NO. 47477-8

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DARREL HARRIS, APPELLANT

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

No. 14-1-00309-1

BRIEF OF RESPONDENT

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

1. Whether defendant has waived any claim of prosecutorial error[1] and even if some of the arguments were improper, defendant is unable to meet his burden under the heightened standard of review and show that he was so prejudiced by any error that no curative instruction would have neutralized it?

2. Whether the defendant has failed to meet his burden of showing that defense counsel's performance was deficient and that he was prejudiced by any deficiency?

3. Whether defendant is unable to show a violation of his constitutional right to present a defense or that the trial court

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[1] " '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). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, 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" for 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 March 14, 2016); 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 March 14, 2016). 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. LEXIS 196 (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 opinions.

abused its discretion when it properly excluded evidence that was irrelevant and cumulative?

4. Whether defendant is unable to show a violation of his constitutional rights when the trial court ordered him to remain emotionless after he was improperly attempting to influence the jury and the court?

5. Whether defendant has failed to show that he is entitled to relief under the doctrine of cumulative error when he has failed to show an accumulation of prejudicial error?

B. STATEMENT OF THE CASE.

1. Procedure

On January 24, 2014, the Pierce County Prosecutor's Office charged DARREL LORNE HARRIS, hereinafter "defendant", with one count of rape of a child in the first degree (Count I) and one count of child molestation in the first degree for crimes against J.J.[2] (Count II), and one count of indecent liberties, domestic violence related, committed against K.M. (Count III). CP 1-2. The case proceeded to trial before the Honorable Vicki Hogan. RP[3] 4. After a child hearsay hearing, the court

[2] An amended information was filed prior to trial on February 6, 2015, which removed the domestic violence designation from these two counts. CP 142-143.

[3] Volumes I-VI of the report of proceedings in this case is contained in consecutively paginated volumes which will be referred to as "RP". Volume VII is likewise consecutively paginated and will be referred to as "RP" but goes from 721-734. The report of proceedings which occurred on February 24, 2015 will be referred to as "2/24/15 RP".

found J.J.'s statements to other witnesses were admissible under RCW 9A.44.120[4]. RP 194-200; CP 50-52. The jury returned guilty verdicts on all counts and the court sentenced defendant to 162 months to life on Count I, 130 months to life on Count II, and 75 months on Count III. RP 727-28; CP 113-16, 144-159.

Defendant filed a timely notice of appeal. CP 166-167[5].

2. Facts

Around September of 2013, K.M. and her four year old daughter, J.J., moved into the defendant's home in Spanaway, Washington. RP 398-402. J.J.'s birthday is October 13, 2008, and K.M.'s birthday is May 7, 1988. RP 347, 398. The defendant is K.M.'s uncle and he would occasionally watch J.J. for K.M. when she went out. RP 401, 405. K.M. did not pay rent to the defendant, but she helped around the house doing yardwork and bought her own food. RP 405-06. Everyone had their own bedrooms, and although there were not doors on any of them, the

[4] RCW 9A.44.120 reads, in relevant part, "A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another... not otherwise admissible by statute or court rule, is admissible in evidence in... criminal proceedings, including juvenile offense adjudications, in the courts of the State of Washington if: (1) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and (2) the child either: (a) testifies at the proceedings; or (b) is unavailable as a witness[.]"

[5] The State is filing a supplemental designation of clerk's papers to include the notice of appeal and anticipates it will be labeled as 166-167.

defendant put doors on his and J.J.'s rooms shortly after K.M. and J.J. moved in. RP 407, 409-10.

The morning of November 6, 2013, K.M. woke up to the defendant rubbing her vagina underneath her clothes, but over her underwear. RP 410-11, 414. K.M. immediately moved his hand away and got up. RP 412. Defendant told her he wanted a relationship with her and K.M. said no and that she was his niece. RP 412-13. Defendant told her he did not care about that, that they did not have to tell anyone and he did not care what others thought. RP 413. When K.M. again told him no and that it was inappropriate, defendant became upset so K.M. ended the conversation and left the room. RP 413.

J.J. had been sleeping while this occurred and when she woke up, K.M. fixed her breakfast and noticed a note on the coffee table from the defendant. RP 414-16. The note said "You are not my companion. You are my roommate. Act like a roommate. Stop borrowing my clothes. Stop asking for rides. Stop acting like a family." RP 414-16. K.M. went outside to where defendant was smoking a cigarette and asked him what he meant by the note, telling him she already had a plan to move out. RP 415-17. Defendant told her she did not have to move out and she could continue living there if she had sex with him twice a week. RP 418.

K.M. did not respond, went back inside and played with J.J. until the defendant left for work. RP 419. Then she went to the neighbor, Janet Satre's house to call her aunt to come get them because K.M. did not have

a car and her phone was not working. RP 419, 476. K.M. did not tell Ms. Satre what had happened because Ms. Satre was good friends with the defendant. RP 476, 488. K.M. and J.J. went back and forth between Ms. Satre's house while they waited for their ride. RP 419-20, 469, 488. K.M. was fearful about how the defendant would react after the incident so she tried to act normal around him when he returned home, even giving him a hug at one point. RP 419-20, 469, 488. She testified that defendant had previously made threats to her when she initially moved in that she had just brushed off at the time. RP 419-20.

Later that night, K.M. packed a bag and her aunt drove her and J.J. to her friend's home. RP 421. K.M. told her aunt about the incident and said she hoped the defendant had not done anything to J.J. too. RP 477. K.M. and J.J. stayed with the friend for several more nights and at some point, K.M. spoke with defendant on the phone and he asked her to bring home some butter. RP 423-26. When she did not, he got upset and told her that if she was not going to live at his house she needed to get the rest of her stuff out. RP 425-26. She and a few friends from church drove to his home and retrieved her belongings defendant had left in the driveway. RP 490.

