Supreme Court No. _____
COA No. 46688-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JUAN CARLOS MADRAZO-MUNOZ,

Petitioner.

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# PETITION FOR REVIEW

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## A. IDENTITY OF PETITIONER

Your Petitioner for discretionary review is Juan Madrazo-Munoz, the Defendant and Appellant in this case, asks this Court to review the decision of the Court of Appeals referred to in section B.

## B. COURT OF APPEALS DECISION

Madrazo seeks review of Division Two's Unpublished Opinion affirming his convictions for two counts of first degree child molestation. *State v. Madrazo-Munoz*, 2016 WL 687312 at *1 (slip op. filed February 17, 2016). A copy of the Unpublished Opinion is attached hereto and incorporated by reference.

## C. ISSUE PRESENTED FOR REVIEW

1. Should this Court grant review and hold that the trial court denied the petitioner his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it refused to allow the defense to elicit relevant evidence that the complaining witness J.N.S. possessed a cell phone which contained photos depicting sexual acts, which showed precocious knowledge and explained why her visits to the petitioner's house became infrequent? RAP 13.4(b)(3); RAP 13.4(b)(4).

## D. STATEMENT OF THE CASE

In December, 2010 police responded to a report of suspected molestation of J.N.S. by the appellant Juan Carlos Madrazo-Munoz. 2Report of Proceedings (RP) at 138-40. The allegation originated when J.N.S.'s mother Jenny Thomas asked J.N.S. if anyone had touched her inappropriately. J.N.S. alleged that Madrazo had put his hand down her underpants and touched her vagina on two occasions at his house in Vancouver, Washington in July, 2010. 2RP at 142, 3RP at 326. Madrazo and his wife Katrina were family friends of Ms. Thomas, and J.N.S. frequently stayed at the Madrazo's house on weekends to play with their children. 2RP at 140-42, 151, 199.

After J.N.S. accused Madrazo of touching her, Ms. Thomas went to the Madrazo's house after midnight and told Katrina about J.N.S.' accusation, and then called the police. 2RP at 143, 191, 200, 215, 216, 217.

J.N.S. was interviewed by a responding officer early in the morning after making the allegation. 2RP at 175. A police officer interviewed J.N.S. in February, 2011, two months after her allegation. J.N.S. stated that once Madrazo put his hand in her underpants while she was sleeping on a couch, and that he did the

same thing a second time when she was sleeping in the bed of one of Madrazo's children. 3RP at 251-54, 256-58, 305, 314.

Almost three years after the allegation, Madrazo was charged by information in Clark County Superior Court with two counts of first degree child molestation against J.N.S. RCW 9A.44.083. Clerk's Papers (CP) 1.

Prior to trial, the State sought to suppress testimony regarding pornography found by Katrina Madrazo on a cell phone belonging to Jenny Thomas that was in the possession of J.N.S. 1RP at 69. The photos contained on the phone depicted Jenny Thomas performing oral sex on an unidentified male and were found by Ms. Madrazo on a cell phone that was in J.N.S.'s backpack in July or August, 2010. 1RP at 69. Ms. Madrazo took the cell phone and did not return it to J.N.S. 1RP at 69.

The defense argued that the photos were relevant because they showed precocious knowledge by J.N.S. and because it refuted the State's argument that J.N.S.'s visits stopped or were reduced because she no longer wanted to stay overnight at the Madrazo's house. 1RP at 70. The trial court "provisionally" granted the motion to exclude this evidence from trial. 1RP at 76.

During trial the defense renewed its request to introduce

testimony regarding the cell phone containing sexually explicit "selfies" taken by Ms. Thomas. 2RP at 223. In an offer of proof Katrina Madrazo stated that in 2010 she and her husband had found a cell phone belonging to Jenny Thomas in items brought to their house by J.N.S. 2RP at 224. Madrazo found images contained in the phone of Ms. Thomas performing oral sex and showed the images to his wife. 2RP at 229. The images appeared to be "selfies" taken by Ms. Thomas. Ms. Madrazo talked with her husband about the images and they decided to keep the phone rather than return it to Ms. Thomas. 2RP at 226. She stated that Ms. Thomas did not ask about the missing phone. 2RP at 226. Defense counsel argued that the phone showed precocious knowledge of the child and was relevant because it showed a possible source of J.N.S.'s knowledge regarding sex. 2RP at 231-32.

