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Supreme Court No. 96461-1
COA No. 49482-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,
v.

PATRICK JAMES EDWARD DOCKERY,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR GRAYS HARBOR COUNTY

The Honorable David Edwards, Judge
No. 15-1-00173-9

PETITION FOR REVIEW

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A. **IDENTITY OF PETITIONER**

Your Petitioner for discretionary review is Patrick Dockery, the petitioner below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in Part B of this petition.

B. **COURT OF APPEALS DECISION**

The Petitioner seeks review of the unpublished opinion of the Court of Appeals in cause number 49482-5-II, filed September 25, 2018. *See* Appendix A at pages A-1 through A-22.

C. **ISSUES PRESENTED FOR REVIEW**

1. Does the decision below conflict with decisions of the United States Supreme Court and of this Court regarding state and federal constitutional rights to due process of law where the trial court failed to give a limiting jury requested by the defense instructing the jury that it could consider the testimony of two witnesses regarding an alleged act that took place on a cot in which witnesses stated that M.N. got on top of Dockery while on a cot outside a tent for the purpose of evaluating witness credibility, where the State argued that the alleged act of child molestation charged in Count 2 took place inside the tent rather than on the cot outside the tent?

2. Did Dockery receive ineffective assistance of counsel which denied him a fair trial where the State argued that the alleged child

molestation took place inside a tent rather than on a cot outside the tent, thus transforming the testimony of two witnesses originally intended to prove that the alleged molestation of M.J.N. took place on the cot into testimony involving an "uncharged act," and admitted without evaluation under ER 404(b) and ER 403?

D. STATEMENT OF THE CASE

Following a mistrial, a jury convicted Patrick Dockery of rape of a child in the second degree (Count 1), and child molestation in the second degree (Count 2) following an incident that took place during a camping trip on or about July 26, 2014. He was sentenced for rape of a child in the second degree only, pursuant to an order merging the two offenses. Report of Proceedings (RP 9/30/16) at 18; Clerk's Papers (CP) 185-199.

In support of Count 2, the State presented testimony by two of M.J.N.'s friends---M.D. and V.R.--- that while on a family camping trip, M.J.N. took off her clothes and got on top of Mr. Dockery while he was sleeping on a cot under a blanket or sleeping bag outside M.J.N.s tent. During a "halftime" motion to dismiss Count 2, the trial court judge expressed skepticism regarding the charge, inquiring how Dockery could have committed an offense while he was sleeping after having consumed alcohol when M.J.N. took off her shirt and got on top of him. 3RP at 548.

Judge Edwards noted that there was no testimony that Dockery was conscious or that he moved in any way in response to M.J.N.'s actions. 3RP at 550. The court found insufficient evidence to support the charge. 3RP at 550. The court did not dismiss the charge, however. After the court indicated that there was insufficient evidence to support the charge of child molestation, the State altered its theory and argued that the act of child molestation occurred *inside* the tent, outside the view of M.D. and V.R. 3RP at 548-551. The trial court stated that the merger doctrine would apply in the event that Dockery was convicted of both rape and molestation. 3RP at 550-51, 4RP at 583.

The following day, defense counsel proposed a limiting instruction that the testimony by M.D. and V.R. that they witnessed M.J.N on Dockery's cot could not be used as "character" evidence to support conviction. 4 RP at 583, CP 143-44. Citing ***State v. Michielli***, 132 Wn. 2d. 229, 937 P.2d. 587 (1997), the court found that the State was entitled to have the jury consider both the rape and molestation charges, but that if convicted of both, the merger doctrine would apply to the molestation charge. 4RP at 582-83. The court denied the defense's request for its proposed limiting instruction. 4RP at 583.

The following is a portion of the testimony from the second trial:

M.J.N. met her friends M.D, V.R. and Lora Dockery at a rest area

in Elma, Washington, and Ms. Dockery drove the three girls to the campsite in rural Grays Harbor County for family camping trip. 1RP at 161. The camp was located on property belonging to friends of Pat Dockery, the father of Patrick Dockery. 1RP at 160-62.

During the first day the only people at the camp were Lora Dockery, M.D., M.J.N., V.R, and another friend, S.H. 1RP at 164. The girls set up the camp and all slept in a large tent the first night. 1RP at 164.

Several other people arrived, including Patrick Dockery and his father. 1RP at 165. They set up two more tents and also brought alcohol, including Mike's Hard Lemonade, which was kept in a cooler, and Fireball, a brand of flavored whiskey. 1RP at 168, 171. M.J.N. stated that all the adults except Lora Dockery were drinking alcohol. 1RP at 171.

Pat Dockery, Patrick Dockery's father, stated that he and Patrick arrived at the camp on Sunday morning. 3RP at 415. He stated that he had worked the previous day and was tired, so he slept at home on Saturday night and came to the camp on Sunday. 3RP at 416.

During the day, M.N., M.D., and V.R. also consumed alcohol by taking bottles and cans from the cooler and then going to the woods to drink. They also drank shots of Fireball. 2RP at 216-17. M.J.N. had

several bottles of Mikes Hard Lemonade, a can of Mikes Harder Lemonade, which has a higher alcohol content, and several shots of Fireball. The State introduced photos showing M.J.N. holding a bottle of Mikes Hard Lemonade while in the camp. 1RP at 177-78.

The girls were subsequently caught drinking by Ms. Dockery and she reprimanded all three of them. 2RP at 333, 357. M.D. and V.R stopped drinking, but M.J.N. continued to drink even after being confronted by Ms. Dockery. 2RP at 333-34, 336, 3RP at 453. Lora Dockery confronted M.J.N. a second time and she told Ms. Dockery that she was not her mother and that she did not have to listen to her and continued drinking. 2RP at 333-34, 369. Ms. Dockery stated that M.J.N. continued to drink and that when confronted a third time, M.J.N. continued to be disrespectful and yelled at her. 2RP at 373.