On Saturday November 9, 2013, K.M. called the police and reported the incident. RP 421, 426. She said she did not initially report the incident because she was confused, did not know where else she and

J.J. were going to live and was not sure what the right thing to do was. RP 422-23.

Officer Alex Richards initially contacted K.M. by phone to take her report of the incident, but she was hysterical and crying which made it difficult for him to get the information. RP 247-48. Instead, he contacted K.M. at her friend's apartment and found her sitting outside on the concrete step while leaning up against a wall, crying and smoking a cigarette. RP 249-50. K.M. told Officer Richards that she was living with her uncle when she woke up one morning to him rubbing her vagina over her clothing. RP 254. When she stopped the defendant and told him she did not want that, the defendant told her he just need to be loved, he had always had a thing for her and that if she wanted to live for free at his home he wanted sex twice per week. RP 254, 256-57.

K.M. told Officer Richards that the incident had occurred Tuesday or Wednesday earlier that week, but she was fearful of reporting it. RP 251-52, 273. She said the defendant was very rude and defensive after she challenged him about the incidents and worried he would retaliate or harm her. RP 258, 273. After completing a handwritten statement, K.M. also gave Officer Richards the note defendant had written her. RP 254-55. Since the incident with K.M. had happened, K.M. had asked J.J. a couple of times if anything bad had happened to her and J.J. had responded no. RP 428. When the officer was there, K.M. asked again and J.J. whispered in K.M.'s ear and K.M. asked J.J. to tell the officer what she had just told

her. RP 259-60, 429. J.J. described how defendant had touched her and put his finger in her "private spot" while pointing to her vagina. RP 259, 429-30. J.J. also said that the finger hurt and she did not want him to do it again, but defendant told her if she said anything to anybody they would get caught. RP 259.

The next day, K.M. took J.J. to the emergency room. RP 292, 430. J.J. described to the doctor that her uncle had touched her in her private and pulled him toward her and it hurt. RP 294-95, 432. She also described that "he put it where I poop from and it felt wet and I told him no." RP 294. J.J. said that he told her he would take her mommy away if she told anyone or complained of pain in her privates. RP 294. J.J.'s physical exam was normal and during the trial, the doctor described that it is common not to find any blatant physical evidence in these types of crimes. RP 296-97.

K.M. also took J.J. to the Child Advocacy Center for a forensic interview and physical exam. RP 433. The child forensic interviewer testified during the trial and a video of her interview with J.J. was played for the jury. RP 540; Exhibit 1. In it, J.J. described how the defendant would rub her "shoo shoo", meaning vagina, and would put his "private spot" or "gut" inside her butt where she goes poop and that it felt wet. Exhibit 1. She described how he would put pillows on her and use her mom's bathrobe to cover her face which felt itchy. Exhibit 1. J.J. said this all happened in the living room or in the defendant's bedroom at his

house and he told her not to tell anyone or he would kill her. Exhibit 1. At one point, J.J. said that the defendant had killed her and the interviewer clarified that that was just pretend. Exhibit 1.

The interviewer testified during the trial that it is very common for children to delay the disclosure of abuse for months or even years because of fear based reasons. RP 509-11. She said it is common that the disclosure comes once the child is no longer around the perpetrator. RP 511. The interviewer testified that after her interview with J.J., she had no concerns J.J. had been coached. RP 549.

J.J. was also examined by a pediatric nurse practitioner while at the Child Advocacy Center. RP 591-92. J.J. told the nurse practitioner that Darrel had done something to her private part and pointed to her genital area when asked what that was. RP 594. J.J. said it hurt, but did not want to talk about it. RP 594-95. The nurse practitioner testified that J.J.'s exam was normal which is common in cases of sexual abuse given how quickly the vaginal and anal area heals from any injury that might have been sustained. RP 596-99.

J.J. testified during the trial. RP 333. She identified the defendant and said that the defendant had done things to her that she did not like. RP 338-42, 345. She said she had told her mom and auntie about what he did, but that she was too scared to talk about it that day. RP 340-44. The next day, after having watched the video of her forensic interview, J.J. was recalled to the stand. RP 385, 391. She testified that the defendant had

touched her in the front and the back where she goes to the bathroom when they were at his home and her mother was outside or sleeping. RP 387-90.

J.J.'s aunt, Theresa Midgette, testified during the trial that J.J. had been living with her for the past few months and J.J. visits with her mother on the weekends at Ms. Midgette's sister's house where K.M. is living. RP 347-50. Ms. Midgette testified that during the time J.J. has been living with her, J.J. has told her about some of the things the defendant did to her. RP 352. Ms. Midgette said it usually happens once a week when they are alone and J.J. is getting ready for bed or to take a shower and J.J. will say she is afraid and wants to talk about what happened. RP 352-53. She described to Ms. Midgette how the defendant put his fingers inside of her while pointing to her vagina and said that the defendant had peed on her. RP 352-53. Ms. Midgette also said that J.J. described one time where he held her down with pillows and another where he was on top of her and his butt was going up and down. RP 353. J.J. has also told her that defendant would pick her up and bring her in a room, pull her pants down and his "long thing" was out and touching her. RP 354-55.

Ms. Midgette said that J.J. is usually very scared, wants to be held and cries sometimes because she is afraid if she tells people the defendant is going to hurt her or her mother. RP 354. Ms. Midgette tells her that she is sorry about what happened to her and she is safe and that he cannot hurt

her anymore. RP 354. Ms. Midgette testified that J.J. was not scared to come to court, but became afraid when they got there. RP 356.