The court reiterated its pre-trial ruling that the proffered testimony regarding the phone and images contained in the phone is irrelevant and any probative value is outweighed by unfair prejudice. 2RP at 234.

Other than the testimony of J.N.S., the only evidence offered was the testimony of two officers who interviewed J.N.S., Jenny

Thomas, and her grandmother, her mother's friend, and Ms. Madrazo. There was no physical evidence introduced at trial.

The jury found Madrazo guilty of child molestation in the first degree as alleged in Counts I and II. CP 174, 176. In special verdict forms, the jury found that both counts were committed using an abuse of trust. CP 175, 177.

The court imposed sentence at the top end of the standard range of range on each count, and ordered the sentences to run concurrently for a total of 96 months. CP 210.

1. **Proceedings on Appeal**.

On appeal, Madrazo challenged his convictions, arguing that his due process right to present a complete defense was violated because the court excluded evidence of the explicit photographs on the cellphone found in J.N.S.'s backpack. The Court of Appeals rejected the argument challenging the convictions. For the reasons set forth below, Madrazo seeks review.

## E. ARGUMENT

### 1. THE TRIAL COURT ERRED BY SUPPRESSING EVIDENCE THAT J.N.S. HAD POSSESSION OF A CELL PHONE CONTAINING EXPLICIT SEXUAL IMAGES, DEPRIVING THE APPELLANT OF HIS DUE PROCESS RIGHT TO PRESENT EVIDENCE TO THE JURY THAT WOULD REBUT THE INFERENCE

**THAT J.N.S. HAD SEXUAL KNOWLEDGE DUE TO THE ALLEGED OFFENSES.**

Madrazo was convicted of two counts of child molestation in the first degree. Under RCW 9A.44.083:

> A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.083(1).

The Sixth and Fourteenth Amendments to the United States Constitution, and article 1, § 21 of the Washington Constitution, guarantee a defendant the right to defend against the State's allegations and present a defense. These are fundamental elements of due process. *Chambers v. Mississippi*, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973); *Washington v. Texas*, 338 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967); *State v. Burri,* 87 Wn.2d 175, 181, 550 P.2d 507 (1976); see also *State v. Austin*, 59 Wn. App. 186, 194, 796 P.2d 746 (1990) (exclusion of evidence material to defense violates due process).

Defense counsel is traditionally allowed to mount a general challenge to the credibility of the witness or, more specifically, to reveal biases, prejudices, or ulterior motives of the witness. *Davis*

*v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, L.Ed.2d 347 (1974). Moreover, the defendant has the right to the admission of relevant evidence. ER 401, 403. Relevant evidence is that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. A party is entitled to admit relevant evidence, except as limited by constitutional requirements or as otherwise provided by statute, by the evidence rules. See ER 402. It is error to exclude relevant evidence absent a legitimate basis for doing so. See, e.g., *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007) (appellate court reviews a trial court's decision to exclude evidence for an abuse of discretion).

Washington courts have often recognized that a child's precocious knowledge of sexual activity is corroborative evidence of abuse. See, e.g., *State v. Swan*, 114 Wn.2d 613, 633, 790 P.2d 610 (1990). Evidence of alternative sources of precocious knowledge on the part of a child witness is admissible, not to impeach the witness's character, but to explain an abnormally high level of sexual knowledge and to rebut the inference that the only way the child witness would have knowledge of sexual matters was because the defendant had sexually abused the child as charged.

*State v. Horton*, 116 Wn.App. 909, 918-20, 68 P.3d 1145 (2003); *State v. Carver*, 37 Wn.App. 122, 125-26, 678 P.2d 842, rev. denied 101 Wn.2d 1019 (1984); *State v. Bailey*, 52 Wn.App. 42, 50, 757 P.2d 541, (1988).

Our courts have found that evidence that a child had another source of sexual knowledge is relevant to disproving the inference that the defendant is the source of the sexually precocious knowledge. See *State v. Kilgore*, 107 Wn.App. 160, 180, 26 P.3d 308 (2001); *State v. Carver*, 37 Wn.App. 122, 124, 678 P.2d 842, review denied, 101 Wn.2d 1019 (1984) (evidence of prior abuse of the alleged victim was probative "to rebut the inference [the child] would not know about such sexual acts unless [he or she] had experienced them with defendant.").