M.J.N., M.D. and V.R. were put in a tent to go to sleep by Pat Dockery. 2RP at 338. Pat Dockery also helped his son get to a cot that was in front of the girls' tent and put a blanket or sleeping bag over him. 1RP at 181. Pat Dockery stayed awake by the fire until Patrick fell asleep. 2RP at 338. During the night M.J.N. vomited in the tent. 1RP at 180, 2RP at 323, 3RP at 432. After M.J.N. threw up, M.D. and V.R. went to sleep in a vehicle located near the tent. 2RP at 232.

M.J.N. testified that she passed out and then later woke up and

went to get water from a table, and then went back into the tent. 1RP at 181. M.J.N. stated that in the tent, Patrick Dockery came into the tent and had sexual intercourse with her. 1RP at 184. She said that she "felt really heavy and kind of numb." 1RP at 184. She stated that he did not say anything and that her memory was "spotty, but I know it happened." 1RP at 185. She stated that after he left the tent she "stayed awake for a while" then fell asleep. 1RP at 186.

V.R. stated that during the night she heard M.J.N. crying and then saw that she was outside the tent and "completely naked on top" of Patrick Dockery, who was on a cot near the tent. 2RP at 324. She stated that she watched until he pushed her off of him and she "fell into the tent." 3RP at 437-38.

M.D. testified that later she heard the zipper on the tent and then saw M.J.N. take off her shirt and bra and then lie on top of her brother on the cot. 3RP at 434. She stated that her brother was not moving and appeared to be asleep and that he pushed her off of him when he woke up. 3RP at 435. The following day, M.D. was angry and walked with M.J.N. to a nearby fishing shack and told her that she had seen her on top of her brother the previous night. 3 RP at 443. She stated that M.J.N. "and acted as if she was unaware of what she was talking about." 2RP at 328.

M.D. and V.R. came into the tent in the morning and then they

walked down a trail and then confronted her. 1RP at 187; 2RP at 199. M.D. asked her asked why she was on top of Patrick on the cot, and she said that she did not respond because she "didn't know what to say." 2RP at 200. She stated that for the rest of the day she tried to "just act normal" and then waited to be taken home. 2RP at 201. She said that she did not talk with Patrick about the incident the rest of the day. 2RP at 202. She stated that she rode on a quad runner with Patrick that day. 2RP at 204.

After they returned from the camping trip, she did not tell anyone about the incident. 2RP at 204, 206. She stated that she eventually told her friend R.D. that "something happened on the camping trip," but she "didn't tell her fully the story until a little later." 2RP at 207. She said that eventually she "told her everything." 2RP at 208.

M.J.N. testified that approximately two and half months later her mother found text messages with R.D. regarding the incident and that her mother took her to a doctor for an examination, but M.J.N. said that she still was not "ready to tell her." 2RP at 209. She was later given a medical examination and later interviewed by law enforcement and also by Lisa Wahl, a nurse practitioner at St Peters Sexual Assault and Child Mal-Treatment Center in Lacey. 2RP at 211; 3RP at 505.

Several months later, in October, 2014, M.J.N.'s mother Yuonhee Kim, viewed text messages on her daughter's phone and discovered a text

to a friend that she had been assaulted. 2RP at 275, 293. Ms. Kim called Lora Dockery and asked if a man in his twenties with facial hair been at the camp. 2RP at 277. Ms. Dockery told her that there was no one with that description at the camp that weekend. 2RP at 277. She stated the M.J.N. told her that Patrick Dockery had assaulted her and she contacted law enforcement. 2RP at 281.

1. Direct appeal

Following conviction, Dockery appealed his jury trial conviction. On appeal, Mr. Dockery argued (1) the trial court erred in failing to give an ER 404(b) limiting instruction, (2) he was provided ineffective assistance of counsel when counsel failed to move for a mistrial after the evidence was admitted, (3) there is insufficient evidence to support a finding that the victim was less than 14 years old at the time Dockery had sexual intercourse with her, and (4) there is insufficient evidence to support the aggravating circumstance that the victim was particularly vulnerable or incapable of resistance at the time. Dockery also raised five issues in a Statement of Additional Grounds. ***State v. Dockery***, No. 49482-5-II, 2018 WL 4603139 (unpublished, cited for facts). The Court of Appeals affirmed his conviction and resulting sentence. ***Dockery***, slip. op. at *1.

For the reasons set forth below, he seeks review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

It is submitted that the issues raised by this Petition should be addressed by this Court because the ruling raises a significant question under the Constitution of the State of Washington, as set forth in RAP 13.4(b).

1. The Trial Court Erred in Failing To Give a Limiting Instruction.

Dockery was initially charged with two counts of second or second degree rape of a child and child molestation in the second degree. The charge of child molestation was apparently based on the incident that took place on the cot outside the tent in which M.N. was seen to have taken off clothing and gotten on top of Dockery. This was reiterated by the trial court judge, who stated, when finding that the charges merged, that there is insufficient evidence of "sexual contact as defined in the statute relating to the contact between [M.N.] and Mr. Dockery outside the tent on the cot." 3RP at 550. It is very clear that the court understood that the testimony of V.R. and M.D. regarding the cot pertained to the molestation charge. Moreover, the State proffered the testimony not to bolster Dockery's claim of innocence, but to show sexual contact with M.N. as alleged in Count 2. The State introduced testimony by V.R. that she saw M.N. on the cot outside the tent "completely naked on top of [Dockery],"

that she was "chest to chest on top of him." 2RP at 324, 340. M.D. also testified that she saw M.N. take her shirt off and get on top of her brother on the cot. 3RP at 434. She stated that she then saw her brother wake up and saw him push M.N. off of him. 3RP at 435. The State was surprised by M.D.'s testimony:

Q [by the prosecutor]: And you- you testified, I think twice now, that you saw your brother wake up and push [M.N.] off of him?
A [by M.D.]: Mm-hmmm. Yes.
Q: But isn't it true that you stated previously that---under oath that your brother was asleep when [M.N.] was on top of him?
A: Yes, he was asleep and then once she got on top of him, he had woken up.
Q: And isn't it true that you never said that previously?
A: Said what?
Q: Said that you saw him push her off? This is new testimony today.