K.M. also testified during the trial that J.J. occasionally talks about what the defendant did to her. RP 434. She said she has never told J.J. what to say and J.J. always brought up the incidents to her, usually at night while acting scared or embarrassed. RP 436-37, 491. J.J. described incidents when K.M. was sleeping when defendant would cover J.J. with pillows and touch her private area. RP 434-35. J.J. also told her about times the defendant would pull down his pants, make J.J. sit on his lap after pulling down her pants and play with her private area. RP 434-35. J.J. also said there was one incident where K.M. woke up to get water and the defendant hid J.J. in the bed. RP 435-36. In another incident, J.J. described the defendant's "gut out" rubbing on her and leaving sticky stuff on her afterwards. RP 435-36. J.J. said that defendant told her not to tell anyone or he would hurt J.J. or her mother, and she feels like it was her fault because sometimes it felt good, but she would tell him to stop when it hurt. RP 437-38.

The defendant's neighbor and friend, Janet Satre, testified for the defense after the conclusion of the State's case. RP 641. Ms. Satre said that after K.M. and J.J. came to live with the defendant, they would come by her house everyday around 11am because K.M. was a nurse and would check on some medical issues Ms. Satre was having. RP 643-44. She said they would stay for 3-5 hours and chat and K.M. never said anything

negative about the defendant. RP 645-46. Ms. Satre said she saw K.M. the day of the incident and she seemed normal. RP 649-50. She testified she never observed J.J. act frightened or shy away from the defendant when they were together and she never saw the defendant alone with J.J. RP 647. She also said she had been to the defendant's home and observed that the door to J.J.'s room could not close because the bedframe was in the way. RP 648. The State called K.M. during rebuttal to point out several inconsistencies in Ms. Satre's testimony, including that K.M. would only go to Ms. Satre's house 2-3 times a week and did not help with any medical issues because she was not trained how to do them. 2/24/15 RP 18.

Defendant chose to testify during the trial and denied all of the allegations made by K.M. and J.J. saying he was never home alone with J.J. RP 660-61, 676, 682, 693. He drew a floorplan diagram of his home and said that J.J.'s door would not close because of the bedframe. RP 664-69. Defendant testified that the day of the alleged incident was a normal day and he took K.M. and J.J. to a doctor's appointment and then they got food. RP 683-85. Defendant said that when he went to work around 3:15, K.M. asked if he could drive her to another appointment the next day and gave him a hug. RP 685-86. He told her he could not and she needed to find another ride, so while he was at work K.M. and J.J. went to K.M.'s aunt's house. RP 686. He said on Friday he asked her to bring home some food and when she did not, it was the last straw for him

so he called her Saturday and told her to move out. RP 689-91. Defendant admitted to writing the letter to K.M., but said he gave it to her several weeks prior to the date she moved out because K.M. was an inconsiderate roommate and her behavior had been bothering him. RP 677-79, 701-02. He also admitted however, that after he gave her the letter, he continued to be affectionate towards her, hugging her, rubbing her back and rubbing her rear end. 2/24/15 RP 8-9.

During trial, a certified copy of the defendant's driver's license was admitted which showed his birthday was March 5, 1966. RP 328, 693. Neither K.M. nor J.J. have ever been married to or in a state registered domestic partnership with the defendant. RP 442, 694.

C. ARGUMENT.

1. DEFENDANT IS UNABLE TO MEET HIS BURDEN OF SHOWING ANY IMPROPER ARGUMENT IN CLOSING WAS SO PREJUDICIAL THAT NO CURATIVE INSTRUCTION COULD HAVE NEUTRALIZED THE ERROR.

To prevail on a claim of prosecutorial error, the defendant has the burden of establishing that the alleged error is both improper and prejudicial. ***State v. Stenson***, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the

case, the evidence addressed in the argument and the instructions given to the jury. ***State v. Russell***, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) (*citing* ***State v. Graham***, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)).

a. The prosecutor did not express a personal opinion about the defendant's guilt.

It is improper for a prosecutor to state a personal belief about the guilt or innocence of the accused. ***State v. Reed***, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). To determine whether the prosecutor is expressing a personal opinion about the defendant's guilt, independent of the evidence, the reviewing court views the challenged comments in context. ***McKenzie***, 157 Wn.2d at 53. Courts recognize that:

> [i]t is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when judged in the light of the total argument, ... it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence.

Id. at 53-54. As a result, no prejudicial error occurs unless it is " 'clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion.' " ***State v. Mckenzie***, 157 Wn.2d 44, 54, 134 P.3d 2221 (2006) (*quoting* ***State v. Papdopoulos***, 34 Wn. App. 397, 400, 662 P.2d 59 (1983)).

Defendant in the present case contends that the prosecutor improperly expressed a personal opinion about the guilt of the defendant when the prosecutor stated:

> At the risk of beating a dead horse, what really is at the heart of defense counsel's argument to you is that this didn't happen because there is no other proof. **What I am telling you is that there almost never is other proof. This is not unusual. Yet, these cases are prosecutable.** You can find someone guilty beyond a reasonable doubt because someone is telling you this happened to me. That is what you have here.

2/24/15 RP 97 (emphasis added[6]); Brief of Appellant at 23. Defendant argues the prosecutor again improperly commented on his guilt when the prosecutor concluded:

> The defendant also touched [K.M.]. As a mother, she had to ask [J.J.], "Did something also happen to you?" That is when it came out. **Don't let the defendant get away with this because it is like so many others where there is no corroborating evidence. It doesn't matter. He did it. Find him guilty.**

2/24/15 RP 98 (emphasis added[7]); Brief of Appellant at 24-25. These two comments came in the concluding remarks of the prosecutor's rebuttal argument. They were referring to an argument the prosecutor had previously made which detailed how the law does not require corroboration and there is almost never evidence of corroboration in these types of cases. In that argument, the prosecutor explained to the jury that the lack of physical corroboration should not prevent them from convicting the defendant because the evidence that was presented to them

[6] The bolded text refers to the quoted portions in the brief of appellant.
[7] The bolded text refers to the quoted portions in the brief of appellant.

was sufficient for them to find him guilty beyond a reasonable doubt. That was a proper argument. It was supported by the jury instructions which contain no instruction requiring evidence of corroboration for a jury to convict. It was also supported by the testimony of the emergency room doctor and the pediatric nurse practitioner who both testified it is common in cases involving the sexual abuse of children to find no physical evidence of an assault. RP 296-97, 597-600, 610-611. The prosecutor's remarks surrounding the two comments cited above also put the comments in context and show that they are part of a larger argument rebuking defendant's claim that he is not guilty because there was no corroborating evidence. The prosecutor's comments cited by defendant were not improper as it is clear the prosecutor was arguing inferences from the evidence and not making a personal expression about defendant's guilt.

b. The prosecutor did not misstate the law.

