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No. 76422-5-I

IN THE COURT OF APPEALS - DIVISION ONE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent
v.

HECTOR TALAVERA, Appellant

APPELLANT'S MOTION FOR DISCRETIONARY REVIEW

MAZZONE LAW FIRM, PLLC
Peter Mazzone, WSBA 25262
James Herr, WSBA 49811
Attorney for Appellant
3002 Colby Avenue, Suite 302
(425) 259-4989 -phone
(425) 259-5994 - fax

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A. Identity of the Petitioner

The Petitioner is Hector Talavera.

B. Decision Below

On November 13, 2018, the Court of Appeals, Division One affirmed Hector Talavera's jury convictions for first degree rape of a child and first degree child molestation in an unpublished opinion, No. 76422-5-I (herein after referred to as "the opinion below"). The opinion is included in Appendix 1.

Appellant submits this timely motion for discretionary review to the honorable Supreme Court of the State of Washington.

C. Issues Presented for Review

1. In a retrial after the first jury failed to return a verdict, should counsel's performance be presumptively prejudicial when counsel failed to prepare transcripts for impeachment of the key witness?

2. In a retrial after the first jury failed to return a verdict, should prejudice be presumed when the key witness' testimony changes and is not impeached?

D. Statement of the Case

Appellant Hector Hugo Talavera was charged by a five count amended information with the following crimes, alleged to have occurred sometime between January 24, 2007 and January 23, 2010: one count of first degree rape of a child and four counts of first degree child molestation. CP 232-234. All counts alleged the same victim, M.H.S., Mr. Talavera's cousin.

Mr. Talavera was tried twice on these allegations. The first trial began on September 20, 2016 and ended six days later in a mistrial, with the jury hung on all counts. CP 199-200. During the following months, Mr. Talavera's trial counsel failed to obtain transcripts of the State's witnesses' testimony from the first trial. See VROP 490-93. Mr. Talavera's second trial began on December 12, 2016 and ended just three days later in guilty verdicts on all counts. CP 152-156. The sentencing court imposed an indeterminate sentence of 280 months to life on Count 1 and 198 months to life on Counts 2-5. CP 10-26. Mr. Talavera filed a timely appeal. CP 9.

M.H.S., a 17 year old female, testified that she and her immediate family lived with Mr. Talavera and other extended family members for a period of time between 2009 and 2011. VROP 367-68, 373, 463. At the time, M.H.S. shared a bedroom with her sister, State's witness Kimberly Hernandez. VROP 369. M.H.S. testified that she was molested seven to ten years earlier by her cousin, Hector Talavera. VROP 376-379. The State offered no physical evidence in support of M.H.S.'s allegations. Her testimony was often vague and her memories incomplete. E.g. VROP 378, 419.

In a case resting exclusively on her credibility, M.H.S.'s testimony and that of her sister substantially evolved on several key issues between the first and second trials. M.H.S testified that Mr. Talavera molested her during a "sleepover" with her sister Kimberly in Mr. Talavera's room when they all lived together. VROP 383-85. M.H.S.'s father, Aurelio Hernandez, contradicted M.H.S.'s testimony about the "sleepover," testifying that

M.H.S and Kimberly "never" slept in Mr. Talavera's room. VROP 470.

At both trials, Kimberly was the State's only other witness to the "sleepover." During the first trial, Kimberly testified that she did not recall any "sleepover" with M.H.S. and Mr. Talavera. VROP 490. At the second trial, Kimberly testified that she now remembered "the sleepover," and trial counsel attempted to impeach Kimberly regarding the inconstistency. VROP 490 (emphasis added). After a protracted discussion outside the presence of the jury, the Court ruled that defense counsel would not be able to impeach Kimberly with her prior inconsistent statement without a transcript of the statement. VROP 492.

While Mr. Talavera's trial counsel offered to "do a transcript . . . but it's just going to take longer," VROP 491, ultimately, no transcripts were used during the second trial. Trial counsel's failure to obtain transcripts directly prevented the convicting jury from learning that the only corroborating witness to the "sleepover," and one of the only corroborating witnesses to any aspect whatsoever of M.H.S.'s criminal allegations against Mr. Talavera, substantially changed her testimony.

M.H.S. testified that she began taking car trips with Mr. Talavera to the bakery when she was "around 9, 10" years old. VROP 378. She described being touched in the groin area, outside of her clothes, in the car while driving to the bakery. VROP 377. M.H.S.'s testimony about the frequency of this touching substantially evolved between the two trials. At the first trial, she testified she was touched in the car on approximately twenty occasions. VROP 77. At the second trial, she testified she was

touched in the car on approximately ten occasions. VROP 378. Like Kimberly's evolving memory of the "sleepover," trial counsel failed to point out M.H.S.'s widely divergent estimates of the frequency of molestation to the convicting jury. None of the claims about touching in the car were corroborated by any other witnesses or physical evidence at either trial.

