NO. 46733-0

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ENDY DOMINGO CORNELIO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Vicki L. Hogan

No. 13-1-02753-6

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Did the trial court err by admitting statements from the child patient during a medical examination where the statements related to treatment of the child for sexual abuse? 1

2. Did the trial court err by sustaining an objection to impeachment with an out-of-court statement where there was no showing that the statement was inconsistent? 1

3. Should this Court review assignments of error that were not only not preserved in the trial court but were agreed to by the defendant? 1

4. Did the prosecutor commit prosecutorial error in closing argument when she argued facts in evidence, drew reasonable inferences from the evidence and expressed those inferences to the jury? 1

5. Did the defense attorney commit trial errors sufficient to establish ineffective assistance of counsel by conceding meritorious evidentiary motions? 1

B. STATEMENT OF THE CASE. 1

1. Procedure 1

2. Facts 3

C. ARGUMENT 9

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING STATEMENTS FROM A SEXUAL ABUSE MEDICAL EXAMINATION INTO EVIDENCE 9

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SUSTAINED AN OBJECTION TO EVIDENCE OF OUT-OF-COURT STATEMENTS THAT WERE NOT INCONSISTENT WITH THE WITNESS'TESTIMONY 14

3. ERROR WAS NOT PRESERVED WHERE THE DEFENSE AGREED WITH THE TRIAL COURT'S EVIDENTIARY RULINGS, THOSE RULINGS WERE CORRECT, AND THERE HAS BEEN NO SHOWING OF AN ERROR OF CONSTITUTIONAL MAGNITUDE 16

4. NO VALID CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL CAN BE MADE WHERE TRIAL COUNSEL DID NOT COMMIT ERROR, MUCH LESS ERROR THAT HAD AN ACTUAL EFFECT ON THE DEFENDANT'S RIGHTS 23

5. SUFFICIENT EVIDENCE WAS INTRODUCED AT TRIAL TO PROVE THE ELEMENTS OF THE CHILD RAPE AND MOLESTATION CHARGES 29

D. CONCLUSION. 33

Table of Authorities

State Cases

In re Pers. Restraint of Grasso, 151 Wn. 2d 1, 19-20, 84 P.3d 859, 869 (2004).....10

In re Personal Restraint of Crace, 174 Wn.2d 835, 847, 280 P.3d 1102(2012).....24

In re S.S., 61 Wn. App. 488, 503, 814 P.2d 204, *review denied* 117 Wn.2d 1011, 816 P.2d 1224 (1991).....11

State v. Alexander, 64 Wn. App. 147, 822P.2d 1250(1992).....30, 31

State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268(2015).....18

State v. Alvarez-Abrego, 154 Wn. App. 351, 362, 225 P.3d 396, 401 (2010).....10

State v. Beadle, 173 Wn. 2d 97, 112, 265 P. 3d 863 (2011).....24

State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995).....19

State v. Butler, 53 Wn. App. 214, 220, 766 P.2d 505 (1989).....10, 11

State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850(1990).....31

State v. Corbett, 158 Wn. App. 576, 589, 242 P.3d 52, 58 (2010).....31

State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....30

State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).....19

State v. Emery, 174 Wn.2d 741, 760-61, 754, 278 P.3d 653 (2012).....19

State v. Fiallo–Lopez, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995).....18

State v. Fisher, 130 Wn. App. 1, 13-14, 108 P.3d 1262, 1269 (2005).....10

State v. Fisher, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937(2009).....18

State v. Florczak, 76 Wn. App. 55, 882 P.2d 199(1994).....10, 11, 12, 14

State v. Franklin, 180 Wn.2d 371, 382, 325 P.3d 159(2014).....28

State v. Furth, 5 Wn.2d. 1, 104 P.2d 925, 933-34(1940) 29

State v. Graham, 59 Wn. App. 418, 428, 798 P.2d 314 (1990).....19

State v. Green, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986) 19

State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201(2006).....18, 19

State v. Hoffman, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991),
cert. denied, 523 U.S. 1008 (1998).....18

State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006) 29, 30

State v. Hutchinson, 135 Wn. 2d 863, 959 P.2d 1061, 1073 (1998).....27

State v. Huynh, 107 Wn. App. 68, 74, 26 P.3d 290 (2001).....14

State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).....28

State v. Kelly, 102 Wn.2d 188, 196, 685 P.2d 564(1984).....26

State v. Lewis, 156 Wn. App.230, 240, 233 P.3d 891(2010).....18, 21

State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).....23

State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267(2008) 29

State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993).....13

State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995) 19

State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).....23

State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994).....19

State v. Ryan, 103 Wn.2d 165, 691 P.2d 197(1984).....2, 17, 24, 25

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) 30

State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) 16

State v. Simonson, 82 Wn. App. 226, 917 P.2d 599(1996).....14

State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).....30

State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209(2002) 14

State v. Stenson, 132 Wn. 2d 668, 940 P.2d 1239 (1997) 13, 18

State v. Thomas, 150 Wn.2d 821, 874–75, 83 P.3d 970, *abrogated in part on other grounds by* ***Crawford v. Washington***, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....30

State v. Wade, ___ Wn. App. ___, 346 P.3d 838, 846 (March 30, 2015).28

State v. Walton, 64 Wn. App. 410, 415–16, 824 P.2d 533(1992).....31

State v. Warren, 165 Wn.2d 17, 30, 195P.3d 940(2008).....19, 20

State v. Wilder, 4 Wn. App. 850, 855, 486 P.2d 319 (1971).....14

State v. Woods, 143 Wn..2d 561, 602, 23 P.3d 1046, *cert. denied*, 534 U.S. 964, 122 S. Ct. 374, 151 L. Ed. 2d 285 (2001).....10