It is improper for a prosecutor to misstate the law to the jury. ***State v. Swanson***, 181 Wn. App. 953, 959, 327 P.3d 67 (2014). Defendant alleges the prosecutor misstated the law in the present case when the prosecutor said "[i]t came up that some people might require more, might not think it would be nice to have more, but actually would require more. As a juror on this case, all of you as jurors on this case, you have taken an oath to follow that law in your instructions. That law does not require

more." 2/24/15 RP 52. The prosecutor was explaining to the jury that while it would be nice to have evidence of corroboration as it would make the case against defendant stronger, there is nothing in the instructions that required evidence of corroboration in order for the jury to convict defendant. The statement that the law does not require corroboration is not improper. It is supported by RCW 9A.44.020(1) which states "[i]n order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated." The prosecutor never told the jury that they had to convict despite no corroboration; she was explaining to the jury that the law did not require corroboration.

The prosecutor's comments preceding the statement cited by defendant also make this clear as the prosecutor explained:

> Those are [J.J.'s] words. That is her telling adults that are there to help her, what happened to her. Her words. That is enough. Nothing more is required. You will not find anywhere in your instructions that something more is required. That, in addition to a child saying it happened to them, you need corroborating evidence. The law doesn't require it. Her words are enough. They are sufficient evidence for you to convict.

2/24/15 RP 52. In other words, even if the jury believed the law should require corroboration, it does not and they had taken a duty to follow the law, regardless of what they believe it should be. When put in context, the prosecutor's arguments were supported by the court's instruction on the

law and what the law does not require. They are statements that accurately reflect the law and were not improper.

c. Even if some of the prosecutor's arguments could be considered improper, defendant is unable to show the prosecutor's comments were flagrant and ill-intentioned, no curative instruction could have remedied the error and the error had a substantial likelihood of affecting the verdict.

In the event a defendant establishes that a prosecutor's statements are improper, the court assesses whether the defendant was prejudiced under one of two standards of review. If the defendant objected at trial, the defendant must show that the prosecutor's error resulted in prejudice that had a substantial likelihood of affecting the jury's verdict. *Id.*; ***State v. Ish***, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); ***State v. Dhaliwal***, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's error was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. ***State v. Thorgerson***, 172 Wn.2d 438, 443, 258 P.3d 43 (2011); ***State v. Stenson***, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury", and (2) the error resulted in prejudice that "had a substantial likelihood of affecting the jury verdict."

Thorgerson, 172 Wn.2d at 442-43; ***State v. Emery***, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. ***State v. Binkin***, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), (*overruled on other grounds* by ***State v. Kilgore***, 147 Wn.2d 288, 53 P.3d 974 (2002)). Failure by the defendant to object to an improper remark constitutes a waiver of that error 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." ***Stenson***, 132 Wn.2d at 719, (*citing* ***State v. Gentry***, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)). Failure to object or move for mistrial at the time of the argument "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." ***State v. Swan***, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990); *see also* ***State v. Monday***, 171 Wn.2d 667, 679, 257 P.3d 551 (2011).

Defense counsel did not object to any of the claimed errors defendant alleges the prosecutor made during closing argument. Thus, even if some of the prosecutor's arguments may be considered improper, he has waived any error unless defendant meets the heightened standard of review and shows that the remark was so flagrant and ill-intentioned it could not have been remedied with a curative instruction. Defendant is unable to meet that burden in the present case.

There are comments the prosecutor made in the closing argument that this court may find improper given its recent decision in ***State v. Thierry***, 190 Wn. App. 680, 360 P.3d 940 (2015). However, even if improper, when the evidence that was presented to the jury is reviewed, both parties' closing arguments are looked at in their entirety and the court's instructions to the jury are considered, defendant is unable to meet this heightened standard warranting reversal.

In the prosecutor's closing argument, the prosecutor made two statements which touch on imagining a criminal justice system where corroborating evidence is required in order to convict an individual of a crime. 2/24/15 RP 52-54. She made the statements in the context of attempting to explain to the jury the reason why the law in Washington does not require corroboration in order to convict an individual of a crime. The State's case relied entirely upon the testimony of the two victims, what J.J. told others had happened to her, and the credibility of all of the State's witnesses. It was a case with no corroborating physical evidence. The prosecutor's comments were made in an effort to help the jury recognize that although the entire case came down to credibility determinations, that that was sufficient under the law in Washington in order to convict. This argument was in no way a flagrant, ill-intentioned attempt to persuade the jury to convict for inappropriate reasons.

Similarly, the comments defendant cites in rebuttal as being improper were in response to defense counsel's arguments during closing.

Brief of Appellant 22. They were responding directly to defense counsel's claim that there was no evidence before the jury to convict defendant of these crimes. 2/24/15 RP 75-77, 86. The prosecutor was pointing out that while there was no physical evidence, there was evidence in the form of testimony by the victims and if believed, that was all the law required. 2/24/15 RP 90-91. The prosecutor was also pointing out that the officer who responded to the scene never attempted to collect evidence because there was not any evidence to collect. 2/24/15 RP 96. While some of these comments may have been somewhat inartful, they came in rebuttal and were in response to defense counsel's claims in his closing. As a result, they too cannot be considered flagrant or ill-intentioned.