In this case, the defense's proposed evidence—the testimony of Katrina Madrazo that J.N.S. had her mother's phone in her possession, and that when Madrazo looked at pictures contained on the cell phone, it contained "selfies" taken by Ms. Thomas depicting the act of oral sex—was offered as evidence relevant to the central issue of the child's credibility and also to document that the reason visits by J.N.S. were reduced was not due to the alleged molestation, but that the Madrazo family was

troubled about the pictures found on J.N.S.'s mother's cell phone and wanted to limit their contact with J.N.S. and her mother. 2RP at 233. The trial court erroneously excluded this evidence, ruling that mere possession of the phone by J.N.S. did not show that she had accessed the photos and that the proffered evidence was not relevant to the trial and even if relevant, its probative value is outweighed by its prejudicial nature under ER 403. 2RP at 234.

The trial court erred in excluding the relevant evidence of the possession of the cell phone and the images contained on the phone because this proposed evidence was relevant to rebut an assumption by the jury that J.N.S. acquired her precocious knowledge of the alleged acts through the defendant. Evidence that the child had knowledge regarding sex before she ever met the defendant shows she knew of this act from another source. See *State v. Kilgore*, 107 Wn.App. 160, 180, 26 P.3d 308 (2001); *State v. Carver,* 37 Wn.App. 122, 124, 678 P.2d 842, review denied, 101 Wn.2d 1019 (1984). This evidence was therefore relevant and essential to the defense.

The only evidence of the alleged molestation entered in this case came from the child's statements; therefore her credibility was the critical issue. In the absence of evidence that the child learned

about inappropriate touching from another source, her testimony to that act could serve to bolster her credibility with the jury.

Without some constitutional reason to exclude the evidence or any counter-balancing prejudice, it was error for the trial court to exclude the evidence. Moreover, the images on the phone serve to refute the State's theory that J.N.S.'s visits at Madrazo's house were dramatically reduced because she was reluctant to go there after the alleged molestation. The Court found that defense counsel "clearly abandoned" the argument that the proffered photos showed a reason for J.N.S.'s reduced visits to the Madrazo's house by arguing that the evidence was relevant "solely to show [her] precocious knowledge." *State v. Madrazo-Munoz*, slip op. at 6. During argument following the offer of proof counsel concentrated on the issue of precocious knowledge, but the record does not indicate that he abandoned the argument that the evidence would show why she reduced her visits or stopped visiting all together, contrary to the ruling of the Court. 2RP at 231. Instead, counsel concentrated on the precocious knowledge prong of his argument because counsel wished to emphasize the holding of a case in which he had previously argued in which a pornographic video viewed by underage girls was excluded by the trial court, but

reversed by the Court of Appeals on the basis that it showed precocious knowledge. 2RP at 232. Here, the court erred by finding that counsel's argument constituted an abandonment of the argument that the cell phone photo was relevant to show a reason for J.N.S.'s reduced frequency of visitation.

The trial court's error below is reversible where it is one that has presumptively affected the final result of the trial. See *State v. Edwards*, 93 Wn.2d 162, 606 P.2d 1224 (1980). An error of constitutional proportions will not be held harmless unless the appellate court is able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Burri*, 87 Wn.2d 175, 550 P.2d 507 (1976); *State v. Vargas*, 25 Wn. App. 809, 610 P.2d 1 (1980). An error of non-constitutional magnitude is also cause for reversal where, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980); *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986).

This case turned on J.N.S.'s credibility. Madrazo was denied his right to challenge her credibility with critical evidence capable of creating reasonable doubt in the minds of some or all jurors. The

trial court's error likely compromised the verdict itself because this was a case with no physical evidence, vague allegations, and a four year delay between the time of the alleged acts and the decision to charge Madrazo. The central issue in the case was therefore the credibility of the child's allegation against Madrazo. The evidence that J.N.S. could have been exposed to explicit images on her mother's cell phone and that she had prior knowledge of sexual activities was directly relevant to her credibility because it rebuts the implication that the child could only know about sexual matters if what she alleged was true. Without this evidence, the defense had a compromised ability to directly rebut the vague, four year old allegations made by the child.

