38.

The defense stipulated to the admission of the videotaped forensic interview between KR and forensic interviewer Coslett. 2RP 46; 3RP 260. In the interview, KR described more incidents of abuse than at trial and gave more details about improper sexual touching. Ex. 33 RP 11-13, 18-19, 22-23, 27-31. The facts are further set forth in the Court of Appeals opinion, pages 1-3, and in Appellant’s Opening and Reply Briefs, passim, incorporated by reference herein.

D. ARGUMENT

1. **When a child is court-ordered to meet with a counselor and does not see these court-mandated sessions as for treatment purposes, the medical hearsay exception of ER 803(a)(4) does not apply.**

a. *The medical treatment hearsay exception should not be extended to a child’s court-ordered counseling sessions when the child has no treatment purpose.*

Under ER 803(a)(4),¹ a patient’s hearsay statements to a medical professional are admissible when “made for purposes of medical diagnosis or treatment.” *State v. Moses*, 129 Wn.App. 718, 729, 119 P.3d 906 (2005), *rev. denied*, 157 Wn.2d 1006 (2006). “The rationale is that we presume a medical patient has a strong motive to be truthful and accurate.

¹ ER 803(a)(4) defines admissible medical hearsay as: [s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

This provides a significant guarantee of trustworthiness.” *State v. Perez*, 137 Wn.App. 97, 106, 151 P.3d 249 (2007).

ER 803(a)(4) does not mention mental health therapy; the rule’s tenor pertains to physical symptoms. A few Court of Appeals decisions have extended the hearsay exception to mental health providers but none address the situation in the case at bar. *See In re Dependency of M.P.*, 76 Wn.App. 87, 92-93, 882 P.2d 1180 (1994). Other jurisdictions recognize that statements to a psychologist are not as equally inherently reliable like those to a medical doctor regarding a physical injury. *People v. LaLone*, 432 Mich. 103, 437 N.W.2d 611, 614 (1989). Lying or misrepresenting medical symptoms to a health care provider “would be detrimental to the patient” who presently needs treatment, and physical symptoms can be empirically corroborated. *Id.* at 613; *see also State v. Hinnant*, 351 N.C. 277, 523 S.E.2d 663, 668 (2000) (“declarant’s health – even life – may depend on the accuracy of information supplied to the doctor” when medical diagnosis or treatment at issue, unlike psychological treatment). But a psychologist incorporates untrue statements into a diagnosis. *LaLone*, 437 N.W.2d at 613.

For example, psychotherapist Jordan would have counseled KR even if KR was reporting false information and she never told KR that it

was important for her to tell the truth. 3RP 353. KR was court-ordered to attend weekly treatment sessions as part of a dependency action filed after she alleged abuse. 1RP 18; CP 59. She did not like going. 3RP 354-55. KR had already made her accusations, been interviewed in great detail by a forensic interview specialist, and been removed from her family home by the time she was ordered to meet with Ms. Jordan. 3RP 335-36.

In *LaLone*, the Michigan Supreme Court ruled that a complainant's statements to a psychologist, made after the accusations were told to police, "did not have the same measure of reliability" as would statements made during a regularly scheduled psychological therapy session. 437 N.W.2d at 615. If the entire story was fabricated, as the defense claimed in *LaLone*, "surely once the complainant had offered the story to the police, she would offer consistent statements to a psychologist." *Id.* The lack of incentive to give the psychologist a different story than the police undercut the presumption of reliability required for the medical hearsay exception. *Id.* Like *LaLone*, KR did not disclose an unreported incident to the counselor and had already made her allegations to the authorities. 1RP 65; 2RP 249, 253; 3RP 296-97. This Court has not addressed whether counseling sessions trigger the same presumptive reliability as statements to a hospital doctor and should grant review.

Furthermore, this Court should address the mandated nature of the counseling as a platform to gather evidence bolstering the State's case without demonstrated reliability. For example, in *Matta-Ballesteros*, the defendant "was ordered to see the prison psychologist and did not even believe that he had any reason to see the psychologist." *United States v. Matta-Ballesteros*, 71 F.3d 754, 767 (9th Cir. 1995), *opinion amended on denial of reh'g*, 98 F.3d 1100 (9th Cir. 1996). Because the counseling was both mandated and unwanted by the defendant, the court concluded that he "had no special incentive to be truthful" and his statements to the psychologist were properly excluded under the medical hearsay exception in the equivalent federal rule of evidence. *Id.* (citing 4 J. Weinstein & M. Berger, *Weinstein's Evidence*, § 803(4) (1992)).²

b. *The trial court relied on the wrong standard, showing the need to clarify the rules for hearsay statements by children who have a different understanding of the purpose of their statements.*

The judge ruled that the counselor's testimony about what KR told her was admissible under ER 803(a)(4):

[s]o long as you can lay a foundation that *from the therapist's perspective* that the purpose behind this treatment is to treat the mental state of the child, then I

² ER 803(a)(4) is the same as the federal rule. K. Tegland, 5D Wash. Prac., Handbook Wash. Evid., 5 n.3 § 803.1 (2013-14 ed.).

believe it is an exception to the hearsay rule and it's admissible.

1RP 19-21 (emphasis added). The court applied the wrong standard because it is the declarant's state of mind that controls, not the therapist's perspective. *State v. Carol M.D.*, 89 Wn.App. 77, 86, 948 P.2d 837 (1997). KR was speaking to Ms. Jordan because she was court ordered to do so and she viewed the sessions as occurring for the purpose of preparing to testify in court, not for her own treatment.