Furthermore, despite not being corroborated by independent physical evidence, the evidence in the form of testimony that the State did present was credible. K.M. remained consistent throughout her testimony about what the defendant had done to her and was only unclear about minor details relating to ancillary events like where she was when conversations took place. She also provided reasonable explanations for her behavior after the incident and decision not to disclose the abuse until several days later.

Similarly, J.J. remained consistent in her descriptions of the abuse by the defendant in both her statements to others and in her testimony when she actually discussed what occurred. RP 259, 294-295, 340-42, 352-56, 387-96, 430-438,594-595; Exhibit 1. The child interviewer

discussed how J.J.'s descriptions of what had occurred, behavior during the interview, late disclosure and detail in regards to time and memory were all consistent with how a five year old child who had suffered abuse would respond. RP 509-513, 522-533, 541-549. She specifically testified she had no concerns about coaching at the end of the forensic interview. RP 549. J.J.'s initial reluctance to discuss what occurred while on the stand was reasonable given that the defendant was present and is even further evidence that she was not coached and told what to say when on the stand.

In contrast, defendant and his neighbor's credibility was called into question numerous times while they were on the stand. The defendant's neighbor was overly confident in her memory of the timeframes J.J. and K.M. would come over and was specifically contradicted by the surveillance video defendant played. RP 658. Defendant himself provided odd explanations about the note he wrote and contended he had never been alone with J.J. at any point, which is near impossible. RP 700-01; 2/24/15 RP 9-11. The photographs he took to argue he could not have shut J.J.'s door were taken after J.J. and K.M. had already moved out. RP 696-700; 2/24/15 RP 14-16. He also only admitted to rubbing K.M.'s rear end after initially denying it and only after he was confronted with video evidence which showed him doing it. RP 702-705; 2/24/15 RP 8-9.

Defendant's claim was that K.M. had made up the allegations because she was upset by defendant telling her to move out after becoming

frustrated with her. 2/24/15 RP 73. But this was refuted by the fact that K.M. had moved out prior to the conversation with defendant on the Saturday when he supposedly told her not to come back which was supposedly her motivation for making false allegations against him. Similarly, defendant claimed that J.J. had been coached about the abuse by K.M., but there was no evidence presented which suggested that and in fact as stated above, evidence was presented to the contrary which suggested J.J. had not been coached.

Even without independent corroborating physical evidence of the crime, the jury was presented with credible evidence from the State to support a conviction, and defendant's claims in defense were conflicting and refutable. All of this was reiterated and argued in great length during the State's closing. Defense counsel also spent the majority of his closing challenging the credibility of the State's witnesses, attempting to point out inconsistencies in their stories and provide motivations for the allegedly false allegations. Any improper comments by the State were momentary in comparison to the lengthy discussions about the credibility of the witnesses in each parties' closing arguments about why the jury should support their theory of the case. Defendant is unable to show that any improper comments by the State evinced an enduring and resulting prejudice sufficient to overcome the evidence that was before the jury.

Nor is defendant able to show that any improper comments could not have been cured by an objection or a remedial instruction telling the

jury to disregard the improper argument. Even without that, the prosecutor repeatedly told the jury it was their job to follow the law and convict based on the evidence that was presented to them. *See* 2/24/15 RP 42 ("It is your oath and your duty to decide this case based on the evidence that was presented to you during the trial in this courtroom. The law that the Court gave to you earlier this morning, that is the law you are to apply to this case."); 2/24/15 RP 43 ("Your decision must be based on the law and the evidence"). 2/24/15 RP 89 ("Closing arguments are the attorneys' interpretations of the evidence, facts, the law. What we say in argument is not evidence. The evidence is the testimony, the exhibits that were admitted.") The court also reminded the jury, in both an oral instruction and the written instruction packet, that it was their duty to decide the case based on the law and the facts that were presented during the trial. 2/24/15 RP 36; CP 84-109, Instruction No. 1. Jurors are presumed to follow the court's instructions. ***State v. Kroll***, 87 Wn.2d 829, 835, 558 P.2d 173 (1976). There is nothing in the present case to suggest they did not do that.

While a few of the prosecutor's comments in the closing and rebuttal may have touched upon an argument that this court has found to be improper, each case must be evaluated independently so as to consider the evidence, arguments and objections that were made. The lack of objection in this case reflects the likelihood that anything now viewed as improper did not appear as such in context of the argument when it was

made in the present case. Had defendant objected or requested a curative instruction in this case it would have obviated any prejudicial effect of the prosecutor's comments. When reviewed in its entirety, the comments made by the prosecutor were brief and miniscule in comparison to the great amount of time the prosecutor and defense counsel spent discussing the credibility of the witnesses in the case. Given the repeated reminders to the jury to consider only the evidence and law that was before them, it was the credible evidence that was before the jury in contrast to the defendant's unpersuasive claims which led the jury to convict defendant of the crimes. Defendant is unable to show that any error resulted in a prejudice that had a substantial likelihood of affecting the jury verdict. Defendant cannot show that any prosecutorial error in the present case warrants reversal as required under the heightened standard of review.

2. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT AND THAT HE WAS PREJUDICED BY ANY DEFICIENCY.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred.

Id. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

> What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489; ***United States v. Layton***, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. ***State v. Lord***, 117 Wn.2d 829, 883, 822 P.2d 177

(1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. ***State v. McFarland***, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. ***State v. White***, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

Defendant argues that he received ineffective assistance of counsel based on the defense attorney's failure to object to the prosecutor's arguments described in the preceding section. However, when the record of defense counsel's performance is reviewed as a whole, defendant is unable to show his counsel's performance was deficient. During the child hearsay hearing, defense counsel cross examined all of the State's witnesses, specifically challenging the minor victim's mother on her recollection of the disclosure, and argued against the admission of the statements. RP 31-33, 52-62, 76-86, 112-118, 159-174, 177-180, 187-190. He also argued for the admission of defendant's surveillance video during motions in limine and asked for a reconsideration of the motion prior to the presentation of defendant's case. RP 214-222, 616-619, 632-633.