E. ARGUMENT

The right to a fair trial is guaranteed in the United States Constitution through the Due Process Clause of the Fourteenth Amendment and the right to Counsel in the Sixth Amendment, as well as the Washington Constitution, article I, section 22. U.S. Const. amend. VI, XIV; Const. art. I, § 22; *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018). The Washington Supreme Court has previously taken opportunities to delineate proper guidelines for criminal defense, as well as establish fundamental requirements for effective counsel. *See, e.g.*, *State v. Estes*, 188 Wn.2d 450, 460, 395 P.3d 1045 (2017); *In re Yung-Cheng Tsai*, 183 Wn.2d 91, 102, 351 P.3d 138 (2015); CrRLJ 3.1 Standards for Indigent Defense. The citizens of Washington have a substantial interest in seeing a fair criminal justice system, which requires defendants to receive adequate, effective counsel. The Washington Supreme Court should accept review as this case addresses a significant question of law under both the U.S. and Washington Constitutions with the right to effective counsel, and also because the issue of having a fair criminal justice system is an ongoing issue of substantial public interest. RAP 13.4(b)(3)-(4).

1. The Court Should Grant the Petition for Review to Clearly Establish Counsel's Duty to Obtain Transcripts for Impeachment of Key Witnesses

The first requirement for a successful claim of ineffective assistance of counsel is that counsel's performance was below a "minimum objective standard of reasonable attorney conduct." *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015) (citing *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993)). The Washington Supreme Court has regularly delineated basic boundaries of effective counsel in prior cases alleging ineffective assistance of counsel. *See, e.g.*, *Lopez*, 190 Wn.2d at 123-24 (counsel's duty to conduct necessary trial preparation); *Estes*, 188 Wn.2d at 460 ("The duty to provide effective assistance includes the duty to research relevant statutes"); *Jones*, 183 Wn.2d at 339 (counsel's duty to investigate and interview witnesses); *Yung-Cheng*, 183 Wn.2d at 102 (counsel's duty to advise on immigration consequences for non-citizen defendant). The facts of Mr. Talavera's case highlight the need for the Supreme Court to further clarify counsel's duty to conduct necessary trial preparation.

The evidence against Talavera consisted solely of testimony of seven-to-ten-year-old recollections of past events—there was no physical evidence to support the convictions. The sole testimony that addressed the elements of the crime came from the victim, M.H.S. Her sister, Kimberly, testified to facts that supported M.H.S.'s testimony. "Cases involving alleged child sex abuse make the child's credibility "an inevitable, central

issue." *State v. Kirkman*, 159 Wn.2d 918, 933, 155 P.3d 125 (2007). Here, the credibility of M.H.S., and her sister Kimberly (whose testimony was entered to support M.H.S.'s allegations) were not merely the central issue in the case—they were the only issue, and the defense was based upon discrediting their testimony.

Talavera's trial counsel did not conduct necessary trial preparation between his first and second trial—the decision not to acquire transcripts of the key witness' testimony belied an assumption that the key witness' testimony would not change between trials. That assumption was ultimately incorrect. "When no other defense was available in counsel's view, the failure to prepare for effective impeachment of the sole eyewitness based on a hunch that her testimony would not differ from the first trial was 'unreasonable under prevailing professional norms and ... was not sound strategy." *Blackburn v. Foltz*, 828 F.2d 1177, 1185 (6th Cir. 1987) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 2588 (1986)) (alterations in original). The duty to prepare for trial includes preparing for cross examination, which necessarily entails preparing for effective impeachment. As this case demonstrates, there is generally no strategic reason for defense counsel to not request transcripts. And in cases where the credibility of the sole witness is the key issue in the case, the duty to prepare for trial includes a duty to acquire transcripts of prior testimony so as to prepare for impeachment.

Mr. Talavera's right to effective assistance of counsel was violated when his trial attorney failed to acquire transcripts of the key witnesses'

testimony from the previous trial, which thereby prevented effective impeachment. The basic requirements of effective assistance of counsel raise significant questions of constitutional law. Additionally, the public has a substantial interest in assuring the criminal justice system is operating fairly, and that defendants are adequately represented by counsel. The public has an interest both in ensuring the criminal justice system reaches a correct outcome, and also in ensuring it reaches a *final* outcome. Delineating basic boundaries of effective counsel provides attorneys with clarity and guidance, and would help diminish the likelihood of future reversals under claims of ineffective assistance of counsel. For both these reasons, the Court should grant review of Mr. Talavera's case to outline counsel's duty to prepare for cross examination and impeachment by acquiring transcripts of key witnesses' prior testimony.