3RP at 438.

It is unrealistic to think that the State introduced the testimony regarding the incident on the cot for any purpose other than to support its allegation in Count 2 of second degree child molestation.

Before closing arguments, the trial court denied the defense motion to dismiss Count 2, but found that the State could procced under the theory that the alleged molestation occurred *inside* the tent. 3RP at 550, 582.

Defense counsel then argued that because of the court's ruling, a limiting instruction was necessary regarding the testimony of V.R. and

M.D., and proposed an instruction that evidence "that the alleged victim got on top of the defendant outside of the tent while he was laying on the cot" is testimony that "may be considered by you only for the purpose of determining credibility of the witnesses." 3RP at 583. Dockery's proposed instruction read:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony that the alleged victim got on top of the defendant outside of the tent while he was laying on the cot. This evidence may be considered by you only for the purpose of determining credibility of the witnesses. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Clerk's Papers 143-44.

Testimony that M.N. got on top of Dockery leads to the conclusion that he solicited or otherwise encouraged M.N. to do so. The Court of Appeals found that "if anything, the evidence showed that Dockery had a propensity for refusing M.N.'s sexual advances and pushing M.N. away from him." Dockery, slip. op. at *9. The Court's ruling, however, presupposes that the jury would accept that portion of M.D.'s testimony that Dockery pushed her off of him. The jury would be aware that M.D. is Dockery's sister and may reasonably be expected to view her exculpatory statement with skepticism. It is equally likely to anticipate that the jury would have believed that Dockery, being an adult, was culpable in M.N.'s

actions and solicited or otherwise encouraged M.N. to get on top of him on the cot.

Moreover, the Court's ruling overlooks the State's surprise regarding M.D.'s testimony that Dockery pushed M.N. off of him after he woke up. The State did not anticipate the exculpatory nature of M.D.'s testimony; the incident regarding the cot was offered solely to prove Count 2 until the trial court's ruling following the close of the State's case. The testimony, despite the testimony by M.D. that her brother pushed M.N. off of him, is highly prejudicial and—as evidence not offered to support a criminal charge—was not subjected to an ER 403 analysis.

A trial court's refusal to give a proposed jury instruction for an abuse of discretion. ***In re Det. of Pouncy***, 168 Wn.2d 382, 390, 229 P.3d 678 (2010). When evidence of a defendant's prior crimes, wrongs, or acts is admissible under ER 404(b) for a proper purpose, the defendant is entitled to a limiting instruction upon his request. ***State v. Gresham***, 173 Wn.2d 405, 423, 269 P.3d 207 (2012). Once a defendant requests a limiting instruction, "the trial court has a duty to correctly instruct the jury." 173 Wn.2d at 424. The trial court has broad discretion to fashion its own limitation on the use of evidence. ***State v. Hartzell***, 156 Wn. App. 918, 937, 237 P.3d 928 (2010). However, an adequate ER 404(b) limiting instruction informs the jury of the purpose for which the evidence is

admitted and that the evidence may not be used for the purpose of concluding that the defendant had a propensity to commit the current offense. ***Gresham***, 173 Wn.2d at 423.

Because evidence that could reasonable be viewed as ER 404(b) evidence was admitted at trial, Dockery was entitled to a limiting instruction. As a result, it was the trial court's duty to provide the jury a correct limiting instruction, and the court had broad discretion to create its own proper limitation on the ER 404(b) evidence.

1. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A MISTRIAL

Dockery argues his trial counsel was ineffective for failing to request a mistrial following the court's ruling that insufficient evidence existed to support a charge of child molestation based on the testimony regarding M.N. on top of Dockery on the cot.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to effective assistance of counsel. ***State v. Grier***, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). A court reviews ineffective assistance of counsel claims de novo. ***State v. Binh Thach***, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's

representation was deficient and that the deficient representation prejudiced him. ***Grier***, 171 Wn.2d at 32–33. Failure to establish either prong is fatal to an ineffective assistance of counsel claim. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984).

Counsel's performance is deficient if it falls below an objective standard of reasonableness, and there is "a strong presumption that counsel's performance was reasonable." ***State v. Kyllo***, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). To establish prejudice, a defendant must show a reasonable probability that but for the deficient performance, the result of the proceeding would have been different. ***Grier***, 171 Wn.2d at 34.

To show prejudice here, Dockery must show there is a reasonable probability that had trial counsel moved for a mistrial, the trial court would have granted that motion. See ***Grier***, 171 Wn.2d at 34. A trial court should grant a mistrial when, in light of all the evidence, the defendant has suffered prejudice such that nothing short of a new trial will ensure that he receives a fair trial. ***State v. Rodriguez***, 146 Wn.2d 260, 270, 45 P.3d 541 (2002).

As discussed above, the trial court did not instruct the jury regarding the use of testimony by V.R. and M.D. involving M.N. being on top of Dockery on the cot for the purpose of determining witness credibility. After the court's ruling, it was impossible to un-ring the bell

since the testimony by V.R. and M.N., which was frankly salacious in nature, had already been admitted, albeit to support the State's initial theory that the molestation took place on the cot. Nonetheless, counsel did not take the final and necessary step to protect Dockery's right to a fair trial: moving for a mistrial. Counsel's failure to move for a mistrial was deficient representation and prejudicial because the evidence regarding the cot was not subjected to evaluation under ER 403, and not admitted under ER 404(b), or for any other reason. After the court's ruling, the evidence was not relevant to prove an element of the charges—which the State alleged both took place inside the tent. It was not evidence of motive, but rather was propensity evidence with a highly prejudicial impact that far outweighed any probative value to the State. ER 402, ER 403; ER 404(b).

F. **CONCLUSION**

This Court should grant review for the reasons indicated in Part E to correct the above-referenced errors in the unpublished opinion of the court below that conflict with prior decisions of the United States Supreme Court, this Court, and the courts of appeals.