The Court of Appeals relied on *State v. Kilgore*, 107 Wn.App. 160, 183, 26 P.3d 308 (2001), *aff'd on other grounds*, 147 Wn.2d 288 (2002), to claim that KR would necessarily understand she was seeing a doctor for purposes of treatment. But *Kilgore* is unhelpful. Factually it involves a child's medical care rather than amorphous counseling sessions, and the child said she understood the treatment purpose. Legally it relies on pre-*Crawford*³ confrontation clause case law, holding that the firmly rooted nature of the medical hearsay exception cures confrontation clause problems, rendering its legal analysis outmoded.

Kilgore involved a child's statements to a medical provider, where the child said she was seeing the doctor to examine if she was healthy after

³ *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

she was raped. 107 Wn.App. at 170, 183 n.25. The court agreed that when there are doubts about the child's purpose when speaking, the State must "affirmatively establish" her treatment motive to satisfy ER 803(a)(4). *Id.* at 183-84 (citing *Carol M.D.*).

The rule announced in *Carol M.D.*, affirmed in *Kilgore*, is:

in the case of a child who has *not* sought medical treatment, but makes statements to a counselor procured for him or her by a state social agency, the State's burden under ER 803 is more onerous. The record must *affirmatively demonstrate* the child made the statements understanding that they would further the diagnosis and possible treatment of the child's condition.

Carol M.D., 89 Wn.App. at 86 (emphasis in original).

Like *Carol M.D.*, KR did not seek counseling and she disliked the sessions. 3RP 354-55. She denied that she spoke to a therapist for purpose of treatment. 2RP 178-79. *Carol M.D.* and *Kilgore* hold that "the party offering the statement must affirmatively establish the declarant had a treatment motive." *Kilgore*, 107 Wn.App. at 184; *Carol M.D.*, 89 Wn.App. at 86. The Court of Appeals decision conflicts with this precedent and ignored the trial court's reliance on the wrong perspective when admitting the evidence.

The error was particularly harmful because the prosecution pointedly emphasized Ms. Jordan's testimony about KR's hearsay

statements during closing argument, demonstrating its importance to the State's case. The extension of ER 803(a)(4)'s hearsay exception to statements made to a counselor during court-mandated sessions without affirmative proof of the declarant's intent to be reliable and truthful for purposes of treatment should be addressed by this Court.

2. The cumulative harm flowing from multiple evidentiary errors requires review

"[W]here there is a risk of prejudice and 'no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary.'" *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583, 587 (2010) (quoting *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)). An accused person is entitled to a fair trial. *United States v. Salerno*, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); U.S. Const. amend. 14; Const. art. I, §§ 3, 22. The "cumulative effect of repetitive prejudicial error" may deny that right. *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956).

a. The State used dependency proceedings to bolster the complainant's credibility.

The State removed KR from her family home, against her will, and instigated dependency proceedings due to her allegations against Mr. Fey. Mr. Fey argued evidence of this placement would improperly bolster KR's

credibility by showing the State believed her and thought Mr. Fey was dangerous. 1RP 64-65; 2RP 116-17, 121-124. The court directed the State to call it an “out of home placement” rather than a dependency or foster care. The judge conceded the jurors might infer Mr. Fey’s guilt from the State’s removal of KR from her home. 2RP 118, 123-24.

The prosecution elicited extensive testimony from KR describing how she was “placed” outside her home and “taken away” from her sisters and mom, unwillingly. 2RP 163; 2RP 176-77. The prosecutor drew out KR’s feelings about being put in a stranger’s home in repetitive detail, dwelling on how she missed her sisters and mother and her almost complete lack of contact with them. 2RP 2RP143-44; 176-77.

The court did not give a limiting instruction to the jury at the time the prosecutor elicited this testimony. It gave a written instruction to the jury in its final instructions, saying KR’s “out of home placement” could only be considered for the “purpose of assessing KR’s credibility or lack thereof.” CP 49 (Instruction 6). But telling the jury KR’s “out of home placement” could be considered to assess her credibility let the jury infer the State’s belief in the strength of her allegations. 2RP 117, 124. A ten year-old girl would not be “placed” out of her home to live with a stranger absent state intervention; calling it an out-of-home placement does not

negate the State's orchestration of it. KR's accusations because her allegations arose before she was placed in foster care, so the resulting loneliness and isolation shed no light on the credibility of her accusation. 2RP 117, 119-20. However, her foster care placement engendered substantial sympathy and implied the State's belief in her veracity. 2RP 119-22. Substantial evidence of KR's placement and isolation was far too prejudicial to outweigh its probative value.

b. *The State cast unnecessary aspersions on KR's parents.*

The court permitted the prosecution to argumentatively cast aspersions on Mr. Fey's parenting choices for allowing all of his children to watch a certain movie when the evidence showed Mr. Fey did not select the movie or know what it was about before his children saw it. 4RP 448-49; 502, 579, 610-11; 5RP 659. It berated KR's mother, and Mr. Fey's wife's for not being supportive of KR, in an argumentative fashion. 4RP 518-20.

c. *The State bolstered the allegations by repeating them despite agreeing not to do so pretrial.*

The State conceded the court erred when it let a teacher repeat the details of KR's claim Mr. Fey was the person who abused her, over defense objection and contrary to the fact of complaint doctrine. 3RP 275; Resp. Brief at 24. The fact of complaint doctrine permits evidence about

the *time* the complainant alleged a sexual offense occurred without elaborating on the perpetrator or the details of the accusation. *State v. Ferguson*, 100 Wn.2d 131, 135, 667 P.2d 68 (1983). It admits only evidence to establish that the complaint was timely made. *Id.* at 135–36.