2. The Court Should Grant the Petition for Review to Establish a Presumption of Prejudice When a Key Witness is Unimpeached Following a Mistrial for Failing to Return a Verdict

To succeed on an ineffective assistance of counsel claim, the defendant must show "a reasonable probability that 'but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Estes*, 188 Wn.2d at 458 (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). "Reasonable probability" is a lower standard than a preponderance of the evidence. *Id.* (citing *Strickland v. Washington* 466 U.S. 668, 694 104 S.Ct. 2052 (1984)).

As previously stated, the sole evidence against Talavera was of

seven-to-ten-year-old recollections of past events from the victim, M.H.S. Her sister, Kimberly, testified to facts that supported M.H.S.'s testimony. The credibility of M.H.S. and her sister Kimberly was not only "an inevitable, central, issue," *Kirkman*, 159 Wn.2d at 933, it was the issue the entire defense was based upon. M.H.S.'s testimony changed after the first trial, alleging half of the molestation attempts she had previously claimed. While the Court of Appeals couched this as potentially beneficial to Talavera, Opinion Below at 9, the different outcomes between the first and second trial point to a different likelihood: the higher number of allegations was less credible to the jury, and so making fewer allegations in the second trial made M.H.S. appear more credible to the jury. Similarly, Kimberly's testimony changed at the second trial in a way to enhance the credibility of M.H.S., by supporting her claims of sleepovers happening in Talavera's room.

Where the testimonies of the key witnesses' change after the first trial in a manner that bolsters the credibility of the key witnesses, it is "more than a 'conceivable effect on the outcome'" when the second trial results in a conviction. The difference in outcomes is obvious; this different outcome should entail a presumption that the different testimony (and enhanced credibility of that testimony) affected the verdict. *See*, *e.g.*, *Blackburn,* 828 at 1186 ("Far from being an open and shut case, the fact that the evidence against Blackburn was not overwhelming is clearly established by the fact that the jury was unable to reach a verdict at the first trial."). In cases such as this one—where the key witness's allegations change after a mistrial on

a hung jury, resulting in a conviction—the courts should presume the new, unimpeached testimony prejudiced the defendant, subject to rebuttal from the State. Given the Constitutional concerns regarding prejudice and ineffective assistance of counsel, the Supreme Court should accept review of Mr. Talavera's case to establish this presumption.

F. CONCLUSION

Mr. Talavera was denied effective assistance of counsel when his attorney failed to obtain transcripts of key witnesses after his first trial ended with a hung jury. He was convicted, after his first jury failed to return a verdict, when the unimpeached witnesses changed their story. The deficient performance and resulting prejudice deprived Mr. Talavera of effective counsel, contrary to the Sixth and Fourteenth Amendments of the U.S. Constitution, as well as article I, section 22 of the Washington Constitution. In addition, Mr. Talavera's case presents an issue of public interest that necessitates clearer guidance from this Court to establish basic requirements for effective counsel. Accordingly, Mr. Talavera respectfully requests this court GRANT this petition for review.

Respectfully submitted this 12 day of December, 2018.

MAZZONE LAW FIRM, PLLC

By Peter Mazzone, WSBA #25262
Attorney for Petitioner

By James Herr, WSBA #49811
Attorney for Petitioner

CERTIFICATE OF SERVICE/PROOF OF FILING

I, Tammy Weisser, hereby certify that the following information is true and correct: That the original pleading of the foregoing document entitled "Motion for Discretionary Review" was filed Electronically with the Court of Appeals, Division I, 600 University Street, One Union Square, Seattle, WA 98101-1176 on This 12 Day of December, 2018. And further, that a true and correct copy of the foregoing pleading was served on the following parties on this 12 Day of December, 2018:

(ELECTRONICALLY)
Snohomish County Superior Court
Prosecuting Attorney – Seth Fine
3000 Rockefeller Avenue
Everett, WA 98201

(VIA US MAIL)
Hector Talavera, DOC#395837
Coyote Ridge Correction Center
PO BOX 769
Connell, WA 99326

Dated: This 12 Day of December, 2018.