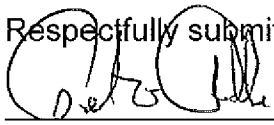
This Court should accept review and hold that the error in was not harmless, and that the error requires reversal.

## F. CONCLUSION

For the foregoing reasons, Juan Madrazo-Munoz respectfully requests this petition for review be granted.

DATED this 16th day of March, 2016.

Respectfully submitted:

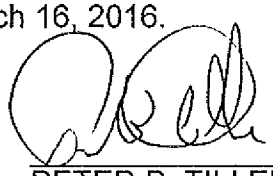


PETER B. TILLER, WSBA #20835
Of Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies that on March 16, 2016, that this Petition for Review was mailed by U.S. mail, postage prepaid, to David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copies were mailed by U.S. mail, postage prepaid Ms. Anne Cruser, Clark County Prosecutor's Office, P.O. Box 5000, Vancouver, WA 98666-5000, and was mailed by U.S. mail, postage prepaid, to the appellant, Mr. Juan Madrazo-Munoz, DOC No. 896028, Coyote Ridge Correction Center, PO Box 769, Connell, WA 99326 LEGAL **MAIL/SPECIAL MAIL**.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 16, 2016.



PETER B. TILLER

Filed
Washington State
Court of Appeals
Division Two

February 17, 2016

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>JUAN CARLOS MADRAZO-MUNOZ,<br><br>Appellant. | No. 46688-1-II<br><br>UNPUBLISHED OPINION |

BJORGEN, A.C.J. — A jury returned verdicts finding Juan Carlos Madrazo-Munoz[1] guilty of two counts of first degree child molestation. The jury also returned special verdicts finding that Juan Carlos used his position of trust to facilitate the commission of the crime on both counts. Juan Carlos appeals his convictions, asserting that his due process right to present a defense was violated by the trial court's ruling excluding certain evidence from trial. In his statement of additional grounds for review (SAG), Juan Carlos appears to argue that his defense counsel was ineffective for failing to call certain witnesses and that the prosecutor committed misconduct by charging him with crimes that he did not commit. We affirm.

FACTS

Jenny Thomas was a close friend of Juan Carlos and his wife, Katrina Madrazo. Thomas's children spent a lot of time with the Madrazos' children and would often spend the

[1] We refer to the Madrazos by their first names for the sake of clarity. We intend no disrespect.

night at the Madrazos' home. In the winter of 2010, Thomas asked her 10-year-old daughter, JNS,[2] if anyone had touched her inappropriately. JNS told Thomas that Juan Carlos had done so.

After JNS's disclosure, Thomas went to the Madrazos' home late at night and told Katrina about the accusation. After telling Katrina about JNS's accusation, Thomas called the police. Vancouver Patrol Sergeant Jay Alie met Thomas at her home to discuss the allegations. JNS was also present and appeared composed when describing how she came to know the Madrazos, but when JNS began describing the allegations of inappropriate touching by Juan Carlos, "her demeanor changed quite suddenly. She put her head down. She started crying. She was unable to continue talking." Report of Proceedings (RP) at 175. Eventually, JNS was able to tell Alie "in generalized terms what had occurred to her." RP at 175. JNS appeared relieved after telling Alie about her accusations against Juan Carlos.

JNS also told her grandmother, Shelly Thomas, about the accusations and that Juan Carlos had put his hands down her pants and fondled her private parts. Additionally, JNS described the incidents with Vancouver Police Sergeant Barbara Kipp. JNS told Kipp that Juan Carlos inappropriately touched her on two separate occasions, and she showed Kipp the manner in which Juan Carlos touched her by demonstrating on her fingers. Based on these accusations, the State charged Juan Carlos by second amended information with two counts of first degree child molestation.