Federal and Other Jurisdictions

Commonwealth v. Tedford, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa.2008) ..18

Ohio v. Clark, ___U.S.___, 135 S. Ct. 2173, ___L. Ed. 2d ___ (June 18, 2015) 10

State v. Fauci, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007) 18

State v. Leutschaft, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS196 (Minn., Mar. 17, 2009).....18

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674(1984).....24, 28

Constitutional Provisions

Sixth Amendment 23

Washington Constitution, Article 1§21 29

Statutes

RCW 9A.44.120 24

Rules and Regulations

ER 103(a)(1) 13

ER 403 28

ER 608(b) 14

ER 613(b) 14, 15

ER 801(c) 15

ER 802 15

ER 803(a)(4) 9, 10, 12

RAP 2.5(a) 13, 16, 17, 22, 23

RAP 2.5(a)(3) 16, 23

Other Authorities

5 K. Tegland, Washington Practice, Evidence § 126, at 312 (1982) 26

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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B. STATEMENT OF THE CASE.

1. Procedure.

On July 9, 2013, Petitioner Endy Domingo Cornelio (the "defendant") was charged with four class A felony sex offenses, namely Rape of a Child First Degree, and three counts of Child Molestation First Degree. CP 1-2. The charging time period coincided with the period between the child victim's fourth and sixth birthdays, and ran from

November 9, 2007, to November 8, 2009. CP3-4. The child rape charge was based on oral genital contact between the defendant and the victim. CP 3-4. The molestation charges were based three separate forms of sexual hand to skin contact. CP 3-4.

The case was called for trial on July 2, 2104. 1 RP 4[1]. The trial court heard several pre-trial motions, including (1) a motion to admit the child's statements given during a medical history to a sexual assault nurse [CP 30-31], (2) a motion to admit child hearsay statements to the child's mother and a forensic child interviewer [CP 5-22], and (3) a motion to exclude specific instances character evidence [CP 35-39]. 1 RP 4, 1 RP 62, 107-113.

On July 2, 2014, the trial court ruled that the medical history statements were admissible. 1 RP 112-13. The court overruled the defendant's objections that the evidence was cumulative, or that the statements were not given for the purpose of medical diagnosis or treatment. 1 RP 109. The trial court subsequently ruled that the child hearsay statements were admissible. 2 PR 141-46. Even though the defendant did not oppose admission, the ruling included detailed oral findings concerning the nine reliability factors from ***State v. Ryan***[2]. At the same hearing, again with the agreement of the defense, the trial court ruled

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[1] The verbatim report of proceedings for the trial-related hearings include seven volumes that contain consecutively number pages. Citations to the verbatim report in this brief will include the volume and page number.

[2] 103 Wn.2d 165, 175-76, 691 P.2d 197(1984).

that evidence of specific instances of misconduct evidence was not admissible. 2 RP 146. At no time during the rest of the trial did the defense ask the trial court to reconsider or modify those rulings.

The trial commenced on July 10, 2014. 6 RP 422. The State called seven witnesses, including the child victim, A.C., who was ten years old at the time of trial. 6 RP 418. The rest of the State's witnesses consisted of A.C.'s mother and father, a sexual assault nurse practitioner, a forensic child interviewer, and two law enforcement officers. *Id.* 7 RP 538. The State also introduced a video recording of A.C.'s forensic interview. Exhibit 1[3]. The defendant rested without presenting a case. 7 RP 653. The trial court instructed the jury and the parties presented closing arguments. The jury returned guilty verdicts on all counts on July 16, 2014. CP 44.

2. Facts.

The incidents of sexual intercourse and sexual contact between the defendant and A.C. were committed in the same location during visitation at her father's residence. 6 RP 493-498. The defendant stayed overnight at the residence at the same time and slept on a couch in the living room near A.C.. 6 RP 497-98. A.C. testified that the defendant (1) grabbed her bottom [6 RP 498], (2) touched his hand to her private part (where she goes "pee") [6 RP 498-99], (3) forced her to have skin to skin contact

[3] The State has designated the video via a supplemental designation of clerk's papers.

between her hand and the defendant's penis (the part that he uses "[t]o go to the bathroom")[6 RP 500-02], (4) that her pajamas were part way down [6 RP 499], (5) that his pants were part way down [6 RP 501]; and (6) that he kissed her on the mouth [6 RP 503]. She further testified that the defendant attempted to coerce her into performing oral sex:

> A. I remember he would always tell me to try to lick his same part, and I would say no, and he would try to make me, and I would just keep saying no until I would just go to my couch.
>
> Q Okay. You said "his part."
>
> A Yeah.
>
> Q Is his part used for anything?
>
> A Yeah.
>
> Q What's that?
>
> A To go to the bathroom.
>
> 6 RP 500

AC's testimony about the sexual incidents was clear and concrete. All of the incidents took place in her father's residence, a trailer in Puyallup. 6 RP 486-87. They occurred during a time period when A.C. was five years old. 6 RP 493- 498. She further narrowed the time period to a time before her step-mother Maria and Maria's children moved into the trailer. 6 RP 495. She explained that the defendant would sleep on a couch as would A.C. and that the defendant would "tell me to go over to

his couch". 6 RP 497-98. She was sleeping on a couch because one of her father's friends was staying in the trailer and sleeping in her room. Her younger sister was sleeping in her father's room. 6 RP 497.