Tammy Weisser, Legal Assistant

APPENDIX 1

Court of Appeals Opinion

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. HECTOR HUGO TALAVERA, Appellant.	)	No. 76422-5-I DIVISION ONE UNPUBLISHED OPINION FILED: November 13, 2018

SMITH, J. — Hector Talavera appeals the judgment and sentence imposed pursuant to his jury conviction for first degree rape of a child and first degree child molestation. Talavera contends (1) defense counsel was constitutionally ineffective for failing to impeach witnesses with their testimony from an earlier trial, (2) two of the State's witnesses improperly vouched for the credibility of other witnesses, (3) the trial court erred in admitting hearsay evidence, (4) he was denied his right to a unanimous verdict, and (5) cumulative error denied him a fair trial. We affirm.

FACTS

M.H.S. is Talavera's younger cousin. Talavera lived with M.H.S.'s family for approximately 10 years, until M.H.S. was 9 or 10 years old. M.H.S. considered Talavera, who was in his twenties at the time, to be "like a big brother." Report of Proceedings (RP) (Dec. 13, 2016) at 374.

M.H.S.'s father frequently sent Talavera to buy pan dulce, a type of sweet bread, from a bakery. Talavera occasionally took M.H.S. with him to the bakery but refused to allow M.H.S.'s siblings to accompany them. On the way to the bakery, Talavera would put his hand in between M.H.S.'s legs and rub her vaginal area over her clothing. M.H.S. testified that this happened on approximately 10 different occasions and that she was around 9 or 10 years old at the time.

On another occasion, M.H.S. and her younger sister Kimberly had a "sleepover" in Talavera's bed. RP (Dec. 13, 2016) at 383. During the middle of the night, Talavera moved Kimberly over and then pulled down his pants and put M.H.S.'s hand on his penis. Each time M.H.S. tried to move her hand away, Talavera put it back on his penis. Talavera stopped after M.H.S. tried to wake up Kimberly.

M.H.S. testified about another incident with Talavera that happened when she was 9 years old. M.H.S. was wearing a zippered one piece pajama set. Talavera told her to change clothes, so M.H.S. went upstairs to her bedroom and got dressed. However, M.H.S. did not return downstairs "[b]ecause I didn't want him to touch me." RP (Dec. 13, 2016) at 386. Talavera went upstairs, picked up M.H.S. and put her over his shoulder, and carried her to his bedroom. Talavera pulled down M.H.S.'s pants and his own pants and put his penis into M.H.S.'s vagina. M.H.S. pretended that she heard her mother calling for her, and Talavera stopped. M.H.S. testified that it hurt and that she saw blood when she went to the bathroom.

After Talavera moved out of M.H.S.'s house, he continued to visit frequently. M.H.S. testified about two other incidents that occurred in the family's living room. The first time, M.H.S. was sitting on the couch when Talavera sat next to her, spread a blanket over them, and touched her vaginal area over her clothing. M.H.S. moved to a different couch and ultimately to her own room in order to escape Talavera. The second time, M.H.S. was lying on the floor underneath a blanket watching television with other members of her family in the room. Talavera lay down next to M.H.S., underneath the blanket, and touched her vaginal area over her clothing. M.H.S. testified that she was around 9 or 10 years old at the time of these two incidents.

M.H.S. did not tell her parents what happened because "[t]hey loved him a lot" and she "felt embarrassed." RP (Dec. 13, 2016) at 389. However, several years later, M.H.S. received a text message from a friend who told her that he was in counseling for depression and "how it sucks to have had something that you know that no one can know." RP (Dec. 13, 2016) at 395-96. This prompted M.H.S. to tell her mother what had happened with Talavera.

The following day, M.H.S.'s eyes were puffy from crying and she attempted to hide them with "bruise makeup" and dark sunglasses. RP (Dec. 13, 2016) at 398-99. M.H.S.'s biology teacher "could tell that something was wrong." RP (Dec. 14, 2016) at 502. She took M.H.S. aside and asked if someone had hit her. M.H.S initially stated that her boyfriend hit her but ultimately disclosed the sexual abuse by Talavera. M.H.S. participated in a sexual assault evaluation by

forensic nurse Colette Dahl and an interview with child interview specialist Gina Coslett.

The State charged Talavera by amended information with one count of first degree rape of a child and four counts of first degree child molestation, alleged to have occurred between January 24, 2007, and January 23, 2010, when M.H.S. was between the ages of 9 and 12. Talavera's first trial took place from September 20 to September 22, 2016. The jury was unable to agree on a verdict as to any of the counts, and the trial court declared a mistrial. Talavera's second trial took place from December 12 to December 15, 2016. A jury convicted Talavera as charged. Talavera appeals.