Contrary to a pretrial agreement, the prosecution elicited details about the allegations when questioning school counselors Laurie Schrieber and Virginia Connell. 1RP 28; 3RP 275, 280. The court overruled Mr. Fey’s objection. 3RP 375. The State misused the fact of complaint doctrine to remind jurors that KR made consistent allegations against Mr. Fey as a way to bolster her credibility in closing argument, to make up for the inconsistencies in her trial testimony that the State was forced to acknowledge. 5RP 629, 657. Details of the allegations, including the identity of the perpetrator, were inadmissible and should not have been used to encourage the jury to believe KR. *Ferguson*, 100 Wn.2d at 135.

d. *Ms. Jordan was permitted to testify KR had a “medical” condition as reason for not remembering the incident.*

No witness may comment, directly or indirectly, on the credibility of another witness. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Under the guise of medical testimony, the prosecution offered psychotherapist Jordan’s opinion that KR was unable to explain the details

of the event was due to a “medical” condition, although the court ruled it should be called a “mental health condition.” 1RP 35-38; 3RP 342.

Ms. Jordan said KR had a “condition” that caused her problems with her memory, trust, and “lots of things.” 3RP 343. The prosecution heavily relied on Ms. Jordan’s opinions in its closing argument, stressing that Ms. Jordan believed KR’s claim of abuse. 5RP 629, 631. It used Ms. Jordan to bolster KR’s credibility for impermissible reasons, when a large part of Ms. Jordan’s testimony should never have been admitted.

In sum, the jury heard impermissible evidence prejudicing it against Mr. Fey. The value the jury would put on this evidence requires a new trial. *Salas*, 168 Wn.2d at 673. The Court of Appeals deferred to the judge even though the judge used incorrect legal standards and allowed the jury to use a host of evidence lacking in probative value but with substantial prejudicial impact. Review should be granted.

3. Defense counsel’s unreasonable stipulation to the substantive admission of otherwise inadmissible evidence that included numerous uncharged offenses constitutes ineffective assistance of counsel

- a. *The right to effective assistance of counsel includes a competent lawyer who makes reasonable tactical decisions.*

An attorney renders constitutionally inadequate representation when she engages in conduct for which there is no legitimate strategic or

tactical reason. *State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011); U.S. Const. amend. VI; Const. art. I, § 22. Even if defense counsel gave a tactical reason, “[t]he relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

“Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kyllo*, 166 Wn.2d 856, 862, 868-69, 215 P.3d 177 (2009). Before trial started, defense counsel stipulated to the admission of the complainant’s recorded interview with a forensic child interview specialist in full, as substantive evidence. 1RP 5-6. Gina Coslett had interviewed KR at the request of the investigating detective, who also watched the interview from the next room and assisted Ms. Coslett in framing questions for KR. Ex. 33RP 3; 2RP 249.

KR’s out-of-court statements to Ms. Coslett were inadmissible absent counsel’s stipulation. *See State v. Sua*, 115 Wn.App. 29, 48-49, 60 P.3d 1234 (2003); 1RP 5, 47; 2RP 128-30. The defense could have impeached KR with inconsistent statements from the interview without

stipulating to its admission as substantive evidence. *State v. Clinkenbeard*, 130 Wn.App. 552, 569-70, 123 P.3d 872 (2005).

Due to the stipulation, the prosecution used KR's out of court allegations to supply separate and discreet grounds to convict Mr. Fey. 5RP 625-26, 629. Indeed, the State told the jury to base its verdict on an incident discussed only in the interview. 5RP 625, 636.

KR's trial testimony offered scant information supporting the allegation; she merely said she was touched in "inappropriate" ways and could only describe one incident. 2RP 152-53, 183. She could not say how or whether Mr. Fey's hand moved when it touched her vagina or how long it lasted. 2RP 158-59. She said she gave a "better" description when she spoke with Ms. Coslett. 2RP 158. Unlike her trial testimony, KR told Ms. Coslett about various types of touching, including being forced to touch Mr. Fey's penis, more incidents, and described their painful nature. Ex. 33RP 11-19, 22-25, 27-31. The video was not needed to impeach KR but gave another vehicle for the State to convict Mr. Fey.

b. *Prejudice results from unreasonably attorney performance when the State uses otherwise inadmissible evidence as an independent basis to convict the defendant.*

During closing argument, the prosecutor emphasized the "integrity" of the child interview specialist, who knew how to elicit "non-

suggestive” and “non-leading” descriptions of events. 5RP 631. These “specific details” occurred in the forensic interview, not during trial testimony. 5RP 632-33. He said the video had “the most compelling detail” proving the incident and KR gave “much more detail in the forensic interview than she did on the stand.” 5RP 633-35. The court gave the jury unlimited access to the videotape during deliberations. 5RP 661.

A tactical decision by counsel must be based on a reasonable trial strategy. *Sears*, 130 S.Ct. at 3265. Stipulating to the admission of an otherwise inadmissible out-of-court statement containing detailed allegations of sexual abuse had no objectively reasonable and legitimate purpose. The only reason to refer to the interview was to show KR was inconsistent at times, and this benefit did not require giving the jury unfettered access to the entire videotape as substantive evidence supplying separate grounds to convict Mr. Fey. Due to the stipulation, the State invited the jury to base its verdict upon allegations mentioned only in the recorded interview, not at trial, and it used the details KR gave only in the interview as evidence of her accuracy and reliability. 5RP 636. Because it is reasonably probable that the jury’s verdict rested on evidence that would not have been admitted absent defense counsel’s stipulation to the lengthy videotaped interview, his unreasonable stipulation to its admission

prejudiced Mr. Fey and this Court should grant review to address the effectiveness of Mr. Fey's counsel. *Strickland*, 466 U.S. at 694.

4. The court unlawfully deprived Mr. Fey of his parental right to a relationship with his own children without weighing this deprivation.