A.C.'s testimony was corroborated by her mother, Tiffany Croll. Ms. Croll confirmed that she separated from A.C.'s father in 2007. 7 RP 546. During 2007 and 2008 she lived in Vancouver, Washington, Oregon, and several locations in Washington. 7 RP 546-49. She also testified that she lived with A.C.'s father with her two daughters for a short period of time in 2008. 7 RP 550-51.

Before she moved back to Washington in 2008, Ms. Croll testified that the defendant and two of his brothers lived in the trailer. 7 RP 552. This was confirmed by A.C.'s father, the defendant's uncle, Jose Cornelio. 7 RP 580. Mr. Cornelio testified that the defendant slept in the living room on a couch and that A.C. and her sister would fall asleep on a couch, but that he would typically take them to his room. 7 RP 583. He further testified that although there was a second bedroom, the girls were "scared to stay in [the second bedroom] by themselves." 7 RP 583. The visitation arrangement throughout this time period was every other weekend. 7 RP 549-51. Thus, during visitation, A.C. was sleeping under the same roof and according to her testimony in the same room in close proximity to the defendant. 6 RP 497.

After confirming A.C.'s timeline, Tiffany Croll also described A.C.'s first disclosure of sexual abuse in October 2012. 7 RP 556. Ms.

Croll had suspected that A.C. had been the victim of sexual abuse because she displayed symptoms that consisted of precocious sexualized behavior. 7 RP 561-62. Without knowing who the perpetrator might have been, Ms. Croll asked A.C. about where she had learned about such things. 7 RP 555-57. A.C. finally told Ms. Croll, "It was Endy that had done bad stuff to her." Ms. Croll further testified:

> A. She didn't really go into much detail. She said that he touched her, and she touched him, and they kissed and that was pretty much all she could say before she shut down and stopped talking about it.
>
> Q Okay. Did she tell you where she touched him and where he touched her?
>
> A Private parts is what she said.
>
> 7 RP 557.

A.C.'s disclosure led Tiffany Croll to contact the police. 7 RP 559. The responding patrol officer was William Pebley. Deputy Pebley met Ms. Croll at a Fred Meyer store in Puyallup. 6 RP 480. A.C. was present, but Pebley followed protocol and did not talk to her about the abuse. 6 RP 481. Instead he prepared a report that would be forwarded to a sexual assault detective for follow up. 6 RP 482.

The follow up included medical treatment by a sexual assault nurse practitioner and a forensic interview at the Mary Bridge Children's Hospital Child Advocacy Center. 6 RP 437-39. 7 RP 603-04. Following standard medical procedure, the nurse practitioner, Cheryl Hanna-

Truscott, testified that she would normally do a complete "head to toe physical" but would have available specialty medical equipment for examining a patient's genitalia. 7 RP 611-13. The exam would include an age appropriate history and would further include examination for specific concerns such as "sexually transmitted diseases" which would be "clarified by lab reports". 7 RP 615. One of the purposes of the history, included identification of the suspect. Ms. Hanna-Truscott's purpose was to find out if anyone else may have done something to the child. 7 RP 617.

Ms. Hanna-Truscott followed her standard medical procedure in A.C.'s case. The exam took place on October 31, 2012. 7 RP 618. During her history, A.C. disclosed, "Him touching my private spot, my cousin" and that the cousin's name was "Endy". 7 RP 623. By chance during the exam, as A.C. was conveying her decision not to consent to the genital exam, A.C. commented:

> A Yes. I asked her if she had any questions to ask me and she quietly stated, "Yes, I just wanted to tell you something. I don't really like people checking my private spot because I am just too embarrassed." She said that a few times.
>
> Q Okay. Did you ask her anything more about her private spot?
>
> A Yes. I asked her if anybody had ever checked her privates before and she said "Only Endy."
>
> 7 RP 624.

While A.C. was able to describe some of the sexual contact during her testimony, a number of details were presented through the forensic child interview. A.C. was eight years old at the time of the interview. 6 RP 459. The interview was conducted just before the medical exam in a space designed for children. 6 RP 438, 459. A.C. displayed a solid understanding of the need to be truthful, and despite a soft-spoken demeanor, was able to complete the interview over the course of approximately an hour. 6 RP 463-65. The interview was introduced and played for the jury as a trial exhibit. Exhibit 1.

A.C. testified on the stand about sexual contact sufficient to support the three child molestation counts. She testified that she did not remember the oral contact. 6 RP 500-04. Evidence of oral contact that was probative of the child rape charge was introduced through the forensic interview. In that interview, in addition to touching, A.C. stated that the defendant had licked her skin to skin on her private spot, that is in her genital area where she goes to the bathroom. Exhibit 1, Time Stamp 11:16 – 11:20.

At the conclusion of all of the evidence, the jury was properly instructed concerning all four child sex abuse charges. The attorneys each presented closing arguments. The State's argument focused on A.C.'s demeanor and the details presented during A.C.'s testimony and in the forensic interview. 7 RP 677-78, 682-84. The defense argument emphasized Ms. Croll's questioning of A.C. about sexual abuse: "What

effect must that have on a young child when your mother is telling you, or at least aggressively questioning you, about sexual abuse countless times?" 7 RP 695. On July 16, 2014, after deliberating, the jury returned guilty verdicts for all counts.

The defendant was sentenced on September 24, 2014, after completion of a mandatory pre-sentence report. The trial court sentenced the defendant to a low end determinate sentence of 240 months on the child rape count, and 198 months on the molestation counts. CP 48. The defendant filed a timely notice of appeal on October 3, 2014. CP 57 – 72.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING STATEMENTS FROM A SEXUAL ABUSE MEDICAL EXAMINATION INTO EVIDENCE.