During the State's case in chief, defense counsel thoroughly cross examined all of the State's witnesses regarding the inconsistencies in their testimony. RP 262-283, 298-306, 328-330, 342-346, 357-365, 392-395, 443-486, 492-494, 550-577, 601-609. With the medical professionals, law

enforcement officers and forensic interviewer, he specifically challenged their practices and procedures and questioned the circumstances surrounding J.J.'s disclosures of the abuse. RP 262-283, 298-306, 328-330, 550-577, 601-608. Defense counsel called defendant's neighbor to testify in an attempt to point out inconsistencies in K.M.'s testimony and provide support for the claim that K.M.'s behavior was no different on the day of the alleged incident than any other. RP 641-651. During the defendant's testimony, defense counsel brought in photographs and drawings of the defendant's home to attempt to contradict J.J.'s claims of how and when the abuse occurred. RP 664-674. He also elicited reasons why K.M. may have motivation to make false allegations against the defendant. RP 677-693. All of these actions reflect that defense counsel attempted in numerous ways to advocate and represent his client throughout the trial. His failure to object to a few brief comments during the State's closing does not make the entirety of his performance deficient.

Furthermore, defense counsel's decision not to object during the prosecutor's closing could have been part of a larger trial strategy. The potentially improper comments by the State made brief mention of a system where corroboration was required in order to convict individuals of a crime. Defense counsel may have chosen not to object to the State's comments in order to address that argument and make somewhat of a reverse comparison in his own closing. Throughout his closing, the defense attorney reminded the jury that there was no evidence in the case

of defendant's guilt aside from K.M. and J.J.'s allegations. RP 70-73. He also argued that K.M. had motive to make up the allegations because she was being kicked out of the defendant's house and then coached J.J. to make her own allegations against defendant. RP 72-73. It was then that defense counsel rephrased the State's comments by saying that we do not live in a world where all that is needed to convict someone of a crime is allegations. He stated:

> It is so easy, it is extremely easy to make an allegation against somebody. It happens every day in every city, in every state in this country. If there weren't standards in place like the burden that the prosecutor has to prove beyond a reasonable doubt that that those allegations actually occurred, individuals, everybody, would be at risk of having allegations determined to be true merely because they were said. We wouldn't need a jury. We wouldn't need anything other than somebody saying, this happened, and that would be the end of it. That is obviously not the case.
>
> There are standards in place. The law states those standards. There [are] standards in the jury instructions you have. The constitution of the United States has standards in those in it to safeguard individuals from random and abusive allegations.

RP 74-75. Defense counsel continued with the argument, employing an analogy to reflect another situation where lack of proof would in no way suffice to hold someone accountable or responsible to something, let alone convict them of a crime:

> In no other situation, I don't think under any other circumstance, would somebody's statement without corroboration be proof positive. I talked about this analogy

> in voir dire. You have the contract case where somebody is owed money. There is absolutely no proof. Now, could there be proof? There might be. Could be contracts, work done, something like that. What I am saying is, if there is no proof, there is no proof of work down, no contract, there are no eyewitnesses, somebody says I am owed the money, if that's all the evidence there was, nobody would rule in that person's favor. Yet that is exactly what you are being asked to do in this case.

RP 76-77.

Essentially, defense counsel countered the comments by the State by positing his own questions to the jury regarding what kind of a system we have and why we have that system. He even employed an analogy to demonstrate to the jury what the State was asking them to do in a situation where the stakes would be unquestionably less serious. Thus, his decision not to object to the State's comments may have been part of a larger strategic decision to challenge the jury with the gravity of what the State was asking them to do by reflecting upon why we the system is set up the way it is. Given this, defendant is unable to show defense counsel's decision not to object was not part of a larger strategic decision. Defendant is unable to show defense counsel's performance was deficient and as such, has failed to satisfy the first prong of the ***Strickland*** test.

Even if defendant was able to show defense counsel's performance was deficient for failing to object during the prosecutor's closing argument, defendant is unable to show he was prejudiced by such inaction as required under the second prong of the ***Strickland*** test. For much of the

same reasons as stated above in the preceding section, defendant cannot show prejudice from the failure to object as the majority of both counsels' arguments focused on the evidence establishing the credibility of each witness and the State's comments were momentary in comparison[8]. The jury was also repeatedly reminded to decide the evidence based on the evidence that was presented during the trial and the law as instructed by the court. Additionally, as also discussed above, defense counsel responded to the State's comments by discussing what would happen if we had a system where allegations were all that is needed and why we have the standards we have. RP 73-77. All of this reflects that even if the failure to object was deficient, defendant cannot show he was prejudiced by it. He is unable to satisfy either the first or second prong of the ***Strickland*** test.

3. DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WAS NOT VIOLATED WHEN THE TRIAL COURT EXCLUDED IRRELEVANT AND CUMULATIVE EVIDENCE.

Evidence is relevant if it has any tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence. ER 401. Evidence must be at least minimally relevant to be admissible. ***State v. Darden***, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

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[8] Please see the State's argument in issue 1(c) for a more thorough analysis of this argument.

Relevant evidence "may be excluded if its probative values is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. A defendant's interest in presenting relevant evidence may " 'bow to accommodate other legitimate interests in the criminal trial process.' " ***Rock v. Arkansas***, 483 U.S. 44, 55, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987) (*quoting* ***Chambers v. Mississippi***, 410 U.S. 284, 295, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973)). The admission or refusal of evidence lies largely within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. ***State v. Stubsjoen***, 48 Wn. App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987).

a. Defendant's home surveillance video

During motions in limine, the State moved to exclude video of defendant's home surveillance cameras which showed an interaction between the defendant and K.M. shortly after the sexual assault took place. RP 214-220. Defendant objected, arguing that the evidence was relevant to show that K.M.'s behavior was not consistent with her anticipated testimony of her reaction after the sexual assault occurred. RP 215-222. The trial court granted the State's motion to exclude the evidence saying it "struggles with relevance" of the videos, but

acknowledged that after K.M.'s testimony, the court would reconsider its ruling if defendant sought to admit the footage for purposes of impeachment. RP 222, 232-233; CP 46-49.