DECISION

1. Ineffective Assistance of Counsel

Talavera argues that defense counsel was ineffective for failing to obtain a complete transcript from his prior trial. He contends that without a transcript, he was unable to impeach M.H.S. or her sister with inconsistencies in their testimony.

We review claims of ineffective assistance of counsel de novo. State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). In order to establish ineffective assistance of counsel, a defendant must demonstrate both that counsel's conduct was deficient and that the deficient performance resulted in prejudice. State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). To show that counsel's performance was deficient, the defendant must establish that it fell below an objective standard of reasonableness given the circumstances. State v.

McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If counsel's conduct can be characterized as a legitimate trial strategy or tactic, performance is not deficient. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To show that the deficient performance was prejudicial, the defendant must show that there is a reasonable probability that but for counsel's errors the result of the proceeding would have been different. McFarland, 127 Wn.2d at 334-35. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Strickland v. Washington, 466 U.S. 668, 700, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We engage in a strong presumption that counsel's representation was effective. McFarland, 127 Wn.2d at 335.

a. M.H.S.'s testimony regarding trips to the bakery

During the first trial, the prosecutor asked M.H.S. how many times Talavera molested her in the car to the bakery.

> [PROSECUTOR:] How many times did this happen in the car when you were going on these trips?
> . . . .
> [PROSECUTOR:] Was it more than one?
> [M.H.S.:] Yeah.
> [PROSECUTOR:] Was it more or less than ten?
> . . . .
> [M.H.S.:] More than ten.
> [PROSECUTOR:] More or less than 20?
> [M.H.S.:] I would say 20.

RP (Dec. 21, 2016) at 77. During the second trial, M.H.S. testified as follows.

> [PROSECUTOR:] And did this happen more than once?
>
> [M.H.S.:] Yes.
>
> [PROSECUTOR:] Do you know how many times?
>
> [M.H.S.:] I don't know exactly how many times, but it did happen.
>
> [PROSECUTOR:] Did it happen more than five times?
>
> [M.H.S.:] Yeah.
>
> [PROSECUTOR:] Ten, more than ten?
>
> [M.H.S.:] I would say around there.

RP (Dec. 13, 2016) at 378.

b. Kimberly's testimony regarding the "sleepover"

During the first trial, the prosecutor asked M.H.S.'s sister, Kimberly, about her recollection of the "sleepover" in Talavera's bed.

> [PROSECUTOR:] Did you ever spend the night down in Hugo's[1] room?
>
> [KIMBERLY:] There is not really—there is—not that I remember. Like, there is not a night I remember, but maybe, because I was so young, probably could have been a time. Like, right now I don't remember a time sleeping there.
>
> [PROSECUTOR:] Okay. Would it have seemed strange to you?
>
> [KIMBERLY:] Not really. I honestly would have seen it perfectly fine. I saw him as family that was like an older brother, so I—mostly see it as a sleepover.

RP (Sept. 21, 2016) at 163-64.

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[1] Several witnesses testified that Talavera went by his middle name.

In Talavera's second trial, the prosecutor did not ask Kimberly any questions about the sleepover, but defense counsel raised the issue during cross-examination.

> [DEFENSE COUNSEL:] Was there ever a time that you remember having a sleepover with [M.H.S.], you and Hugo and you slept on his bed?
>
> [KIMBERLY:] Yeah, I don't know if it was—I don't know if it was the ground floor or the bed. I don't remember.
>
> [DEFENSE COUNSEL:] You remember that?
>
> [KIMBERLY:] But I do remember the sleepover.
>
> [DEFENSE COUNSEL:] Okay. Do you remember I asked that you in a different hearing and you said no?
>
> [KIMBERLY:] What do you mean?
>
> [DEFENSE COUNSEL:] I asked you the exact same question in a different hearing and you said that you could not remember a night that you had a sleepover with Hugo.
>
> [KIMBERLY:] Well, we did.
>
> [DEFENSE COUNSEL:] So was that true or was what you are saying today true?
>
> [KIMBERLY:] What I am saying today is true.
>
> [DEFENSE COUNSEL:] On that occasion you said it under oath.

RP (Dec. 14, 2016) at 490.

The prosecutor objected. Outside the presence of the jury, the prosecutor stated:

> Your Honor, there is no transcript of the prior testimony from the prior hearing. [Defense counsel] is, in essence, making herself a witness. What she is saying is not my recollection. My recollection

> is that this witness said that she didn't remember, and then on redirect she said that it wouldn't have been unusual if that happened. Nevertheless, I don't think this is proper impeachment when it is just purely based on defense counsel who is not a witness and not on a witness' memory.