Patients consult medical treatment providers for a wide variety of ailments, including physical and psychological trauma from sexual abuse. Under ER 803(a)(4), statements from patients to medical providers are not excluded as hearsay where they are, "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." Nor does the admission of such statements contravene the confrontation clause where the statements are not given to law enforcement but are given to a medical provider as part of a *bona fide*

effort to secure medical treatment. ***State v. Fisher***, 130 Wn. App. 1, 13-14, 108 P.3d 1262, 1269 (2005). *See* ***Ohio v. Clark***, ___U.S.___, 135 S. Ct. 2173, ___L. Ed. 2d ___(June 18, 2015)(child hearsay about physical injury to a mandatory reporter teacher).

The medical treatment exception applies to statements only insofar as they were "reasonably pertinent to diagnosis or treatment." ***In re Pers. Restraint of Grasso***, 151 Wn. 2d 1, 19-20, 84 P.3d 859, 869 (2004), quoting ER 803(a)(4), and citing ***State v. Woods***, 143 Wn..2d 561, 602, 23 P.3d 1046, *cert. denied,* 534 U.S. 964, 122 S. Ct. 374, 151 L. Ed. 2d 285 (2001). "Generally, to establish reasonable pertinence (1) the declarant's motive in making the statement must be to promote treatment, and (2) the medical professional must have reasonably relied on the statement for purposes of treatment." *Id.*, citing ***State v. Butler***, 53 Wn. App. 214, 220, 766 P.2d 505 (1989). The standard of review is abuse of discretion and a "trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds." ***State v. Alvarez-Abrego***, 154 Wn. App. 351, 362, 225 P.3d 396, 401 (2010).

A child's statements to a medical provider may be admitted under ER 803(a)(4) if the statements were made for the purpose of medical diagnosis or treatment. ***State v. Florczak***, 76 Wn. App. 55, 882 P.2d 199(1994). "Washington courts admit child hearsay statements under ER 803(a)(4) even if the child declarant does not understand that the statements were necessary for medical diagnosis or treatment. However,

the courts do so only if corroborating evidence supports the child's statements and it appears unlikely that the child would have fabricated the cause of injury." *Id.* at 65, *citing* ***In re S.S.***, 61 Wn. App. 488, 503, 814 P.2d 204, *review denied* 117 Wn.2d 1011, 816 P.2d 1224 (1991), and ***State v. Butler***, 53 Wn. App. 214, 222–23, 766 P.2d 505, *review denied,* 112 Wn.2d 1014 (1989).

In this case, the State offered A.C.'s medical exam statements to advanced registered nurse practitioner Cheryl Hannah-Truscott. 1 RP 108-09. The child was being seen at the time for a medical problem, namely sexual abuse, and was talking to a pediatric specialist qualified to treat or refer concerning the child's that problem. The defense objected that the statements were either (1) cumulative in light of other child hearsay that was expected to be admitted, or (2) not given for a medical purpose in light of the lack of evidence of physical findings or injury. 1 RP 108-09. The trial court correctly rejected these arguments.

The statements were in no way cumulative. There were other statements to other adults to be sure, but those statements were not comparable to the statements to the nurse practitioner. No other medical statements were admitted. Thus it is inaccurate to allege that the unique testimony from Ms. Hannah-Truscott that consisted of the child speaking one-on-one to a pediatric medical provider was cumulative.

Furthermore, the statements were unique in another sense. The primary defense contention was that the child was unduly influenced by

her mother for advantage in a divorce proceeding. Thus it could hardly be cumulative for the state to offer the child's statement to a disinterested medical provider who could hardly be under the sway of the mother. In light of the probative value of the statements to the nurse practitioner, the trial court did not act in a "manifestly unreasonable" manner, nor on "untenable grounds." ***State v. Florczak***, 76 Wn.App.at 65.

As to the lack of physical evidence, the defense argument rests on the mistaken premise that only patients with visible physical injury give reliable statements under ER 803(a)(4). Common sense indicates that this is not the case. Such a rule would lead to wholesale exclusion of statements about medical conditions or injury that are not capable of visual inspection. For instance, it would also lead to the exclusion of statements about emotional, psychological or psychiatric illnesses that are typically not available for visible inspection. Were this Court to accept the defense argument, entire categories of illnesses or injury common to internal or psychological medicine would be excluded. The defendant cites no authority for such a result.

The primary defense argument in this appeal concerns sufficiency of the State's corroboration evidence. The defendant did not articulate this argument to the trial court. Where an argument is not made in the trial court, the defendant is "deemed to have waived any error and appellate review is precluded, unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could

not have been neutralized by an admonition to the jury." ***State v. Stenson***, 132 Wn. 2d 668, 726-27, 940 P.2d 1239, 1268 (1997), RAP 2.5(a), ER 103(a)(1). "An objection to a prosecutor's question is inadequate unless it calls the trial court's attention to the specific reason for the impropriety of the question." ***State v. Padilla***, 69 Wn. App. 295, 300, 846 P.2d 564 (1993). If despite these restrictions, the issue of corroboration is considered, this Court should nevertheless reject the defense argument.

Corroboration in this case was unwittingly provided by the child herself. Without being aware of it, A.C. unintentionally displayed symptoms of sexual abuse. The child interviewer put the significance into context: "It doesn't happen in all cases, but sometimes an indicator that there may have been abuse may be that you see children acting out sexually." 6 RP 430-33. That possibility manifested itself in A.C.'s case. Her mother testified about her daughter's sexualized behavior which she described as a game of "boyfriend and girlfriend". She testified:

> A. Well, they were, like, not just like hanging out boyfriend and girlfriend. They were in bed together boyfriend and girlfriend. She -- when her sister was still in diapers she was laying her on the ground. I had walked around the corner, and I pushed the door open because they weren't allowed to play with the door shut, and she was on top of her telling her lay down and don't move. And she is, like, I'm the boyfriend, and she was, like, trying to act like she was kissing her.
>
> 7 RP 56.