A parent has a fundamental liberty and privacy interest in the care, custody and enjoyment of his child. *Troxel v. Granville*, 530 U.S. 57, 65-66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). A sentencing court may not impose a no-contact order between a defendant and his biological child as a matter of routine practice. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 377-82, 229 P.3d 686 (2010). Instead, the court must consider whether the order limiting contact is "reasonably necessary in scope and duration to prevent harm to the child." *Id.* at 379. Conditions that interfere with a fundamental constitutional right "to the care, custody, and companionship of one's children . . . must be 'sensitively imposed' so that they are "reasonably necessary to accomplish the essential needs of the State and public order." *Id.* at 374-75.

Without acknowledging the existence of Mr. Fey's parental rights, the court entered community custody conditions curtailing his parent-child relationship with his biological children, Hailey and Ember, who were six

years old. 4RP 423, 465, 574; CP 33. The blanket restrictions Mr. Fey's contact with his own children or his wife, who is the mother of minor children. CP 33 (conditions 4, 6, 8, 9). Mr. Fey may not communicate with his own family if his children are minors. *Id.*

In *Rainey*, "given the fact-specific nature of the inquiry," the court struck the no-contact order between father and daughter and remanded for resentencing "so that the sentencing court may address the parameters of the no-contact order under the 'reasonably necessary' standard." 168 Wn.2d at 382. Here, the court gave no explanation for entering these boilerplate conditions even though they violate his Mr. Fey's fundamental right to have a relationship with his own children. These conditions conflict with *Rainey* and require resentencing.

E. CONCLUSION

Based on the foregoing, Petitioner James Fey respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 3rd day of December 2014.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 JAMES MATTHEW FEY,)
)
 Appellant.)

No. 70443-5-I
DIVISION ONE
UNPUBLISHED OPINION
FILED: November 3, 2014

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COURT OF APPEALS
STATE OF WASHINGTON

APPELWICK, J. — Fey was convicted of child molestation in the first degree after his stepdaughter, K.R., reported that Fey molested her. Fey argues that the trial court erred in admitting statements K.R. made to her therapist under ER 803(a)(4). He asserts that this error combined with several other evidentiary rulings deprived him of his right to a fair trial. He alleges that he received ineffective assistance of counsel when his attorney stipulated to the admission of K.R.'s recorded interview with a child forensic interview specialist. He contends that his sentencing conditions deprived him of his parental right to a relationship with his own children. We affirm.

FACTS

K.R. lived with her mother, C.R., stepfather, James Fey, older sister, A.R., and younger twin sisters, H.F. and E.F. At the time of trial, K.R. was 11 years old, and C.R. and Fey had been together for nine years. C.R. and Fey are H.F.'s and E.F.'s biological parents. K.R. and A.R. have a different biological father but were raised by Fey since they were young. They call him "dad."

On May 29, 2012, an educational theater group performed a play at K.R.'s school. The play was about safety rules in situations of bullying or abuse. In one of the acts, a 12 year old character was inappropriately touched by her mother's boyfriend. After

watching the play, K.R. asked one of the actresses, "What if it's a parent touching you? What if it's your dad? That's happening to me. I should tell." The actress informed a school counselor who spoke to K.R. K.R. told the counselor that her stepfather touched her inappropriately. The counselor contacted the police.

K.R. was taken to the hospital for a sexual assault examination. Her examination was inconclusive.

K.R. was then interviewed by a forensic child interview specialist, Gina Coslett. The interview was videotaped. During the interview, K.R. told Coslett that the first time Fey touched her was in July 2011. Fey and K.R. were in Fey's living room—called the "man cave"—and Fey was tickling K.R. K.R. said he "put his fingers over the pants and started just feeling it." K.R. said, "Stop," and Fey did.

K.R. told Coslett that Fey touched her another time when they were watching a movie together. Fey lifted K.R. up beside him and starting touching her vagina. She said it felt "very, very uncomfortable." K.R. said she told him to stop, but she did not think she said it loud enough, because he kept touching her. Fey stopped when K.R. "almost screamed 'Stop.'" K.R. said that Fey also put K.R.'s hand on "his nuts" that night.

K.R. told Coslett that the last time Fey touched her inappropriately was also when they were watching a movie together in the man cave. K.R. said that Fey reached down her shorts and rubbed her vagina with his fingers. He stopped when K.R. said, "Ow."

After the allegations, K.R. was placed with in a foster home with Kim Miller. K.R. remained with Miller throughout the trial court proceedings. The State initiated a dependency case against Fey and C.R. As part of the dependency proceeding, K.R.

attended weekly counseling with Jo Jordan, a psychotherapist.¹ Jordan diagnosed K.R. with posttraumatic stress disorder (PTSD).

The State charged Fey with one count of child molestation in the first degree. Fey pleaded not guilty. His defense was that K.R. lied for attention when she accused Fey of molesting her and that she incorporated details from the educational play into her accusations and interview with Coslett. Fey's counsel stipulated to the admission of the interview video recording.

K.R. testified at trial. She said that Fey touched her vagina multiple times. K.R. testified that she best remembered the second time that Fey touched her. She said that they were watching a movie in the man cave when it happened. She also testified that Fey made her touch "his nuts." She did not remember many other details.

The State called Coslett, who testified about the forensic interview process. The State played the videotape of K.R.'s interview for the jury, per Fey's stipulation.

Jordan testified about K.R.'s counseling sessions. She said that K.R. told her that Fey molested her when they watched a movie together under a blanket in the man cave. K.R. said that Fey "tickled her up and down her sides and then down the front, and then he touched her on her front privates."

Fey testified. He stated that he never molested K.R. or touched her inappropriately.

The jury found Fey guilty as charged. He was sentenced to 59.5 months to life in prison. He appeals.

¹ The record does not otherwise reflect the terms of K.R.'s counseling.

DISCUSSION

Fey argues that multiple erroneous evidentiary rulings amounted to cumulative error which deprived him of his right to a fair trial. He further maintains that he received ineffective assistance of counsel when his attorney stipulated to the admission of K.R.'s videotaped forensic interview. Finally, he argues that his sentencing conditions impede his parental relationship with his biological daughters.