DATED this 24th day of October, 2018.

Respectfully submitted:

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

CERTIFICATE OF SERVICE

The undersigned certifies that on October 24, 2018, that this Petition for Review was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Erin Christine Jany, Grays Harbor Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

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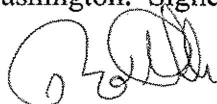
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on October 24, 2018.



PETER B. TILLER

Filed
Washington State
Court of Appeals
Division Two

September 25, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. PATRICK JAMES EDWARD DOCKERY, Appellant.	No. 49482-5-II UNPUBLISHED OPINION

LEE, J. — Patrick James Edward Dockery appeals his jury trial conviction for second degree rape of a child. He argues that (1) the trial court erred in failing to give an ER 404(b) limiting instruction, (2) he was provided ineffective assistance of counsel when counsel failed to move for a mistrial after the evidence was admitted, (3) there is insufficient evidence to support a finding that the victim was less than 14 years old at the time Dockery had sexual intercourse with her, and (4) there is insufficient evidence to support the aggravating circumstance that the victim was particularly vulnerable or incapable of resistance at the time. Dockery also raises additional challenges in a statement of additional grounds.

We hold that Dockery's claims fail. Accordingly, we affirm.[1]

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[1] Dockery asks us to exercise our discretion and decline to impose appellate costs if the State prevails on this appeal. The State "defers to the Court regarding any waiver of appellate costs." Br. of Resp't at 26. We hold that if the State files a request for appellate costs, Dockery may challenge that request before a commissioner of this court under RAP 14.2.

FACTS

A. THE INCIDENT

In July 2014, thirteen year old M.N.[2] accompanied her best friend, M.D., and M.D.'s family on a camping trip. M.D.'s girlfriend at the time, V.R., also went camping with M.D.'s family. The trip began Friday, July 25, and lasted three days. M.D.'s 25 year old brother, Dockery, arrived at the campsite on Saturday, July 26.

The minor girls began drinking alcohol on Saturday. M.N. openly consumed multiple bottles of Mike's Hard Lemonade, two cans of Mike's Harder Lemonade, and a shot of whiskey. According to M.N., everyone at the campsite saw the girls drinking and knew that they were consuming alcohol.

Eventually, M.N. vomited outside and inside of the tent she was meant to share with M.D. and V.R. that night. M.D. and V.R. decided to sleep in M.D.'s mother's car, which was parked nearby. Meanwhile, M.N. "passed out" inside of the tent alone. 1 Verbatim Report of Proceedings (VRP) (Aug. 30, 2016) at 181. At some point in the night, M.N. got up to get some water. As M.N. walked from her tent to a nearby table, she saw Dockery sleeping on a cot outside of her tent. According to M.N., she did not interact with Dockery while getting water, but instead, returned to her tent and fell back asleep.

Sometime after she returned to her tent, M.N. awoke to the sound of her tent being unzipped. M.N. looked back and saw Dockery enter her tent. Dockery then undressed M.N. and had vaginal intercourse with her.

[2] Pursuant to this court's General Order 2011-1, we use initials for child witnesses in sex crimes.

The next day, Sunday, M.D.'s mother drove M.N. home. On Monday, July 28, M.N. turned 14 years old.

Approximately a month following the camping trip, M.N. texted a friend about what had happened between her and Dockery in the tent. M.N.'s mother discovered these text messages and contacted law enforcement.

Dockery was subsequently charged with one count of second degree rape of a child.[3] The State later amended the charges against Dockery to allege an additional count of second degree child molestation.[4] The State also alleged an aggravating circumstance to each count that Dockery knew or should have known that M.N. was particularly vulnerable or incapable of resistance.[5]

B. RELEVANT PORTIONS OF TRIAL

At trial, M.N. testified to the facts discussed above. M.N. also testified that as Dockery had sex with her, she "still felt really heavy and kind of numb" and that she "felt like [her] senses were really dull." 1 VRP (Aug. 30, 2016) at 184.

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[3] A person is guilty of second degree rape of a child "when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.076(1).

[4] A person is guilty of second degree child molestation "when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.086(1). "Sexual contact" is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

[5] RCW 9.94A.535(3)(b).

During M.N.'s testimony, the State moved to admit into evidence several photographs that the girls took at the campsite that weekend. First, the State moved to admit a copy of M.D.'s public Facebook page, which showed several pictures of the girls at the campsite on Saturday, July 26. M.N. testified that the pictures posted on M.D.'s Facebook page were from the camping trip.

Next, the State moved to admit a blown up picture of one of the photos on M.D.'s Facebook page. M.N. identified the people in this photo as herself, M.D., V.R., and Dockery. M.N. testified that this photo was taken on the Saturday of the camping trip. The trial court admitted both the copy of M.D.'s Facebook page and the individual photo into evidence. The trial court also admitted two photographs of M.N., M.D., and V.R., taken on Saturday, which depicted M.N. openly holding a bottle of Mike's Hard Lemonade at the campsite.

M.D. testified that the camping trip began Saturday and that everybody left the campsite on Monday. According to M.D., the majority of her family arrived at the campsite on Sunday, including Dockery. M.D. also testified that M.N. was 14 years old during the trip.

M.D. further testified that as she slept in her mother's car on the second night, she woke up to the sound of M.N. unzipping her tent. M.D. looked out the window of the car and saw M.N. leave the tent and begin to undress. M.D. then saw M.N. lay on top of Dockery as he slept on the cot. According to M.D., Dockery woke up and immediately pushed M.N. off of him.

V.R. also testified that she saw M.N. laying on top of Dockery on the cot that night. V.R. stated that M.N. was completely naked and that Dockery was fully clothed. According to V.R., Dockery was asleep and was not moving.