There could hardly be a stronger case of corroboration than the unintended, unconscious display of precocious sexual knowledge and ideation by a child. That circumstance in this case more than satisfied the corroboration requirement from ***Florczak***. Even if the Court reaches the unpreserved corroboration argument, the trial court's decision to admit the medical purpose statements in this case should be upheld.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SUSTAINED AN OBJECTION TO EVIDENCE OF OUT-OF-COURT STATEMENTS THAT WERE NOT INCONSISTENT WITH THE WITNESS' TESTIMONY.

A criminal defendant has a constitutional right to impeach prosecution witnesses. ***State v. Spencer***, 111 Wn. App. 401, 408, 45 P.3d 209(2002). Such impeachment can be accomplished through evidence of prior statements of the witness that are inconsistent with the witness' testimony at trial under ER 613(b), or through evidence of the witness' bias as shown by prior statements of the witness under ER 608(b). *Id.* at 409-10, citing ***State v. Wilder***, 4 Wn. App. 850, 855, 486 P.2d 319 (1971), and ***State v. Huynh***, 107 Wn. App. 68, 74, 26 P.3d 290 (2001). "A prior inconsistent statement is a comparison of something the witness said out of court with a statement the witness made on the stand." ***State v. Spencer***, 111 Wn. App. at 409. ***State v. Simonson***, 82 Wn. App. 226, 234-35, 917 P.2d 599(1996).

In this case, Exhibit 5 contains the out-of-court statement at issue in this case. Exhibit 5 was a transcript of a defense interview of A.C.. The transcript was handed to A.C. during cross examination and she was directed to read a short excerpt to herself. 6 RP 518-22. After she read, the defense attorney sought to question her about the content of the transcript. 6 RP 522. His paraphrase of the transcript was objected to as not inconsistent with A.C.'s testimony.

The trial court reviewed the transcript and sustained the objection. It found the transcript was not inconsistent with A.C.'s testimony. 6 RP 522. Review of the pages at issue from Exhibit 5 supports this finding. The attempt by the defense attorney to paraphrase consistent hearsay statements from a transcript was not permitted by ER 613(b). Even if the defense attorney had offered to read the transcript verbatim, it still would not have been admissible because it was not inconsistent. If not inconsistent, the transcript was hearsay. ER 801(c), ER 802. Therefore, there is no support for the claim that the trial court erred by sustaining the State's objection.

The defendant's argument that sufficient foundation was introduced is of little consequence. The objection was hearsay not authenticity. Something more than authenticity must be shown. The State has no quarrel with the defense contention that the transcript was authentic in that contained A.C.'s statements, and that A.C. was confronted with it while she was on the stand. Authenticity is not the issue. Because the

defendant did not establish that the statements were inconsistent, the trial court correctly sustained the objection. Absent inconsistency, the statement was simply hearsay and this Court should uphold the trial court's ruling.

3. ERROR WAS NOT PRESERVED WHERE THE DEFENSE AGREED WITH THE TRIAL COURT'S EVIDENTIARY RULINGS, THOSE RULINGS WERE CORRECT, AND THERE HAS BEEN NO SHOWING OF AN ERROR OF CONSTITUTIONAL MAGNITUDE.

Error may not be raised for the first time on review except under limited circumstances. RAP 2.5(a). The rule is permissive and states that the appellate court "may refuse to review any claim of error which was not raised in the trial court." *Id.* A potential exception to this general rule is "manifest error affecting a constitutional right." RAP 2.5(a)(3). This exception is not intended to provide a means for an end run around the rule, but rather is "a narrow one" to be applied sparingly. ***State v. Scott***, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Two of the defendant's assignments of error were not preserved. The first, the trial court's child hearsay ruling, was not only not objected to but was agreed to by the defense:

> MR. SHAW: Thank you, Your Honor. I think that the statute and the *Ryan* factors have been met by the State, and so I don't have a cogent argument to present that the State has not met under *Ryan* and the statute that the child's statements to others should come in. I, of course, will be cross examining the State's witnesses and will be attempting to, through them, lay forth our theory of

> the case, and I will try and do that through admissible evidence. Thank you. 2 RP 140-41.

The defense attorney's concession was for good reason. The child hearsay hearing included two days of testimony. The court took testimony from four witnesses. There was no challenge to any of the testimony and thus no legitimate basis for the defense attorney to argue against admissibility. Moreover, even though there was agreement and a clear record, the trial court issued extensive and detailed oral findings and conclusions in support of its ruling. 2 RP 141-46. *See* ***State v. Ryan***, 103 Wn.2d 165, 175-76, 691 P.2d 197(1984). If any case were to present a "claim of error which was not raised in the trial court" that should be rejected on appeal, the alleged child hearsay error in this case is such a case. RAP 2.5(a).