I. Evidentiary Rulings

We review a trial court's evidentiary rulings for abuse of discretion. Cox v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265, 22 P.3d 791 (2000). We will not overturn the trial court's ruling absent manifest abuse of discretion. Sintra, Inc. v. City of Seattle, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997). The accumulation of otherwise nonreversible errors may deny the defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

A. K.R.'s Statements to Her Therapist

Fey argues that the trial court erred in admitting statements K.R. made to Jordan during counseling, because the statements were inadmissible hearsay.² Fey asserts that K.R. did not make her statements for the purpose of treatment and thus the statements lack the guarantee of trustworthiness required by ER 803(a)(4).

ER 803(a)(4) establishes the medical diagnosis exception to the rule against hearsay. Under this exception, out-of-court statements are admissible if made for the

² The State contends that Fey waived his objection to K.R.'s statements. But, Fey objected to their admission during motions in limine. His objection was ongoing. State v. Kelly, 102 Wn.2d 188, 193, 685 P.2d 564 (1984) ("Unless the trial court indicates further objections are required when making its ruling, its decision is final, and the party losing the motion in limine has a standing objection."). Fey's objection is preserved for appeal.

purpose of medical diagnosis or treatment. Id. The rationale is that a medical patient is presumed to have a strong motive to be truthful and accurate, providing a “significant guarantee of trustworthiness.” State v. Perez, 137 Wn. App. 97, 106, 151 P.3d 249 (2007). For the purposes of ER 803(a)(4), the term “medical” applies to both physical and mental health, including therapy for sexual abuse.³ In re Pers. Restraint of Grasso, 151 Wn.2d 1, 19, 84 P.3d 859 (2004); State v. Woods, 143 Wn.2d 561, 602-03, 23 P.3d 1046 (2001); In re Dependency of M.P., 76 Wn. App. 87, 92-93, 882 P.2d 1180 (1994).

The medical diagnosis exception becomes more complicated in the context of child declarants. We do not presume that children cannot understand that certain statements they make are for the purpose of treatment. M.P., 76 Wn. App. at 93. Nor is there a per se requirement that a child declarant affirmatively understand a statement's treatment purpose, so long as the statement has other indicia of reliability. State v. Ashcroft, 71 Wn. App. 444, 457, 859 P.2d 60 (1993). For example, the court may admit statements made by child declarants who cannot understand the treatment purpose of their statements if corroborating evidence supports the child's statements and it appears unlikely that the child would have fabricated the cause of injury. State v. Florczak, 76 Wn. App. 55, 58-59, 65, 882 P.2d 199 (1994). Subsequent cases have clarified that the rule in Florczak applies to only very young children.⁴ See State v. Kilgore, 107 Wn. App. 160, 183, 26 P.3d 308 (2001), aff'd, 147 Wn.2d 288, 41 P.3d 974 (2002); State v. Carol M.D.,

³ Fey asserts that statements to a mental health therapist should not be treated as statements to a medical doctor under ER 803(a)(4). Washington courts have declined to make this distinction. See, e.g., M.P., 76 Wn. App. at 92-93 (“We cannot conclude that therapy for sexual abuse, as an exercise in healing, differs materially from other medical treatment for the purposes of ER 803(a)(4).”).

⁴ The child declarant in Florczak was three years old. 76 Wn. App. at 58.

89 Wn. App. 77, 87-88, 948 P.2d 837 (1997), withdrawn in part on other grounds, 97 Wn. App. 355 983 P.2d 1165 (1999).

In Carol M.D., the court found that nine year old M.D. was old enough to be capable of understanding that her statements were made for the purpose of treatment. 89 Wn. App. at 87-88. However, on the record before it, the court did not find that M.D. was motivated to tell the truth by her self-interest in obtaining proper medical treatment. Id. at 87. M.D. testified that Cindy Andrews was her therapist, but also said she did not know what Andrews was supposed to do. Id. at 86. Andrews testified that her standard practice was to tell children who she is and what she does. Id. at 87. But, she did not testify that she explained to M.D. that her treatment's success depended upon truthful and accurate information. Id. The court held that, where a child declarant has not sought medical treatment, but makes statements to a state-appointed counselor, the "record must affirmatively demonstrate the child made the statements understanding that they would further the diagnosis and possible treatment of the child's conditions." Id. at 86.

The Kilgore court narrowed the rule in Carol M.D.:

When the party is offering hearsay testimony through the medical diagnosis exception, when the declarant has stated he or she does not know what the medical personnel to whom the statement was made does . . . the party offering the statement must affirmatively establish the declarant had a treatment motive. Otherwise, as long as the declarant is not a very young child, courts may infer the declarant had such a motive.^[5]

107 Wn. App. at 184 (emphasis added).

When K.R. began therapy, Jordan explained her role as a psychotherapist. She told K.R. that "it was a safe place, and let her know the kind of work I do, and that a lot of

⁵ In Kilgore, the child declarant was almost 11 years old. 107 Wn. App. at 183. The court presumed that she had a treatment motive. Id.

kids feel the way that she feels and a lot of kids have had the experience that she described. And I let her know that when she was ready to talk that I would be there for her." Jordan also told K.R. that their conversations were confidential, as long as no one was getting hurt. Their sessions consisted of therapeutic activities, such as games to help K.R. be more comfortable facing her issues and feelings. K.R. testified that she went to counseling with Jordan once a week, starting shortly after K.R. went to live with her foster mother. K.R.'s therapy began in June 2012 and continued through trial in March 2013. K.R. said that she and Jordan would talk and play "feeling games."