RP (Dec. 14, 2016) at 491. Defense counsel responded:

> I could do a transcript, Your Honor, but it's just going to take longer. My notes say I cannot remember a night I slept in Hugo's room, quotation sleepover, and I do have that she said that that would not be unusual as well. . . .
> . . . .
> . . . I was going to ask her if she remembers saying that. If you want me to have the transcript made, I can do that, Your Honor. I will recall her in defense case.

RP (Dec. 14, 2016) at 491-92. The trial court stated:

> Without a transcript, if the witness' statement is either I didn't say that or I don't remember saying that, or what have you, the questioning needs to stop there in the Court's view, because there is nothing further that you can offer since you don't have a transcript at this time.
> . . . .
> . . . I don't have any qualms you asking that last question that you want to ask, so the State's objection to that is overruled. But whatever her answer is, it needs to stand, unless there is some further objective evidence as to what her testimony was at that trial.

RP (Dec. 14, 2016) at 492-94.

When the jury returned, defense counsel continued as follows:

> [DEFENSE COUNSEL:] Thank you, Kimberly. Do you ever recall telling us before that you don't remember ever having a sleepover in Hugo's bedroom on the bed?
>
> [KIMBERLY:] I guess, but I was probably nervous, because I did get nervous.
>
> [DEFENSE COUNSEL:] Are you nervous now?
>
> [KIMBERLY:] A little.

> [DEFENSE COUNSEL:] Okay. Does you being nervous change your memory?
>
> [KIMBERLY:] I mean, yeah. . . .

RP (Dec. 14, 2016) at 495.

Talavera contends, without citation to authority, that it is per se deficient for an attorney to fail to request transcripts of a prior trial ending in a mistrial. But it is unnecessary to address this claim because Talavera does not establish prejudice. Under the circumstances, the inconsistencies in M.H.S.'s testimony were minimal. It was clear in both trials that M.H.S. was unsure of the actual number of incidents and was estimating broadly. Moreover, M.H.S. remembered *fewer* incidents in the second trial than she did in the first. Despite Talavera's claims to the contrary, it was not unreasonable that defense counsel chose not to highlight the higher number from the first trial.

Nor does Talavera establish prejudice with regard to Kimberly's testimony. During the first trial, Kimberly testified that while she did not specifically remember a sleepover occurring, there "probably could have been a time." RP (Sept. 21, 2016) at 164. Kimberly testified that such an occurrence would not be unusual because Talavera was like an older brother to her. During the second trial, Kimberly testified that she did remember a sleepover occurring. However, such an inconsistency was not significant because Kimberly did not give any details about what happened at the sleepover. Furthermore, defense counsel successfully impeached Kimberly's credibility even without the transcript. In response to defense counsel's questioning, Kimberly admitted that she gave a

different statement at the first trial. She also testified that testifying made her nervous and that being nervous could "change [her] memory." RP (Dec. 14, 2016) at 495. Talavera fails to establish a reasonable probability that the outcome of the trial would have been different had defense counsel obtained a transcript of the first trial.[2]

2. Vouching

For the first time on appeal, Talavera contends that he was denied his right to a fair trial because two of the State's witnesses—child interview specialist Gina Coslett and Detective Susan Eviston—vouched for the credibility of other witnesses.

"[N]o witness may give an opinion on another witness' credibility." State v. Carlson, 80 Wn. App. 116, 123, 906 P.2d 999 (1995). Such testimony invades the province of the jury as the ultimate arbiter of credibility of the witness. State v. Warren, 134 Wn. App. 44, 52-53, 138 P.3d 1081 (2006), aff'd, 165 Wn.2d 17, 195 P.3d 940 (2008). However, where a defendant did not object below, he or she may only raise an error on appeal if it is manifest constitutional error. State v. Kirkman, 159 Wn.2d 918, 934, 155 P.3d 125 (2007). Improper opinion testimony constitutes a manifest constitutional error only if the witness made "an explicit or almost explicit witness statement on an ultimate issue of fact." Kirkman, 159 Wn.2d at 936.

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[2] Talavera argues that defense counsel could also have used the transcript to impeach M.H.S. "potentially on her other vague and guessed-at answers." Br. of Appellant at 19. Talavera does not identify any portions of the record relevant to this claim, and we decline to review it.

a. Gina Coslett's testimony

Coslett explained "the rules" for conducting a child interview, including that the child not guess at answers, that the child ask for clarification of anything he or she does not understand, and that the child "promise [to] tell the truth." RP (Dec. 14, 2016) at 604. Coslett testified that if a child "appears they're not following the rules" that she "might go over the rules again." RP (Dec. 14, 2016) at 605. Coslett stated that she did not "have the need to reiterate the rules" with M.H.S. RP (Dec. 14, 2016) at 607.