The second claimed error not objected to was the prosecution's closing argument. The defendant now asserts that the prosecution's

credibility arguments were improper[4]. A prosecutor is permitted wide latitude to argue the facts in evidence, draw reasonable inferences from the evidence, and express those inferences to the jury. ***State v. Stenson***, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997), citing ***State v. Hoffman***, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991), *cert. denied*, 523 U.S. 1008 (1998), and ***State v. Fiallo–Lopez***, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995). A prosecutor may also argue the jury instructions but may not misstate the law. ***State v. Allen***, 182 Wn.2d 364, 374, 341 P.3d 268(2015). While it would be improper for a prosecutor to argue a personal opinion about the credibility of a witness, a prosecutor "may freely comment on witness credibility based on the evidence." ***State v. Lewis***, 156 Wn. App.230, 240, 233 P.3d 891(2010), citing ***State v. Gregory***, 158 Wn.2d 759, 860, 147 P.3d 1201(2006). ***State v. Warren***,

[4] The defense used the phrase "prosecutorial misconduct". Brief of Appellant, p. 40. " 'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." ***State v. Fisher***, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937(2009). Word choice can carry repercussions beyond the case at hand, to include a tendency to undermine the public's confidence in the criminal justice system. Thus both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" to intentional acts rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010) http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010),http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g.*, ***State v. Fauci***, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); ***State v. Leutschaft***, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS196 (Minn., Mar. 17, 2009); ***Commonwealth v. Tedford***, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa.2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State urges this Court to use the same phrase in its opinion.

165 Wn.2d 17, 30, 195P.3d 940(2008). A prosecutor's closing argument does not constitute a personal opinion unless it is clear that the prosecutor was not arguing an inference from the evidence, but was instead expressing a personal opinion about credibility. ***State v. Warren***, 165 Wn.2d at 30, citing ***State v. Brett***, 126 Wn.2d 136, 892 P.2d 29 (1995).

The standard of review for allegedly improper comments during closing argument requires that the comments be reviewed in context. ***State v. Russell***, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). The comments are examined in light of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given. *Id.* at 86, citing ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), ***State v. Green***, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986). ***State v. Gregory***, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006).

Prejudice from allegedly improper argument is established only where "there is a substantial likelihood that the instances of misconduct affected the jury's verdict." ***State v. Dhaliwal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003), quoting ***State v. Pirtle***, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). Where no objection is made at trial, a defendant is deemed to have waived any error and must show not only improper conduct and prejudice, but must also show that the alleged error was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. ***State v. Emery***, 174 Wn.2d 741, 760-61, 754, 278 P.3d 653 (2012).

In this case, the defense did not object during the prosecution's closing argument. Nor would any objection have been sustained if it had been made. Improper personal opinion argument is readily distinguishable from evidence-based argument. ***State v. Warren,*** 165 Wn.2d 17, 30-31, 195 P.3d 940(2008). In ***Warren,*** the Supreme Court reversed a conviction based on improper argument but upheld an argument similar to the argument in this case. The prosecutor in ***Warren*** argued that graphic details about sex acts described by the child victim were a "badge of truth" and gave her testimony a "ring of truth" or "rang out clearly with truth in it". *Id.* at 30. These were not improper arguments because they were based on the evidence presented at trial rather than on the prosecutor's personal opinion. *Id.*

It is not hard to imagine how the argument in this case might have strayed into error. Had the prosecutor told the jury, "I think A.C. was telling the truth" or "I believe A.C., and you should too", she would clearly have committed prosecutorial error and surely would have drawn an objection from the defense attorney. Those arguments were not made and there was no objection. The prosecutor confined her argument to the circumstances and events that supported A.C.'s credibility. Her most powerful and oft repeated argument focused on the detail of the sex acts in the forensic interview. This was not personal opinion; it was a proper discussion of evidence that was admitted during the trial.

A prosecutor does not commit error by arguing that a witness "was credible based on specific details to which he testified at trial". ***State v. Lewis***, 156 Wn. App. 230, 241, 233 P.3d 891, 897 (2010). In ***Lewis,*** the prosecutor argued that the evidence supported the victim's credibility and hurt the defendant's. This is similar to the arguments presented by the prosecutor in this case. Here the prosecutor argued:

> I submit to you that the fact that she did not recall the licking of her vagina here in court doesn't mean it didn't happen. She was able to give all of the detail in her forensic interview with Ms. Arnold. And there is no way she just came up with all of that. Consider in conjunction with that the other types of details in her forensic interview. Not only did she detail things that meet the definition of sexual contact and sexual intercourse, but she also had more to say about things he would do. The kissing, the rubbing of his private part on her body, on her thigh and on her stomach, if she had been told, given the idea by someone or told what to say about what had happened, why complicate things for an eight-year-old with throwing in those types of details?
>
> 7 RP 685

The prosecutor's comments in the closing argument in this case were confined to the evidence that supported A.C.'s credibility. The prosecutor never used phraseology such as "I think", or "I believe", or in "my view", or in "my opinion". She discussed the actual evidence which was more than sufficient to support the conviction. Accordingly, the prosecutor's comments during closing argument did not amount to prosecutorial error and should not be grounds for reversal.

In light of the standard admonition about lawyer's statements in the introductory jury instruction, it would have been fruitless for the prosecutor to ask the jury to convict based on her personal opinion. A much more powerful argument was the argument actually given, namely that A.C. found the courage to describe the details of the sexual abuse while she was in the safe, supportive, child-friendly environment of the CAC. There, while talking to a trained, non-threatening, female child interviewer, A.C. was able to describe details of oral/genital sex abuse, including what it felt like when the defendant licked her private spot. Exhibit 1, 11:18 – 11:20.

The prosecutor's argument and her references to the child interview evidence was presented with the full knowledge that the jury had seen the video and would see it again during deliberations. The prosecutor had no need to rely on personal opinion when she had the child's own words and demeanor admitted as a trial exhibit. In light of these circumstances, under RAP 2.5(a) this Court should refuse to review the prosecutorial error issue.

4. NO VALID CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL CAN BE MADE WHERE TRIAL COUNSEL DID NOT COMMIT ERROR, MUCH LESS ERROR THAT HAD AN ACTUAL EFFECT ON THE DEFENDANT'S RIGHTS.