After the State rested its case-in-chief, Dockery moved to dismiss the second degree child molestation charge based on insufficient evidence. Dockery argued that if the jury believed M.N.'s testimony regarding what happened in the tent, that testimony would support the rape allegation. As to the testimony regarding the cot, Dockery argued that the evidence was insufficient to support a finding of child molestation. Specifically, Dockery argued that the State failed to present any evidence that Dockery touched M.N.'s sexual or intimate parts to support the second degree child molestation charge.

The trial court agreed that M.D. and V.R.'s testimony regarding what happened on the cot failed to provide sufficient evidence of sexual contact. Nonetheless, the trial court ruled that the evidence regarding the tent was sufficient to support the molestation charge. The trial court also ruled that the jury may consider both the molestation and rape charges based on the evidence regarding the tent, but if the jury found Dockery guilty on both counts, then the merger doctrine would apply.

Dockery conceded that the State was permitted to present both charges to the jury. However, Dockery argued that a supplemental jury instruction was appropriate to preclude the jury from considering the testimony regarding M.N. and Dockery's interaction on the cot as evidence of guilt on the child molestation charge. Specifically, Dockery proposed the following jury instruction:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of testimony that the alleged victim got on top of the defendant outside of the tent while he was laying on the cot. This evidence may be considered by you only for the purposes of determining the credibility of the witnesses. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

WPIC 5.30 Evidence Limited as to Purpose

Clerk's Papers (CP) (emphasis omitted) at 144. The trial court rejected Dockery's proposed jury instruction, finding it to be a comment on the evidence by the court.

The jury found Dockery guilty on both counts. The jury also returned a special verdict on both counts finding an aggravating circumstance that Dockery knew or should have known that M.N. was particularly vulnerable or incapable of resistance.

The trial court sentenced Dockery only on the second degree rape of a child conviction, finding that the second degree child molestation conviction merged in to the second degree rape of a child conviction.

Dockery appeals.

ANALYSIS

A. ER 404(b) Limiting Instruction

Dockery argues that the trial court erred by failing to give his proposed "ER 404(b) limiting instruction[]" regarding the evidence that M.N. undressed and climbed on top of Dockery as he slept on the cot. Br. of Appellant at 14. We disagree.

1. Standard of Review

We review a trial court's refusal to give a proposed jury instruction for an abuse of discretion. *State v. Hummel*, 165 Wn. App. 749, 777, 266 P.3d 269 (2012), *review denied* 176 Wn.2d 1023 (2013). A trial court abuses its discretion when its decision " 'is manifestly unreasonable or based upon untenable grounds or reasons.' " *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012) (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). A trial

court's decision is manifestly unreasonable if it falls " 'outside the range of acceptable choices, given the facts and the applicable legal standard.' " *Id.* (*In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)). The trial court's decision is based upon untenable reasons " 'if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.' " *Id.*

2. The Trial Court did not Abuse its Discretion

Dockery argues that the trial court erred in refusing to give his proposed jury instruction because such refusal allowed the jury to consider Dockery's prior misconduct on the cot as evidence of his propensity to commit an offense against M.N. We disagree.

ER 404(b) prohibits the trial court from admitting "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." This prohibition encompasses any evidence offered to " 'show the character of a person to prove the person acted in conformity' " with that character at the time of the offense. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (quoting *State v. Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002)). However, ER 404(b) evidence may still be admissible for another purpose, such as proof of motive, plan, or identity. *Id.* The purpose of ER 404(b) is not " 'to deprive the State of relevant evidence necessary to establish an essential element of its case.' " *Id.* (quoting *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995)). Instead, its purpose is to prevent the State from suggesting that a defendant is guilty of the charged crime because "he or she is a criminal-type person" who would likely commit such crime. *Id.*

If evidence of the defendant's prior crimes, wrongs, or acts is admissible for a proper purpose, then the defendant, upon request, is entitled to a limiting instruction. *State v. Gresham*, 173 Wn.2d 405, 423, 269 P.3d 207 (2012). "An adequate ER 404(b) limiting instruction must, at a minimum, inform the jury of the purpose for which the evidence is admitted and that the evidence may not be used for the purpose of concluding that the defendant has a particular character and has acted in conformity with that character." *Id.* at 423-24. The trial court has no duty to give an ER 404(b) limiting instruction sua sponte. *State v. Russell*, 171 Wn.2d 118, 124, 249 P.3d 604 (2011).

Dockery contends that the evidence became "irregularly admitted," " 'untested' ER 404(b) evidence" because (1) the trial court ruled the evidence was insufficient for the jury to find Dockery guilty of child molestation based on his conduct on the cot, and (2) the State "abruptly changed its theory" of the case by arguing the child molestation took place in the tent after the trial court's ruling. Br. of Appellant at 11-12. But the record shows that the State complied with the trial court's ruling and limited its argument to what happened within the tent and not what happened on the cot. The record also shows that the State did not abruptly change its theory of the case.

Dockery argues that the trial court erred by failing to give his proposed limiting instruction based on ER 404(b). However, his proposed instruction was never based on ER 404(b). Instead, Dockery proposed a limiting instruction precluding the jury from considering M.D. and V.R.'s testimony about what happened on the cot as evidence of guilt on the second degree child

molestation charge. Thus, it was not untenable for the trial court to not provide an ER 404(b) limiting instruction.[6]

3. Harmless Error

Even when the trial court has a duty to correctly instruct the jury by providing an ER 404(b) limiting instruction, such failure may still be harmless. *Gresham*, 173 Wn.2d at 425. "Evidentiary errors under ER 404 are not of constitutional magnitude." *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). Therefore, we must determine whether, " 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.' " *Gresham*, 173 Wn.2d at 425 (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

Here, even had Dockery objected, and the trial court had found the evidence related to the cot to be evidence of prior acts under ER 404(b), this error would have been harmless. Dockery argues that the testimony regarding the cot was evidence of Dockery's "propensity to commit an offense against [M.N.]." Br. of Appellant at 16. However, if anything, the evidence showed that Dockery had a propensity for refusing M.N.'s sexual advances and pushing M.N. away from him.