When the prosecutor asked about M.H.S.'s demeanor during the interview, Coslett testified that during the initial introductions, M.H.S. "was able to talk about her feelings and you could see that in her demeanor." But when Coslett began asking questions about Talavera, [M.H.S.] "got quiet . . . she was careful to think about her answer and give me the information." RP (Dec. 14, 2016) at 606-07.

The prosecutor asked Coslett to define "a good interview."[3] RP (Dec. 14, 2016) at 608. Coslett testified that "good interviews or an interview is being able to bring in the research with also the developmental knowledge, asking the open-ended questions and waiting for the information to be able to build upon that in getting more detail." RP (Dec. 14, 2016) at 609. She stated that she considered M.H.S.'s interview "a good interview." RP (Dec. 14, 2016) at 609.

[3] Talavera objected to this question at trial on relevance grounds, not on the grounds he now raises on appeal.

Here, Coslett's statements about "the rules" of the interview did not constitute a comment on M.H.S.'s credibility. Coslett agreed during cross-examination that she had "no way of knowing" if the child she was interviewing was being truthful and explicitly stated that her role was not to determine the truth of the allegations. RP (Dec. 14, 2016) at 612. The testimony did not infringe on the jury's role as the ultimate judge of M.H.S.'s credibility. Nor were Coslett's comments on M.H.S.'s demeanor during the interview improper. A witness may describe the manner and demeanor of a child at the time the child is making statements and state inferences from these observations. State v. Madison, 53 Wn. App. 754, 760, 770 P.2d 662 (1989). And Coslett explained that a "good interview" meant that the interviewer correctly followed standard protocols; it did not refer to whether the interviewee was telling the truth. Coslett's testimony did not give rise to manifest constitutional error reviewable for the first time on appeal.

b. Detective Susan Eviston's testimony

Detective Eviston testified about the steps she took in her investigation. When the prosecutor asked why Detective Eviston chose to use a child interview specialist despite the fact that M.H.S. was 17, Detective Eviston responded:

> For me personally you heard Ms. Coslett and her level of expertise is just unquestionable, so I don't want to make mistakes, because a lot of these cases, and especially this case, these disclosure [sic] come later, usually when someone's life is falling apart than we hear what's caused them to be the way they are, and I don't want to make mistakes. And, so I want the professional forensic interviewer to do the interview . . . .

RP (Dec. 14, 2016) at 624-25. Detective Eviston observed the child interview through a one-way mirror. When asked about M.H.S.'s demeanor during the interview, she described M.H.S. "just a really shattered little girl." RP (Dec. 14, 2016) at 627.

However, Detective Eviston gave Coslett's expertise as only one reason for her decision; she also testified that having Coslett conduct the interview gave her more freedom to observe a child's demeanor and determine whether the statutory elements for a crime were met. And Detective Eviston's comments that M.H.S. appeared traumatized were permissible comments on M.H.S.'s demeanor. See, e.g., State v. Magers, 164 Wn.2d 174, 190, 189 P.3d 126 (2008) (police officer's testimony that victim was "'obviously traumatized'" and "'something was terribly wrong'" were permissible comments on victim's demeanor, not opinions about the victim's credibility or the defendant's guilt) (internal quotation marks omitted), quoting Answer to Pet. for Review at 15. None of the challenged statements by Detective Eviston constitute manifest constitutional error.

3. Hearsay

Talavera argues that the trial court erred in admitting statements that M.H.S. made to forensic nurse Colette Dahl. Specifically, he challenges M.H.S.'s statement "I was bleeding. . . . I was so scared" and her identification of Talavera as the person who sexually abused her. RP (Dec. 14, 2016) at 573. He argues that the statements were hearsay and were not admissible pursuant to ER 803(a)(4), the exception for medical treatment or diagnosis.

But Talavera did not object to the statements below.[4] It is well settled that objections to evidence cannot be raised for the first time on appeal. See RAP 2.5(a); ER 103(a)(1); State v. Leavitt, 111 Wn.2d 66, 71-72, 758 P.2d 982 (1988). Because Talavera did not challenge the testimony below on hearsay grounds, he has waived the claim on appeal.