Unlike the declarant in Carol M.D., K.R. did not state that she did not know what Jordan does. To the contrary, K.R. testified that Jordan was her counselor and spoke about therapeutic activities they did together, indicating that she understood Jordan's work. Thus, under the limiting principle set forth in Kilgore, we may infer that 11 year old K.R. had a treatment motive when making her statements. See 107 Wn. App. at 183-84 (presuming 10 year old had treatment motive).

Fey seeks to rebut this inference, arguing that the record shows that K.R. did not make her statements for the purpose of treatment. First, he asserts that K.R.'s incentive to be truthful was reduced, because she "did not seek treatment from Ms. Jordan and did not like going." According to Jordan, K.R. was negative and anxious in the beginning of counseling. However, Jordan also testified that K.R. became more relaxed and willing to share as time went on. And, K.R. testified that counseling was "going okay. I like Jo because, like, she -- she's not afraid to express herself." The record does not support Fey's assertion that K.R.'s feelings towards therapy affected her truthfulness.

Fey further contends that K.R. did not make her statements for the purpose of treatment, because she believed the reason she went to therapy was to prepare her for court. Specifically, he refers to K.R.'s testimony that she and Jordan talked about what happened with Fey "[o]nly when I had to -- we had to talk about it for court to get me ready." When the prosecutor asked K.R. to explain, she replied,

Like, she has to go, like, tell me, like, what's going to happen, and, like -- like, when every -- everybody's going to be there, like, who's going to be there, and she was going to be here but I don't think she could make it. And she -- and we just go over what we were going to -- what I was going to say and everything, and, like, talk about the only truth thing, and we talked about how I felt about it.

Fey's argument ignores an important piece of context. Jordan diagnosed K.R. with PTSD. Jordan's job was to help K.R. deal with and heal from her trauma. K.R. had difficulty talking about what happened to her. As trial approached,⁶ Jordan had every reason to be concerned about how testifying would affect K.R. It follows that Jordan would want as part of K.R.'s treatment to prepare K.R. for a potentially difficult experience. K.R. did not say that her only reason for seeing Jordan was to prepare for trial. She did not say Jordan coached her on what to say at trial. Jordan testified that K.R.'s counseling sessions were not for the purpose of preparing her for trial. The record shows that Jordan built a trusting, therapeutic relationship with K.R. over several months. There is no evidence to suggest that this relationship changed when discussing trial preparation. And, preparing K.R. for trial was consistent with her treatment.

Moreover, Jordan emphasized the need for candor when she talked with K.R. about trial. K.R. testified that Jordan told her "it's, basically, like, the truth chair. Don't tell

⁶ Jordan testified that she and K.R. spoke about Fey in January 2013. Trial began in March 2013.

a lie, and, like -- like, for us, the truth thing is when I, like, tell -- actually tell my feelings about how I feel about court and everything." Thus, to the extent that K.R.'s statements to Jordan related to trial preparation, K.R. was aware that it was essential to speak the truth.

Fey does not overcome the presumption that K.R.'s statements were for the purpose of treatment. The trial court did not abuse its discretion in admitting her statements.

B. K.R.'s Testimony About Her Out-of-Home Placement

Fey argues that the trial court admitted irrelevant and unduly prejudicial testimony about K.R.'s foster placement. "Relevant evidence" is evidence having any tendency to prove or disprove a fact that is material to the determination of the action. ER 401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. The trial court has wide discretion in balancing the probative value of evidence against its potential prejudicial impact. Coe, 101 Wn.2d at 782.

The trial court admitted the State's evidence about K.R.'s foster placement on the condition that the State use the less prejudicial term "out-of-home placement" in lieu of "foster care." Fey argues that K.R.'s testimony about her out-of-home placement was not relevant to her credibility, because she was placed there after she made her allegations. But, K.R. testified that she was initially scared at the new home and missed her family. The State's theory was that, under those circumstances, K.R. would have recanted if she was lying. K.R.'s commitment to her allegations in the face of discomfort and loneliness

was probative of her credibility, especially in a case where her credibility was the central issue.

Neither the prosecutor nor K.R. suggested that the State arranged K.R.'s out-of-home placement. But, Fey contends that the testimony prejudiced him by allowing the jury to infer that the State removed K.R. from her home and by engendering sympathy for K.R., bolstering her credibility. "Almost all evidence is prejudicial in the sense that it is used to convince the trier of fact to reach one decision rather than another." State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987). The trial court weighed the potential for prejudice from such an inference and the probative value relative to K.R.'s credibility and concluded that the evidence was admissible. This was not an abuse of discretion.

Moreover, the court instructed the jury that the evidence may be considered only for the limited purpose of assessing K.R.'s credibility. We presume that juries follow all instructions given. State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Fey did not object to the instruction below. He waived his objection to the instruction on appeal. RAP 2.5(a); State v. Smith, 174 Wn. App. 359, 364, 298 P.3d 785 (2013) ("Generally, a party who fails to object to jury instructions in the trial court waives a claim of error on appeal."), review denied, 178 Wn.2d 1008, 308 P.3d 643 (2013).

C. Fact of Complaint Evidence

Fey asserts that the trial court erred in permitting "fact of complaint" witnesses to testify that K.R. identified Fey as her molester. The fact of complaint doctrine is an exception to the rule against hearsay. State v. Ackerman, 90 Wn. App. 477, 481, 953 P.2d 816 (1998). It allows the State in a sex offense case to present evidence that the victim complained to someone after the assault. State v. Ferguson, 100 Wn.2d 131, 135,

667 P.2d 68 (1983). This rule admits only evidence establishing that the complaint was timely made. Id. at 135-36. A fact of complaint witness may not testify about the identity of the offender. Id. at 136. However, error in admitting evidence about the offender's identity may be harmless where identity is not contested. See, e.g., State v. Fleming, 27 Wn. App. 952, 957-58, 621 P.2d 779 (1980).