After K.M. had testified, defendant asked the court to reconsider its ruling regarding the videos arguing that although K.M. had testified and admitted all the events that occurred in the video, the videos were relevant and admissible for the jury to see her behavior. RP 616, 633. The State again argued against their admission on the basis that they would be misleading and irrelevant, reiterating that the video had no audio, showed only K.M.'s back in portions and did not dispute anything she had already testified to. RP 633-34. The court reviewed the video and again denied the defense motion, finding the video was not relevant to the ultimate issue in the case. RP 637.

Defendant argues the exclusion of this evidence denied him his constitutional right to present a defense. However, he did not raise this claim below and appears to be merely characterizing an evidentiary issue as a violation of his constitutional right to present a defense. *See* ***State v. Lynn***, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). Both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant's right to present a defense. ***State v. Starbuck***, 189 Wn. App. 740, 751, 355 P.3d 1167 (2015) (*citing* ***State v. Strizheus***, 163 Wn. App. 820, 829-30, 262 P.3d 100 (2011), *review denied*, 173 Wn.2d 1030, 274 P.3d 374 (2012)).

An erroneous evidentiary ruling that violates the defendant's constitutional rights is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt. ***State v. Franklin***, 180 Wn.2d 371, 377 n. 2, 325 P.3d 159 (2014). But, a criminal defendant does not have a constitutional right to present irrelevant or inadmissible evidence. ***Starbuck***, 189 Wn. App. at 750. Furthermore, a defendant's constitutional right to present a defense is not necessarily impinged by a trial court's exclusion of minimally relevant evidence. *See* ***State v. Summers***, 70 Wn. App. 424, 435, 853 P.2d 953 (1993).

In this case, the exclusion of the home surveillance video did not infringe upon the defendant's constitutional right to present a defense, and the trial court did not abuse its discretion in excluding it as the video was of little to no relevance to the ultimate issues in the case and cumulative. Defense counsel questioned K.M. in detail about her behavior and actions after the sexual assault took place. RP 468-70, 492. K.M. did not deny that she "acted normal" and gave defendant a hug despite her claim that she had just been sexually assaulted by him. RP 468-70, 492. The video itself contained no audio and did not contradict anything K.M. testified to. RP 632-34.

Defendant had the video for over a year and he chose what clips to include. The State did not receive the video until two weeks before the trial and was unable to have a law enforcement technical person review the system. RP 218-22. Allowing the jury to view video of something

that a person has already testified to and allowing the parties to go into detail about the credibility concerns of the video would be redundant and serve only to confuse, delay and mislead the jury about the issues in the case. The trial court was specifically concerned with this saying "I don't want a trial on these videos" and properly excluded them as there were of little to no relevance and appropriately excludable under ER 403. RP 222.

For the same reasons the trial court did not abuse its discretion in excluding the videos, the exclusion did not infringe upon the defendant's constitutional right to present a defense. It is not sufficient when raising a constitutional issue for the first time on appeal to merely identify a constitutional error and then require the state to prove it was harmless beyond a reasonable doubt. Because defendant is unable to show the exclusion of the video infringed on his constitutional right to present a defense, he is unable to show a manifest constitutional error as required for review under RAP 2.5(a)(3). Thus, this Court should initially decline to review this claim of constitutional error for this reason.

However, even if the exclusion of the video was an error, any error was harmless. Defendant was allowed to confront and cross-examine K.M. about her behavior after the sexual assault. RP 468-70, 492. The video showed nothing she had not already testified to and admitted. 468-70, 492. Defendant was able to question the credibility of K.M. by her own admission of her behavior. The exclusion of the video did not deny him the right to argue that point to the jury and he in fact did so during his

closing argument. 2/24/15 RP 78-82. Any error in the exclusion of the video was harmless.

b. Defense investigator

During the trial, defendant sought to have a defense investigator testify about the layout of defendant's home, doorway locations and the measurements of some distances he took after K.M. and J.J. had moved out. RP 618-19. The State objected to the witness arguing that his testimony was cumulative as defendant was going to testify about his home which included photographs he had taken of various locations inside. RP 619-21. The trial court ruled that if defendant was going to testify, the testimony of the defense investigator would be cumulative as the investigator would not add anything that the defendant could not provide. RP 621. The court also clarified that in the event the defendant chose not to testify, the defense investigator could testify to his observations. RP 621.

Defendant now claims that the trial court abused its discretion in precluding the defense investigator from testifying as he was a "non-party witness who had conducted an independent investigation." Brief of Appellant at 37. However, the trial court properly excluded the evidence under ER 403 as the little to no probative value the defense investigator's testimony would have provided was substantially outweighed by the needless presentation of cumulative evidence.

First, the individual was a defense investigator and the trial court correctly pointed out that aside from testifying about his observations in the home, "[h]e would have to suffer through hired guns and bias" so he was not a "non-party" witness whose credibility would not be questioned. RP 621. In addition, his investigation took place after K.M. and J.J. had moved out so he could not testify to the location of furniture or whether there were doors on any of the rooms when the sexual assaults took place. RP 619-21. Defendant was able to testify about all of that, drawing a floor plan and even providing photographs he had taken of the various rooms. RP 664-74. Because defendant chose to testify, the defense investigator's testimony had little to no probative value. The trial court did not abuse its discretion in precluding the defense investigator's testimony as any probative value was substantially outweighed by the needless presentation of cumulative evidence under ER 403. For these same reasons, even if the trial court erred in excluding the defense investigator for some reason, because his testimony would not have added anything the defendant had not already testified to, the exclusion was harmless.