Before trial, the State sought to exclude any testimony that Katrina had found explicit photographs of Thomas performing sexual acts that were contained on a cell phone in JNS's backpack while staying at the Madrazos' home. Defense counsel argued that testimony about

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[2] This opinion refers to the juvenile victim by her initials to protect her privacy interests. General Order 2011-1 of Division II, *In Re The Use Of Initials Or Pseudonyms For Child Witnesses in Sex Crimes Cases*.

the alleged photographs was relevant to show (1) why JNS's visits with the Madrazos had stopped and (2) to explain JNS's precocious knowledge of sexual matters apart from the allegations against Juan Carlos. The trial court asked defense counsel whether there was any evidence that JNS had viewed these photographs. Defense counsel admitted that there was no evidence that JNS had viewed the photographs apart from her possession of the cell phone. The trial court ruled that it would provisionally grant the State's motion to exclude evidence of the alleged photographs under ER 401 and ER 403, noting that "if the evidence comes in, and if the situation warrants it, then the Court will reconsider that ruling." RP at 76.

At trial, defense counsel asked Thomas on cross-examination whether she remembered a conversation with the Madrazos about photographs found on her cell phone, and the State objected. The trial court sustained the State's objection, noting that defense counsel's question was outside the scope of direct examination and that its provisional pretrial ruling remained in place unless and until defense counsel properly presented evidence warranting admission of the cell phone photograph evidence. Defense counsel again attempted to present evidence of the alleged photographs during Katrina's cross-examination through an offer of proof outside the jury's presence.

During the offer of proof, it was established that (1) Katrina found Thomas's cell phone in JNS's backpack during JNS's visit at his home, (2) the cell phone contained photographs of Thomas engaged in sexual acts, (3) the Madrazos did not discuss the photographs with Thomas or JNS, (4) the Madrazos decided to place the cell phone in a cupboard inaccessible to JNS, (5) the Madrazos never returned the cell phone to Thomas, (5) the Madrazos had no knowledge of whether JNS had viewed or knew how to access the photographs, and (6) as a result of finding the photographs, JNS's visits became less frequent for a period of time but did not end entirely.

After the offer of proof, the trial court asked defense counsel to explain the materiality of the proffered evidence. Defense counsel responded:

> Well, Your Honor, the issue is precocious knowledge of the child. The materiality is, you know, the argument you get frequently in these kind of cases is where would the child learn about that kind of behavior, and the answer is—is by seeing it or viewing it. It can be seen on commercials on TV. It can be seen in television and motion picture shows. In this case, it could have been seen on the cell phone.
> . . . .
> It's for precocious knowledge, Your Honor. I mean, that's what—that's what the argument is all about is precocious knowledge. If the State is going to waive the precocious knowledge argument and say but for Mr. Madrazo molesting the child, fine. Then I don't need it.
> . . . .
> But if [the State] is going to make that argument, then I think I'm entitled to introduce this event.

RP at 231-33. The trial court ruled that it would adhere to its pretrial ruling, noting that the evidence was not relevant under ER 401 and, in the alternative, that any relevance was substantially outweighed by the prejudicial nature of the evidence under ER 403.

JNS testified at trial that she had twice awakened at the Madrazos' home to Juan Carlos laying behind her with his hands down her pajamas and on her vagina. JNS stated that on one of the occasions, she had told Juan Carlos to stop and that he complied. JNS also testified that on the morning following one of the incidents, Juan Carlos stated that she "was really nice last night. She had manners." RP at 257. Several witnesses testified at trial that JNS's behavior changed dramatically after her disclosure, stating that JNS began wetting her bed more frequently, gained weight, became withdrawn and angry, and would "freak out" in public if she saw someone resembling Juan Carlos. RP at 285.

The jury returned verdicts finding Juan Carlos guilty of two counts of first degree child molestation, and it returned special verdicts finding that he used his position of trust to facilitate the commission of both offenses. Juan Carlos appeals his convictions.

## ANALYSIS

### I. RIGHT TO PRESENT A DEFENSE

Juan Carlos contends that his due process right to present a defense was violated by the trial court's ruling excluding evidence that Katrina had found explicit photographs of Thomas on a cell phone contained in JNS's backpack. We disagree.

A defendant in a criminal trial has a constitutional right to present a defense. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

*Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). However, a criminal defendant's right to present a defense is subject to an important limitation: a defendant seeking to present evidence must show that the evidence is at least minimally relevant to a fact at issue in the case. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

If the defendant establishes the minimal relevance of the evidence sought to be presented, the burden shifts to the State "to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). A

trial court must then balance "the State's interest to exclude prejudicial evidence . . . against the defendant's need for the information sought," and may exclude such evidence only where "the State's interest outweighs the defendant's need." *Darden*, 145 Wn.2d at 622.