4. Jury Unanimity

Talavera contends that his right to a unanimous verdict was violated when the prosecutor failed to elect specific acts for the jury's consideration. He argues that M.H.S. testified about approximately 13 acts of sexual abuse but that the State failed to elect the 4 acts on which the jury should rely to support the four counts of first degree child molestation.

The constitutional right to a jury trial requires that the jury be unanimous about the specific acts the defendant committed for each crime. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). To ensure jury unanimity in multiple acts cases, either (1) the State must elect the particular criminal act on which it will rely for conviction or (2) the trial court must instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a

[4] In a pretrial motion, the State sought to admit Dahl's testimony regarding "the victim's description of the crime" as "evidence of diagnosis or treatment." Clerk's Papers (CP) at 226; RP (Sept. 21, 2016) at 54. Defense counsel informed the court she had no objection to the State's motion. During Dahl's testimony, defense counsel made only one hearsay objection, to Dahl's recitation of the family's home address, arguing that it "[d]oesn't fall within the exception that we discussed for the purposes of medical." RP (Dec. 14, 2016) at 574.

reasonable doubt. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988) (citing Petrich, 101 Wn.2d at 572).

Here, the trial court instructed the jury that "[t]o convict the defendant on any count of Child Molestation in the First Degree, one particular act of Child Molestation in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved." CP at 170. Because the jury was so instructed, there was no requirement that the State elect the specific acts it relied on for conviction.

5. Cumulative Error

Talavera argues that cumulative error denied him a fair trial. "Under the cumulative error doctrine, [an appellate court] may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant [of his or] her right to a fair trial, even if each error standing alone would be harmless." State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). Because Talavera cannot show multiple errors affected the outcome at his trial, his cumulative error claim fails.

Affirmed.

WE CONCUR:

APPENDIX 2

Constitution of the State of Washington

CONSTITUTION OF THE STATE OF WASHINGTON

This Constitution was framed by a convention of seventy-five delegates, chosen by the people of the Territory of Washington at an election held May 14, 1889, under section 3 of the Enabling Act. The convention met at Olympia on the fourth day of July, 1889, and adjourned on the twenty-second day of August, 1889. The Constitution was ratified by the people at an election held on October 1, 1889, and on November 11, 1889, in accordance with section 8 of the Enabling Act, the president of the United States proclaimed the admission of the State of Washington into the Union.

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(A) Constitution of the State of Washington
(B) Constitutional Amendments (in order of adoption)
(C) Index to State Constitution.

In part (A), for convenience of the reader, the latest constitutional amendments have been integrated with the currently effective original sections of the Constitution with the result that the Constitution is herein presented in its currently amended form.

All current sections, whether original sections or constitutional amendments, are carried in Article and section order and are printed in regular type.

Following each section which has been amended, the original section and intervening amendments (if any) are printed in italics.

Appended to each amendatory section is a history note stating the amendment number and date of its approval as well as the citation to the session law wherein may be found the legislative measure proposing the amendment; e.g. "**[AMENDMENT 27**, 1951 House Joint Resolution No. 8, p 961. Approved November 4, 1952.]"

In part (B), the constitutional amendments are also printed separately, in order of their adoption.

(A) Constitution of the State of Washington

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PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the universe for our liberties, do ordain this constitution.

ARTICLE I
DECLARATION OF RIGHTS

SECTION 1 POLITICAL POWER. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 4 RIGHT OF PETITION AND ASSEMBLAGE. The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

SECTION 5 FREEDOM OF SPEECH. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

SECTION 6 OATHS - MODE OF ADMINISTERING. The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.

SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

a showing by clear and convincing evidence of a propensity for violence that creates a substantial likelihood of danger to the community or any persons, subject to such limitations as shall be determined by the legislature. [**AMENDMENT 104**, 2010 Engrossed Substitute House Joint Resolution No. 4220, p 3129. Approved November 2, 2010.]

Original text — Art. 1 Section 20 BAIL, WHEN AUTHORIZED — *All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great.*

SECTION 21 TRIAL BY JURY. The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

SECTION 22 RIGHTS OF THE ACCUSED. In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided,* The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed. [**AMENDMENT 10**, 1921 p 79 Section 1. Approved November, 1922.]

Original text — Art. 1 Section 22 RIGHTS OF ACCUSED PERSONS — *In criminal prosecution, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and, in no instance, shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.*

SECTION 23 BILL OF ATTAINDER, EX POST FACTO LAW, ETC. No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.

MAZZONE LAW FIRM

December 12, 2018 - 4:12 PM

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Appellate Court Case Title:	State of Washington, Resp/Cross App v. Hector Talavera, App/Cross Resp
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