[6] Dockery urges us to reach the same conclusion that we did in *State v. Russell*, 154 Wn. App. 775, 781-82, 225 P.3d 478 (2010), *rev'd*, 171 Wn.2d 118, 249 P.3d 604 (2011), and hold "that when ER 404(b) evidence is admitted, a limiting instruction must be given." Br. of Appellant at 14. In *Russell*, we held that the trial court was obligated to provide an ER 404(b) limiting instruction even though neither party requested such instruction. 154 Wn. App. at 786. However, our Supreme Court reversed this holding and specifically "disavow[ed] any interpretation of our previous case law suggesting a trial court commits reversible error by failing to give a limiting instruction for ER 404(b) evidence absent a request for such an instruction." *Russell*, 171 Wn.2d at 124.

Dockery fails to show within reasonable probability, that the trial outcome would have been materially affected absent this evidence. Therefore, even if the trial had erred, such error would be harmless.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Dockery contends that he was provided ineffective assistance of counsel at trial because his trial counsel failed to ask for a mistrial after the trial court ruled that the previously admitted evidence that M.N. undressed and climbed on top of him as he slept on the cot was insufficient to support the child molestation charge. We disagree.

1. Legal Principles

The Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution guarantee the accused the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014). An ineffective assistance of counsel claim is a mixed question of law and fact that we review de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To have a criminal conviction reversed based on an ineffective assistance of counsel claim, the defendant must show that (1) counsel's performance was deficient and (2) this deficient performance prejudiced the defense. *Grier*, 171 Wn.2d at 32-33 (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). An ineffective assistance claim fails if the defendant fails to satisfy either prong. *Id.* at 33.

2. Counsel's Performance was not Deficient

Counsel's performance is deficient if it falls " 'below an objective standard of reasonableness.' " *Id.* (quoting *Strickland*, 466 U.S. at 688). To prevail, the defendant must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A defendant may overcome this presumption by showing that " 'there is no conceivable legitimate tactic explaining counsel's performance.' " *Grier*, 171 Wn.2d at 33 (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). However, a " 'fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' " *Id.* at 34 (quoting *Strickland*, 466 U.S. at 689).

Here, there were legitimate tactical reasons for Dockery's trial counsel to not seek a mistrial based on the testimony related to the incident on the cot. Both M.D. and V.R. testified that they saw M.N. undress and climb on top of Dockery as he laid unconscious on the cot. M.D. testified that Dockery woke up and then immediately pushed M.N. off of him. This testimony cast doubt on M.N.'s testimony that Dockery would be inclined to seek her out and have sex with her. In fact, Dockery used this fact to his advantage during closing argument, when he drew the jury's attention to the evidence that Dockery pushed M.N. off of him when he woke up on the cot.

Because the evidence was actually favorable to Dockery, defense counsel had a conceivable legitimate tactical reason to not move for a mistrial. Therefore, Dockery fails to show that his counsel's performance fell below an objective standard of reasonableness.

3. No Prejudice

Dockery also fails to show prejudice. Dockery argues that this testimony prejudiced him because it was improper propensity evidence under ER 404(b). However, Dockery fails to explain how evidence that he refused the sexual advances of a minor girl was prejudicial in a case where the State accused him of having sexual contact with a minor girl. If anything, this evidence showed that Docker had a propensity to avoid sexual contact with M.N., even when she initiated such contact. Thus, we hold that Dockery's ineffective assistance of counsel claim fails.

C. SUFFICIENCY OF THE EVIDENCE

Dockery argues that the State failed to present sufficient evidence that M.N. was less than 14 years old when Dockery had sex with her on the camping trip. Dockery also contends that the State presented insufficient evidence to support the aggravating factor that Dockery knew or should have known that M.N. was particularly vulnerable or incapable of resistance at the time. We disagree on both accounts.

1. Standard of Review

In determining whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determine "whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt." *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). An insufficiency claim admits the truth of the State's evidence. *Id.* at 106. All reasonable inferences from the evidence " 'must be drawn in favor of the State and interpreted most strongly against the defendant.' " *Id.* (quoting *State v. Salinas*, 119 Wn.2d 192,

201, 829 P.2d 1068 (1992)). Direct and circumstantial evidence are equally reliable. *State v. Farnsworth*, 185 Wn.2d 768, 775, 374 P.3d 1152 (2016).

We review a challenge to the sufficiency of the evidence de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). We also review "a jury's special verdict finding the existence of an aggravating circumstance under the sufficiency of the evidence standard." *State v. Chanthabouly*, 164 Wn. App. 104, 142, 262 P.3d 144 (2011), *review denied*, 173 Wn.2d 1018 (2012).

2. Sufficient Evidence Presented to Show M.N. was Less than 14 Years Old

A person is guilty of second degree rape of a child if that person "has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.076(1). Sexual intercourse "occurs upon any penetration, however slight." RCW 9A.44.010(1).

Dockery claims that he did not arrive at the campsite until Sunday, July 27. He also claims that the sexual intercourse did not occur until after midnight that night, after M.N. turned 14. However, we defer to the fact finder on issues of witness credibility and the persuasiveness of evidence. *State v. Ague-Masters*, 138 Wn. App. 86, 102, 156 P.3d 265 (2007).

Here, M.N. testified that at the time of the camping trip, she was 13 years old. She also testified that on the second day of the camping trip, Saturday, July 26, Dockery came inside of her tent and had vaginal intercourse with her. Also, the court admitted a copy of M.D.'s Facebook page, which showed a picture of M.N. and Dockery together at the campsite, which was uploaded

on Saturday, July 26. M.N. turned 14 years old Monday, July 28. Viewing this evidence in a light most favorable to the State, a rational fact finder could have found that Dockery was indeed at the campsite on Saturday, July 26, and that M.N. was less than 14 years old when Dockery had sexual intercourse with her. Therefore, we hold that Dockery's argument fails.

3. Sufficient Evidence Supported the Finding of an Aggravating Circumstance

Dockery argues that the State failed to present sufficient evidence for the jury to find that Dockery knew or should have known that M.N. was particularly vulnerable or incapable of resistance at the time of the offense. We disagree.