A valid ineffective assistance claim could certainly satisfy the RAP 2.5(a) exception of "error affecting a constitutional right". This does not mean that just any claim of ineffective assistance will suffice. Where trial counsel did not object for valid reasons, there can be no claim of an error, much less an error affecting a constitutional right.

For an issue to meet the rather demanding standard of RAP 2.5(a)(3), "[t]he defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest", allowing appellate review. ***State v. McFarland***, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *Id.*, citing ***State v. Riley***, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

In order to prevail on a claim of denial of the Sixth Amendment right of effective assistance of counsel, a defendant must show:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the

> defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674(1984). ***In re Personal Restraint of Crace***, 174 Wn.2d 835, 847, 280 P.3d 1102(2012).

a. The Child Hearsay Evidence Satisfied the Ryan Factors and Was Properly Admitted into Evidence and Does Not Provide A Basis For an Ineffective Assistance Claim.

Nowhere is the ineffective assistance claim less supported than in the child hearsay ruling. The child hearsay evidence was admitted under Washington's child hearsay statute, RCW 9A.44.120. The child hearsay statute permits admission of statements from a child under the age of ten "describing any act of sexual contact performed with or on the child by another". *Id.* When issuing a ruling concerning child hearsay, trial courts apply the so-called ***Ryan*** factors and thereby determine whether the child hearsay statements are sufficiently reliable. ***State v. Ryan***, 103 Wn.2d 165, 175-76, 691 P.2d 197(1984). Appellate courts review a trial court's admission of child hearsay statements for abuse of discretion. ***State v. Beadle***, 173 Wn. 2d 97, 112, 265 P. 3d 863 (2011).

The trial court did not abuse its discretion. The trial court not only accepted the defendant's concession as to admissibility but also independently applied the ***Ryan*** factors. 2 RP 141-46. The defense now argues that the child hearsay should not have been admitted because the child had been known to fib and take things that did not belong to her while growing up. AC's parents admitted as much under questioning from the prosecutor, but they did not testify that such incidents were anything more serious than normal childhood behavior. They testified that it was "kid stuff" and that A.C. "was a little instigator when she was younger, always trying to get her sister and brother in trouble". 1 RP 25. 1 RP 94. They did not describe abnormal or sociopathic behavior, nor did such behavior cause them to seek out professional help. From the parents' testimony, the trial court correctly concluded that A.C. was a normal little girl.

The defendant's arguments on appeal are that normal childhood behavior should have rendered the child hearsay inadmissible. But in the trial court the defense strategy was different. At trial, the defendant blamed the mother. The defense cross examinations and closing arguments suggested that the child's mother was the instigator of the sex abuse allegations to gain an advantage in child custody proceedings. 7 RP 570-71. 7 RP 594-95. 7 RP 695-96. In light of this strategy, arguments attacking the child would have undermined the defense. What possible benefit would there have been for the defense attorney to attack a ten year

old child and suggested that she was a master manipulator, capable of fabricating and persisting in untrue sex abuse allegations for no apparent reason?

The defendant would have squandered his credibility and ruined any hope that his carefully thought out trial strategy would raise a reasonable doubt had he attacked the child. Neither the trial judge nor the defense attorney can be faulted for having allowed the introduction of clearly admissible child hearsay, and thereby permitting the defense attorney's strategy to play out.

b. The State's Evidentiary Objections Were Correctly Conceded and Ruled Upon and Do Not Support an Ineffective Assistance Claim.

A similar analysis applies to the ineffective assistance arguments based on the trial court's evidentiary rulings. The prosecution's motion to exclude inadmissible character evidence was granted after the defense attorney stated:

> MR. SHAW: Well, I think it's a well-positioned supported motion *in limine*, and I will attempt to, should the Court grant it, to follow it. Should the door be opened by any witness, of course, I will ask the Court to readdress this very point. 2 RP 146.

"In criminal cases, character is rarely an essential element of the charge, claim or defense." ***State v. Kelly,*** 102 Wn.2d 188, 196, 685 P.2d 564(1984), citing 5 K. Tegland, Washington Practice, Evidence § 126, at 312 (1982). Even where a pertinent character trait of a victim might be

relevant, such as a victim's character for violence in a self-defense case, specific acts "character evidence relating to the victim's alleged propensity for violence is not an essential element of self-defense." ***State v. Hutchinson***, 135 Wn. 2d 863, 886-87, 959 P.2d 1061, 1073 (1998). Accordingly inquiry about specific acts of fibbing or taking things that didn't belong to her in A.C.'s case was not admissible.

The doubtful admissibility of the evidence complained of in this appeal was all the more properly not objected to by the defense attorney considering his trial strategy. The defense strategy was to attack A.C.'s mother as the instigator. 7 RP 570-71. To support that strategy, the defense necessarily considered A.C. to be an innocent dupe. The defense strategy would not have been supported by inadmissible evidence intended to assassinate the character of the victim.

The evidentiary ruling on other suspect evidence leads to a similar conclusion. A mid-trial oral motion *in limine* was granted concerning allegations of sexual contact between A.C.'s father and A.C.'s aunt. The defense attorney's response was:

> MR. SHAW: I do not plan to get into this, Your Honor. It may come up through some back door, but I am not going to directly inquire of anyone.
>
> 7RP 540.