4. THE TRIAL COURT DID NOT VIOLATE DEFENDANT'S CONSTITUTIONAL RIGHTS WHEN IT ASKED HIM TO REMAIN EMOTIONLESS AFTER HE WAS IMPROPERLY ATTEMPTING TO INFLUENCE THE COURT AND THE JURY.

Both the State and Federal Constitutions guarantee a defendant the fundamental right to be present at all critical stages of a trial. ***State v.***

Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). Courts have also recognized that a defendant is entitled to the physical indicia of innocence which includes the right to be brought before the court with the appearance, dignity and self-respect of a free and innocent man. ***State v. Finch***, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). The right to be present is not absolute however, and when a defendant misbehaves in a courtroom, the trial judge "must be given sufficient discretion" to determine the appropriate course of action. ***State v. Fualaau***, 155 Wn. App. 347, 360-61, 228 P.3d 771 (2010) (*citing* ***Illinois v. Allen***, 397 U.S. 337, 343, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). "No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations." *Id.* Similarly, while defendant has a constitutional right to appear free from restraints or shackles of any kind, such a right may yield in the interest of courtroom safety, security, and decorum. ***State v. Walker***, 185 Wn. App. 790, 800, 344 P.3d 227 (2015), *review denied*, 185 Wn.2d 1025, 355 P.3d 1154 (2015). Whether the trial court violated a defendant's right to be present is reviewed de novo. ***Irby***, 170 Wn.2d at 880.

Defendant in the present case argues that the trial court violated his constitutional rights when it ordered the defendant to remain emotionless in court as this limited his ability to appear before the jury. Brief of Appellant at 39. The court made the order during the trial when the jury

was in recess and the parties were discussing a foundational issue regarding J.J.'s testimony. The judge told defense counsel:

> tell your client to quit emoting. I don't want him nodding or agreeing or trying to send the Court a clue, not only to me but to the jury -- ... with regard to what is being said in the courtroom. That applies to all the viewing public. Everybody has to remain emotionless.

RP 377. Defense counsel agreed to speak with the defendant. RP 377. Defense counsel never objected to the court's request to have defendant get his behavior under control or argued that that was somehow a violation of defendant's constitutional rights. On appeal, defendant fails to argue how this was a manifest error affecting a constitutional right under RAP 2.5(a)(3). This court should decline to review the issue because defendant failed to preserve it below and fails to show it is manifest constitutional error which may be raised for the first time on appeal. RAP 2.5(a).

Even if this court were to review the issue however, defendant's claim that the trial court's request was unjustified and prejudicial to the defendant is without merit. At the end of the day, outside of the presence of the jury after K.M. and J.J. had concluded their testimony, the State made a record about defendant shaking his head, laughing under his breath and smirking while K.M. was testifying. RP 497. Defense counsel told the court that he had told his client to remain emotionless and he did not believe the defendant was doing anything intentional, but he would remind him again. RP 497-98. The court stated that it was very clear that

morning that it wanted everyone to get themselves under control and the defendant had not been able to do that. The court stated:

> If it continues, the Court shall declare a mistrial because that's exactly why this is happening. [The prosecutor] has made an accurate record of what's going on. The Court has observed it through the entire trial. I had it this morning with him trying to give me advice by indicating what he thought that I should do based upon what you were presenting to the Court. Not acceptable.

RP 498-99. Given this, the trial court's earlier request that defense counsel ask his client to remain emotionless was proper in light of the defendant's inappropriate behavior in court.

Furthermore, defendant is unable to show he was prejudiced by the court's request that he remain emotionless. The defendant's federal and state constitutional right to be present and appear free from restraints before the jury was never implicated by the court's request that he remain emotionless. Those constitutional rights exist to ensure the defendant receives a fair and impartial trial. There is absolutely nothing in the record to suggest that the trial court's limitation of defendant's inappropriate behavior erroneously influenced the jury's determination of his guilt. Defendant's claim is without merit.

5. DEFENDANT IS NOT ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that

"an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." ***Rose v. Clark***, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." ***Neder v. United States***, 527 U.S. 1, 18, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). A defendant is entitled to a fair trial but not a perfect one, for "there are no perfect trials." ***Brown v. United States***, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. ***Rose***, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also* ***State v. Kitchen***, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) ("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. ***In re Lord***, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); ***State v. Coe***, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also* ***State v. Johnson***, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. ***State v. Russell***, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See, Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *See, Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g.,* ***Johnson***, 90 Wn. App. at 74. Conversely, errors that

individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g.,* ***State v. Stevens***, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) ("Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.").

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare ***State v. Whalon***, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (holding that three errors amounted to cumulative error and required reversal), with ***State v. Wall***, 52 Wn. App. 665, 679, 763 P.2d 462 (1988) (holding that three errors did not amount to cumulative error), and ***State v. Kinard***, 21 Wn. App. 587, 592 93, 585 P.2d 836 (1979) (holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see, e.g.,* ***State v. Badda***, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated

witness with caution, and (4) to be unanimous in their verdicts as to cumulative error), or because the errors centered around a key issue, *see, e.g.,* ***State v. Coe***, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility, combined with two errors relating to credibility of State witnesses, amounted to cumulative error because credibility was central to the State's and defendant's case); ***State v. Alexander***, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated, some so many times that a curative instruction lost all effect, *see, e.g.,* ***State v. Torres***, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial error was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See* ***Stevens***, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant has failed to establish that any prejudicial error occurred at his trial, much less that there was an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's conviction and sentence.

DATED: March 21, 2016.

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WSB # 42892

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.

3.21.16
Date Signature

PIERCE COUNTY PROSECUTOR

March 21, 2016 - 4:22 PM

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