A jury finding that a victim was particularly vulnerable or incapable of resistance can support a sentence above the standard sentencing range. RCW 9.94A.535(3)(b). In order for the court to impose a sentence above the standard range based on the particular vulnerability[7] of the victim, the jury must find that "[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." RCW 9.94A.535(3)(b).

Dockery's sufficiency challenge is based on whether the State presented sufficient evidence for the jury to conclude that Dockery was aware of M.N.'s level of intoxication. He specifically argues that Dockery "had no way of knowing how impaired [M.N.] may have been"

[7] "Vulnerability can be the result of characteristics other than the victim's physical condition or stature." *State v. Ross*, 71 Wn. App. 556, 565, 861 P.2d 473 (1993), *amended*, 71 Wn. App. 556 (1994). For example, Washington courts have found that rape victims attacked in their sleep are particularly vulnerable because they can quickly be rendered incapable of attempting to resist, as compared to rape victims attacked while awake. *See State v. Hick*, 61 Wn. App. 923, 931, 812 P.2d 893 (1991).

because Dockery himself was intoxicated and M.N. was consuming alcohol secretly. Br. of Appellant at 25. The record does not support this argument.

M.N. testified that everyone at the campsite on Saturday saw and knew that she was consuming alcohol. She had consumed multiple drinks over the course of the afternoon to the point that she publically vomited outside of her tent. The trial court admitted into evidence two photographs that were taken on Saturday showing M.N. openly holding a bottle of Mike's Hard Lemonade at the campsite. The trial court also admitted a photo that was taken on Saturday depicting M.N., M.D., V.R., and Dockery. Viewing this evidence in the light most favorable to the State, a reasonable fact finder could have found that Dockery, who was present at the campsite on Saturday, knew or should have known that M.N. was intoxicated.

Dockery argues that the State presented insufficient evidence to show that Dockery should have known M.N. was intoxicated because M.D. and V.R. had testified that they were secretly drinking that day. However, we view the evidence and draw all reasonable inferences in a light most favorable to the State. *Homan*, 181 Wn.2d at 106. And we defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *Ague-Masters*, 138 Wn. App. at 102.

Dockery also argues that the State failed to present sufficient evidence for the jury to conclude that M.N.'s alcohol intake made her "more susceptible to becoming a victim" because both M.N. and Dockery were equally intoxicated Br. of Appellant at 26. Dockery offers no support for his argument that his own level of intoxication somehow influenced whether M.N. was particularly vulnerable. Nonetheless, this argument is without merit because "[w]hen analyzing

particular vulnerability, the focus is on the victim. The court determines if the victim is more vulnerable to the offense than other victims and if the defendant knew of that vulnerability." *State v. Bedker*, 74 Wn. App. 87, 94, 871 P.2d 673, *review denied*, 125 Wn.2d 1004 (1994).

Dockery also fails to offer any factual or legal support for his argument that "[t]here was no evidence presented that due to [M.N.]'s alcohol use she was more susceptible to becoming a victim." Br. of Appellant at 26. To the contrary, the evidence at trial showed that M.N. drank to the point of vomiting inside and outside of her tent. She "passed out" in her tent; and, when Dockery had sex with her, she "felt really heavy and kind of numb" and that her senses were dulled. 1 VRP (Aug. 30, 2016) at 181, 184. Based on this evidence, the jury could reasonably conclude that M.N. was particularly vulnerable or incapable of resisting sexual assault when compared to other victims. Thus, we hold that Dockery's challenge fails.

D. STATEMENT OF ADDITIONAL GROUNDS

In a statement of additional grounds, Dockery asks us to review: (1) whether the prosecutor knowingly elicited and presented false evidence at trial, (2) whether the State committed *Brady*[8] violations by withholding evidence, (3) whether the prosecutor knowingly failed to correct false testimony regarding M.N.'s anxiety and depression, (4) whether the court erred in failing to provide a unanimity instruction, and (5) whether the cumulative errors deprived Dockery of his right to a fair trial. We hold that each of these claims fails.

[8] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

1. Knowingly Elicited False Testimony

Dockery argues that the prosecutor knowingly elicited and presented false testimony by presenting the testimony of two officers who were not knowledgeable as to whether the gates of the campsite were locked that weekend. We disagree.

Dockery relies on *Napue v. People of State of Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed 1217 (1959), to support his claim that the State knowingly elicited false testimony. In *Napue*, the U.S. Supreme Court held that the "State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction." 360 U.S. at 269. A " 'conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 936, 952 P.2d 116 (1998) (quoting *United States v. Agurs*, 427 U.S. 97, 103, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976)). Thus, to prove that the State knowingly elicited false testimony, the defendant must show that (1) the State knowingly used perjured testimony and (2) there was a reasonable likelihood that the false testimony could have affected the jury's judgment. *Id.* at 937.

Here, Dockery points to contradictions between the officers' testimony and the testimony of other witnesses about locked gates at the campsite to support his claim that the State knowingly elicited false testimony. However, this alone does not show that the officers' testimony was false. It is not uncommon for the testimony of different witnesses to conflict, and we defer to the fact finder on issues of conflicting testimony. *See Ague-Masters*, 138 Wn. App. at 102. Further, even if Dockery did show that the officers' testimony was false, there is no evidence in the record

showing that the State knew such testimony was false. Dockery also does not explain how the testimony, which addressed whether the gates leading to the campsite were locked, would have affected the jury's findings. Therefore, we hold that this argument fails.