"The right to present a defense does not extend to irrelevant or inadmissible evidence." ***State v. Wade***, ___ Wn. App. ___, 346 P.3d 838,

846 (March 30, 2015), citing ***State v. Jones***, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). The standard for relevance of other suspect evidence is whether there is evidence "tending to connect someone other than the defendant with the crime." ***State v. Wade***, 346 P.3d at 846, quoting ***State v. Franklin***, 180 Wn.2d 371, 382, 325 P.3d 159(2014).

In this case, the record is not clear as to the source of the allegation of sexual contact between A.C.'s father and A.C.'s aunt. However, even if there was a record, the allegation would not constitute admissible evidence. There could have been no relevance, and simultaneously a great deal of "danger of unfair prejudice, confusion of the issues, or misleading the jury", since the allegation was not related to A.C.. ER 403. Evidence tending to prove that A.C.'s father had an inappropriate relationship with a third party would not have tended to prove that A.C.'s father abused his own daughter.

It has been said that an ineffective assistance claim requires a showing "that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment" and that "the defendant must show that the deficient performance prejudiced the defense." ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). In light of the correct rulings made by the trial court on evidentiary issues during the trial, and furthermore in light of the defense strategy, it is not possible for

the defendant to satisfy this standard. The defendant's assignments of error premised on ineffective assistance should be rejected.

5. SUFFICIENT EVIDENCE WAS INTRODUCED AT TRIAL TO PROVE THE ELEMENTS OF THE CHILD RAPE AND MOLESTATION CHARGES.

There is no complaint from the defendant in this case that the jury was improperly instructed about the elements of the crimes, nor that the jury engaged in misconduct. The jury instructions stated, "It is your duty to determine which facts have been proved in this case from the evidence produced in court. . . ." Instruction No. 1. There has been no showing that the twelve jurors who deliberated failed in any way to carry out that duty.

The first sentence of the first paragraph of the first jury instruction conveyed to the jury their role as the finders of fact as is provided for by the Washington Constitution. Washington Constitution, Article 1§21. ***State v. Furth***, 5 Wn.2d. 1, 104 P.2d 925, 933-34(1940). Neither the court nor witnesses may invade the province of the jury because "the jury is consigned under the constitution 'the ultimate power to weigh the evidence and determine the facts." ***State v. Montgomery***, 163 Wn.2d 577, 590, 183 P.3d 267(2008).

With the foregoing in mind, the test of sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***State v. Hosier***, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). Furthermore, "[a]ll reasonable inferences from the

evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* at 8.

In an insufficiency claim, the defendant "admits the truth of the State's evidence" and all reasonable inferences that can be drawn from it. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The court defers "to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." ***State v. Thomas***, 150 Wn.2d 821, 874–75, 83 P.3d 970, *abrogated in part on other grounds by* ***Crawford v. Washington***, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt can a claim of insufficiency be sustained. ***State v. Smith***, 155 Wn.2d 496, 501, 120 P.3d 559 (2005).

In this case, the defendant relies on the ***Alexander*** case for support of his sufficiency claim. ***State v. Alexander***, 64 Wn. App. 147, 822P.2d 1250(1992). ***Alexander*** involved challenges to admissibility of evidence and to prosecution error in improperly vouching for and bolstering the credibility of the victim. *Id.* at 149. The court held that a good deal of the prosecution's evidence was inadmissible and that the prosecution had

committed error. *Id.* at 158. These holdings distinguish ***Alexander*** from this case.

In this case, there was no error in the admission of any of the evidence, and thus no reason to invalidate the jury's fact finding. In a similar case this Court pointed out, "As an initial matter, regardless of whether inconsistencies exist in [a child victim's] statements, we defer to the trier of fact, here the jury, on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." ***State v. Corbett***, 158 Wn. App. 576, 589, 242 P.3d 52, 58 (2010), citing ***State v. Camarillo***, 115 Wn.2d 60, 71, 794 P.2d 850(1990), and ***State v. Walton***, 64 Wn. App. 410, 415–16, 824 P.2d 533(1992). As was the case in ***Corbett***, in this case the defendant's argument goes to A.C.'s credibility and "her credibility is a matter to be resolved by the jury that heard her testimony, not a reviewing court." ***State v. Corbett***, 158 Wn. App. at 589.

The jury in this case had a superior platform for considering the credibility and probative value of A.C.'s testimony. It heard her testimony in court when she described the defendant touching her with his hand, kissing her on the mouth and wanting her to perform oral sex upon him. 6 RP 497-503. It also heard and saw her describe on video to the forensic child interviewer that the defendant forced himself on her by licking "my private spot" where I "go to the bathroom." Exhibit 1, Time Stamp 11:17-11:20. Her account of the circumstances, namely where it would happen,

when it would happen, and what she and the defendant were doing at the time was consistent with her trial testimony.

The jury should not be second guessed in its decision on credibility. Concerning A.C's inability to describe the oral sex on the stand, the jury surely took into account that this ten year old child was called to the stand and thus had to describe that sex act under the fluorescent lights of an adult courtroom filled with adult strangers. The jury can hardly be faulted for considering it of little consequence that she was unable to describe for them, as she had previously described for the forensic interviewer, intimate details of oral copulation by her cousin. Would not most adults have similar difficulty?

When deference to the jury's constitutional fact finding function is taken into account, there is no basis for concluding that there was insufficient evidence in this case. This case was properly decided, after a trial in which the evidence was properly admitted, by a jury that had been properly instructed. The defendant's claim of insufficiency should be rejected.

D. CONCLUSION.

For the foregoing reasons the State urges the Court to affirm the defendant's convictions.

DATED: Monday, July 20, 2015

MARK LINDQUIST
Pierce County
Prosecuting Attorney

JAMES SCHACHT
Deputy Prosecuting Attorney
WSB # 17298

Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7.20.15
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