At trial, the State elicited fact of complaint testimony from two counselors at K.R.'s school. Both testified that K.R. said her father molested her. The trial court overruled Fey's objection to this testimony. This was error. However, the identity of K.R.'s molester was not in question. And, several other pieces of evidence identified Fey as the perpetrator. Thus, the error was harmless.

Fey also argues that the State used the fact of complaint evidence in closing argument to impermissibly bolster K.R.'s credibility. But, the State did not refer to the fact of complaint witnesses in closing. When the State argued that K.R.'s testimony was corroborated by other witnesses, it named Fey—not the fact of complaint witnesses—as an example and discussed how Fey's testimony was similar to K.R.'s regarding the details of the incident.

Any error in admitting the fact of complaint evidence was harmless.

D. Therapist's Testimony About K.R.'s Memory Problems

Fey contends that Jordan improperly testified to K.R.'s credibility "[u]nder the guise of medical testimony" about K.R.'s memory loss due to her medical condition.⁷ Expert testimony is admissible when (1) the witness qualifies as an expert, (2) the opinion is

⁷ The court barred the State from referring to K.R.'s PTSD by name due to its potential for prejudice. Instead, the State referred to K.R.'s PTSD as her "medical condition."

based upon an explanatory theory generally recognized in the scientific community, and (3) if it will be helpful to the trier of fact. ER 702; In re Pers. Restraint of Morris, 176 Wn.2d 157, 168-69, 288 P.3d 1140 (2012). An expert's opinion is not automatically excluded if it covers an issue to be decided by the trier of fact. ER 704; State v. Kirkman, 159 Wn.2d 918, 929, 155 P.3d 125 (2007). However, no witness may comment on the credibility of another witness. State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995).

In Kirkman, the defendant was accused of sexually assaulting a child. 159 Wn.2d at 924. The doctor who examined the victim testified that there was no physical evidence of sexual contact. Id. The State asked the doctor if his findings were consistent with the victim's allegations of abuse. Id. The doctor replied that "to have no findings after receiving a history like [the victim reported] is actually the norm rather than the exception." Id. The Washington Supreme Court found this testimony proper. Id. at 933. It noted that, where a child victim's credibility is at issue, a trial court has broad discretion to admit evidence corroborating the child's testimony. Id. There, the doctor did not opine that the defendant was guilty or that the victim was truthful. Id. Rather, his testimony was "content neutral" and did not comment on the substance of the matters they discussed. Id.

Here, the State asked K.R.'s therapist whether K.R.'s medical condition affects her memory. Jordan testified that "[o]ften times this condition affects the memory in ways that they forget critical parts of what happened to them. Sometimes they -- sometimes it's time that they get wrong, and they might take several instances and put it into one. Sometimes they forget details." She also testified that stress can exacerbate K.R.'s condition.

This is analogous to Kirkman. Fey's defense relied on challenging K.R.'s credibility. Jordan did not opine on K.R.'s truthfulness. Like the doctor in Kirkman, Jordan merely explained why inconsistencies in K.R.'s testimony might occur. And, the line of questioning here was less blatant than in Kirkman, where the State directly asked the doctor if the inconsistency could be reconciled. See 159 Wn.2d at 924.

The trial court did not abuse its discretion in admitting Jordan's testimony about K.R.'s memory loss.

E. Questions About Fey and C.R.'s Bad Parenting

Fey argues that the trial court erred in admitting evidence that suggested Fey and C.R. were bad parents.

He first challenges evidence that he permitted his daughters to watch an inappropriate movie called Sucker Punch. (Warner Brothers 2011). During A.R.'s cross-examination, the State asked her, "So let's talk about Sucker Punch. . . . Do you think that's an appropriate movie for [K.R.] to be watching?" A.R. replied that the movie was "[p]robably not entirely appropriate, but it's not extremely inappropriate." The State argues that this was relevant to whether Fey molested K.R., because "[a]llowing a child to watch movies with sexual themes could desensitize the child to sexual situations." But, A.R.'s testimony does not specify that the movie was sexual or otherwise suggest that Fey molested K.R. A.R.'s opinion about Sucker Punch's appropriateness has questionable relevance. However, Fey testified—without objection—that certain parts of the movie were inappropriate and would "get kind of sexual." Fey does not demonstrate prejudice from A.R.'s testimony.

Fey's remaining challenges are without merit. He complains that the prosecutor repeatedly questioned him about why he did not tell detectives about watching Sucker Punch with K.R. But, the court sustained both of Fey's objections to this line of questioning. In addition, Fey seems to object to the State addressing this evidence in closing. However, the attorneys' statements are not evidence, and the jury was instructed as such. Finally, Fey challenges the line of questioning by the prosecutor which attacked C.R.'s parenting. The prosecutor asked multiple questions about C.R.'s comment that "four innocent people' were suffering" due to K.R.'s accusations.⁸ Fey objected at trial. Fey now argues that these tactics placed irrelevant and unduly prejudicial evidence before the jury. But, the underlying evidence that people were suffering was introduced during testimony by Jordan without objection. We will not find error based on an evidentiary grounds not raised at trial. State v. Powell, 166 Wn.2d 73, 82-83, 206 P.3d 321 (2009).

To the extent the trial court erred in admitting irrelevant evidence, it was harmless.

F. Cumulative Error

Fey argues that the aforementioned evidentiary errors amounted to cumulative error, prejudicing his right to a fair trial. We find that the trial court made two harmless errors. This did not constitute cumulative error.