2. *Brady* Violation

a. Standard of review

A violation of the State's *Brady* obligations is a violation of constitutional due process. *State v. Mullen*, 171 Wn.2d 881, 893, 259 P.3d 158 (2011). We review de novo alleged due process violations. *Id.* Therefore, we review claims under *Brady* de novo. *Id.* at 894.

b. State did not violate *Brady*

" 'The animating purpose of *Brady* is to preserve the fairness of criminal trials.' " *Id.* at 895 (quoting *Morris v. Ylst*, 447 F.3d 735, 742 (9th Cir. 2006)). The *Brady* rule is not intended to " 'displace the adversary system,' " and " 'the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose *evidence* favorable to the accused, that, if suppressed, would deprive the defendant of a fair trial.' " *Id.* (quoting *Morris*, 447 F.3d at 742). In order for the defendant to establish a *Brady* violation, the defendant must show: (1) that the evidence at issue was favorable to the accused, either because it was exculpatory or impeaching, (2) that the State suppressed such evidence, either willfully or inadvertently, and (3) the defendant suffered resulting prejudice. *Id.*

Here, Dockery fails to establish any of the three required elements in arguing that the State violated *Brady* by withholding a statement that M.N. gave to law enforcement officers. Dockery's sole argument here is that three different officers testified that M.N. had given them a statement,

but M.N. testified at trial that she "gave about two" statements. SAG at 5. According to Dockery, this means that there was a third statement not provided to defense. However, Dockery fails to explain how M.N. testifying at trial that she gave "about two" statements somehow shows that the State failed to provide a third statement to defense. SAG at 5. There is no evidence in the record of the State possessing a third statement from M.N. that was not produced to the defense. Even if Dockery did show that the State withheld a statement M.N. provided to law enforcement, Dockery fails to show how this statement would have been favorable to him or how he suffered resulting prejudice. Therefore, we hold that his *Brady* argument fails.

Dockery also argues that the State violated its *Brady* obligations by (1) withholding contact information of a witness who was present at the camping trip and (2) failing to disclose that one of the testifying officers had previously altered evidence in a different case. As to the witness contact information, Dockery fails to show that the witnesses had any information that was favorable to him. Therefore, we find his argument fails.

As to the State's failure to disclose that one of the testifying officers, Darrin Wallace, had altered evidence in a previous trial, Dockery relies solely on an unpublished opinion from this court, which referenced the testimony of an officer named Darrin Wallace. Assuming that these are in fact the same officers, Detective Wallace's testimony in the previous case was that he had inadvertently changed one of the dates shown on an iPod containing a series of poems the defendant wrote to the victim. *State v. Gotcher*, No. 461196-II, slip op. at 4 (Wash. Ct. App. Feb. 23, 2016) (unpublished), http://www.courts.wa.gov/opinions/pdf/D2%2046119-6-II%20%20Unpublished%20Opinion.pdf,, *review denied*, 186 Wn.2d 1010 (2016). Dockery fails

to explain how evidence that Detective Wallace had accidentally changed the date on an iPod in a previous case, and then informed the jury of such mistake, would have been favorable to him. He also fails to show that the State either willfully or inadvertently suppressed this information or that he suffered resulting prejudice.

Further, " '[a] *Brady* violation does not arise if the defendant, using reasonable diligence, could have obtained the information' at issue." *Benn*, 134 Wn.2d at 916 (quoting *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994)). Dockery's assignment of error shows that with reasonable diligence, he could have readily found this information. Therefore, we hold that this assignment of error fails.

3. Prosecutorial Misconduct

Dockery contends that the State engaged in prosecutorial misconduct by presenting testimony that M.N. exhibited new signs of anxiety and depression after the camping trip, which the State knew was false. Again, Dockery relies on *Napue* to support his claim.

The defendant bears the burden of demonstrating that the prosecutor's comments at trial were both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). When the defendant fails to object or request a curative instruction at trial, the issue of prosecutorial misconduct is waived, unless the prosecutor's conduct was so flagrant and ill intentioned that the resulting prejudice could not have been cured through an instruction. *Id.* at 443.

Here, there is no evidence in the record showing that the State knew the testimony about M.N.'s change in behavior after the camping trip was false. However, the record does show that

Dockery raised this issue to the trial court by arguing that he should be entitled to bring evidence of M.N.'s mental health condition in light of her mother's testimony. The trial court ruled that the mother's testimony opened the door for Dockery to present evidence of M.N.'s mental health history. Thus, Dockery was provided the opportunity to present evidence of M.N.'s mental health history. Dockery fails to explain how he was prejudiced when he had the opportunity to correct the testimony and delve into M.N.'s mental health history prior to the camping trip. Therefore, we hold that this claim fails.

4. Failure to Provide a Unanimity Instruction

Dockery argues that the trial court erred in failing to provide the jury with his requested unanimity instruction. We disagree.

In order to convict a defendant of a criminal charge, the jury must unanimously find that the defendant committed the criminal act. *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990). When there is evidence of multiple acts of misconduct which relate to one charge against the defendant, then the State must elect which act it is relying upon for a conviction. *Id.* Failure of the State to elect which act it relies upon, and failure of the court to then provide a unanimity instruction "is 'violative of a defendant's state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial.' " *Id.* at 64 (quoting *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)).

Here, Dockery never proposed a unanimity instruction. Instead, Dockery proposed a jury instruction, under WPIC 5.30 which is "a generic instruction to be used when evidence is admissible only for a limited purpose." WPIC 5.30.

As to unanimity, the State did elect that it was relying on Dockery's act inside of the tent to support both convictions. In closing, the State specifically limited its argument to the evidence that Dockery went inside of M.N.'s tent, undressed M.N., and had vaginal intercourse with her inside of the tent. Thus, the State did elect which act it relied upon for a conviction, and the trial court was not required to provide a unanimity instruction. Therefore, the trial court did not err in failing to provide a unanimity instruction.

5. Cumulative Error Doctrine

Dockery contends that the combined errors he has identified deprived him of a fair trial and compel reversal. Because Dockery has failed to show any error here, we find that his cumulative error argument fails.

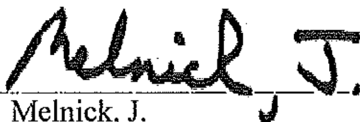
We affirm.

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

Lee, J.

We concur:

Maxa, C.J.



Melnick, J.

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