Juan Carlos argues that evidence of the photographs he found on a cell phone in JNS's backpack was relevant to provide a reason for her precocious knowledge of sexual activity and, thus, was crucial for the jury's determination of JNS's credibility. Juan Carlos also argues that evidence regarding the photographs was relevant to show an alternative reason for JNS's reduced visits with the Madrazos apart from the fact of molestation. On both points, we disagree.

Evidence providing a reason for a child-victim's precocious knowledge of sexual activity may be admissible "'to rebut the inference [the child] would not know about such sexual acts unless [he or she] had experienced them with defendant.'" *State v. Kilgore*, 107 Wn. App. 160, 179-80, 26 P.3d 308 (2001), *aff'd*, 147 jWn.2d 288 (2002) (alteration in original) (quoting *State v. Carver*, 37 Wn. App. 122, 124, 678 P.2d 842 (1984)). However, here the State neither presented evidence nor argued at closing that JNS gained precocious knowledge of sexual activity through Juan Carlos's illicit conduct. Absent this evidence or argument, evidence of the alleged photographs contained on a cell phone found in JNS's backpack was not relevant to rebut the inference that she gained such precocious knowledge through Juan Carlos's illicit conduct. Accordingly, the trial court did not violate Juan Carlos's right to present a defense by denying admission of the evidence on this basis.

Regarding the relevance of the proffered evidence to show an alternative reason for JNS's reduced visits with the Madrazos, defense counsel clearly abandoned this argument at trial when he argued that the evidence was relevant solely to show JNS's precocious knowledge. Moreover, JNS's reduced visits with the Madrazos was not a fact of consequence at trial as there

was no evidence presented that her visitations had declined after the molestation incidents and prior to her disclosures. Thus, even if defense counsel did not abandon his argument that the evidence was relevant for this purpose, he did not lay the proper foundation for admission of the evidence on this basis. For these reasons, the trial court did not err by excluding the photographs on the cell phone.

## II. SAG

Juan Carlos appears to argue in his SAG that his defense counsel was ineffective for failing to call his witnesses to testify at trial and for failing to call the nurse who examined JNS to testify at trial. On both points, we disagree.

To demonstrate ineffective assistance of counsel, Juan Carlos must show (1) that his defense counsel's conduct was deficient and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). To show prejudice, Juan Carlos must show a reasonable probability that, but for counsel's purportedly deficient performance, the outcome of the trial would have differed. *Reichenbach*, 153 Wn.2d at 130. "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

With regard to his claim that defense counsel was ineffective for failing to call requested witnesses, there is nothing in the record showing that Juan Carlos had identified potential defense witnesses to defense counsel. Accordingly, this issue concerns a matter outside the record that we do not consider on direct review. *See State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (Where ineffective assistance of trial counsel is raised on direct review, reviewing court will not consider matters outside the trial record; a personal restraint petition is the appropriate means of having the reviewing court consider matters outside the record.).

With regard to defense counsel's decision to not call JNS's treating nurse, we note that the decision to call witnesses is generally a matter of trial strategy that cannot form the basis for an ineffective assistance of counsel claim. *State v. Jones*, 33 Wn. App. 865, 872, 658 P.2d 1262 (1983) (citing *State v. Thomas*, 71 Wn.2d 470, 472, 429 P.2d 231 (1967); *State v. Floyd*, 11 Wn. App. 1, 2, 521 P.2d 1187 (1974)). Further, Juan Carlos cannot demonstrate prejudice on this record, because the record does not reveal how the treating nurse would have testified had he or she been called to do so. Accordingly, we do not further address this claim.

Juan Carlos also appears to argue in his SAG that the prosecutor committed misconduct by charging him with crimes that he did not commit. This argument, however, is not sufficiently developed to merit judicial review. *See* RAP 10.10(c) ("[A]ppellate court will not consider a defendant's [SAG] if it does not inform the court of the nature and occurrence of alleged errors."). Accordingly, we do not further address it. We affirm Juan Carlos's convictions.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, A.C.J.

BJORGEN, A.C.J.

We concur:

Melnick, J.

MELNICK, J.

Sutton, J.

SUTTON, J.

# TILLER LAW OFFICE

## March 16, 2016 - 4:34 PM

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