II. Ineffective Assistance of Counsel

Fey argues that his counsel was ineffective for stipulating to the admission of K.R.'s recorded interview with Coslett. He maintains that the interview consisted of

⁸ Fey's argument on appeal seems to challenge the prosecutor's behavior. However, he frames his argument as an evidentiary challenge and does not allege prosecutorial misconduct. Accordingly, we treat the challenge as evidentiary.

otherwise inadmissible hearsay that prejudiced the jury's verdict. He contends that there was no conceivable legitimate tactical reason for counsel's actions.

The Sixth Amendment of the United States Constitution guarantees defendants the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To demonstrate ineffective assistance of counsel, an appellant must show that the attorney's performance was deficient and that the deficiency was prejudicial. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance is that which falls below an objective standard of reasonableness. In re Det. of Moore, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009). The reasonableness of counsel's conduct is judged "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690. Prejudice occurs if, but for the deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong presumption of effective assistance. Moore, 167 Wn.2d at 122. But, this court will conclude that counsel's representation is ineffective if it can find no legitimate strategic or tactical reason for a particular decision. McFarland, 127 Wn.2d at 336. For example, the decision to present certain evidence is a matter for difference of opinion and therefore presumed to be a matter of legitimate trial tactics. See In re Pers. Restraint of Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004).

Defense counsel's theory of the case was that K.R. lied for attention when she accused Fey. Counsel theorized that K.R. incorporated details from the play in her interview with Coslett and that those details differed from K.R.'s testimony at trial eight

months later. Counsel used the video to note specific inconsistencies between K.R.'s interview and trial testimony. This allowed him to draw doubt about her credibility.

Fey argues that counsel could have impeached K.R. without stipulating to the admission of the entire interview. But, counsel also used the video to dispute the State's assertion that K.R. had memory issues. He referred to the video when questioning Coslett's interview techniques. And, he asked the jury to observe K.R. demeanor's during the interview.

Fey contends that the interview was prejudicial, because it presented evidence that did not arise elsewhere. But, counsel was clearly aware of this, as it was the basis for his argument that K.R.'s testimony was unreliable. Fey may disagree with counsel's strategy, but that does not make it illegitimate. See Davis, 152 Wn.2d at 742. Nor does the fact that Fey was ultimately convicted. See In re Pers. Restraint of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992) (In considering ineffective assistance, "the court must make every effort to eliminate the distorting effects of hindsight.").

Fey's defense was that K.R. lied about his transgressions. The video was central to presenting his theory of the case. Counsel's stipulation to the video's admission was a legitimate tactical choice. It did not constitute ineffective assistance of counsel.

III. Sentencing Conditions

Fey challenges his sentencing conditions that restrict his contact with minors. He asserts that the conditions violate his fundamental right to a relationship with his biological daughters, H.F. and E.F.

The trial court has the authority to impose crime-related prohibitions as a condition of sentence. RCW 9.94A.505(8); State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940

(2008). We review sentencing conditions for abuse of discretion. Id. This remains the standard even where the condition interferes with a fundamental right, such as the relationship between parent and child. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 374-75, 229 P.3d 686 (2010). However, we review such conditions more carefully to ensure that they are sensitively imposed and reasonably necessary to accomplish the essential needs of the State and public order. Id. at 374. The State has a compelling interest in preventing harm and protecting children. State v. Corbett, 158 Wn. App. 576, 598, 242 P.3d 52 (2010).

Fey's sentence included the following prohibitions:

4. Do not initiate or prolong contact with minor children without the presence of an adult who is knowledgeable of the offense and has been approved by the supervising Community Corrections Officer.
-
6. Do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer.
-
8. Do not date women or form relationships with families who have minor children, as directed by the supervising Community Corrections Officer.
9. Do not remain overnight in a residence where minor children live or are spending the night.

Fey argues that these conditions bar him from communicating with his own family for as long as his children are minors.

We may vacate a no-contact order where it is not sufficiently related to the harm it seeks to prevent. See, e.g., State v. Letourneau, 100 Wn. App. 424, 427, 997 P.2d 436 (2000). In Letourneau, the defendant was convicted of second degree rape of a child. Id. The victim was a 13 year old boy to whom Letourneau was not related. Id. at 428-29.

As a condition of her sentence, Letourneau was prohibited from unsupervised contact with her biological children until they reached the age of majority. Id. at 437-38. Because there was no evidence that Letourneau might molest her own children, we found that the condition was not reasonably necessary to accomplish the State's needs. Id. at 441-42.

The present case is distinguishable. Although K.R. is not Fey's biological daughter, he essentially raised K.R. as his own. K.R. has called Fey "dad" for nine of her 11 years. Fey's conviction serves as evidence that Fey molested a child he considered his own. Unlike in Letourneau, it is reasonable to impose a condition to ensure that Fey's biological daughters are not at risk. And, Fey is able to see his daughters as long as an approved adult is present. The sentencing conditions are tailored to Fey's offense and reasonably necessary to prevent harm to minor children.

Relying on Rainey, Fey also challenges the lifetime duration of his conditions. In Rainey, the court entered a lifetime no-contact order between Rainey and his daughter after Rainey kidnapped the child and used her to gain leverage over his ex-wife. 168 Wn.2d at 379. The Washington Supreme Court approved the order's scope but found no justification on the record for the order's lifetime duration. Id. at 382. It remanded for the sentencing court to consider the duration of the order under the "reasonably necessary" standard. Id. at 382.

Again, the present case is distinguishable. Fey's conditions limit his interactions with minors for his lifetime. But, the conditions are not lifelong as they pertain to his children. Fey's contact with his daughters is restricted only until they reach the age of majority. This duration is justified by his offense.

No. 70443-5-1/19

The trial court did not abuse its discretion in imposing Fey's crime-related prohibitions.

We affirm.

WE CONCUR:

Seindler J

Appelwick J

COX, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70443-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- respondent Mary Kathleen Webber
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Snohomish County Prosecuting Attorney
- petitioner
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- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

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