SUPREME COURT NO. 97436-5

NO. 50892-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANDRE VARGAS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Shelly K. Speir, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Andre Vargas asks this Court to grant review of the court of appeals' unpublished decision in State v. Vargas, No. 50892-3-II, filed June 18, 2019 (attached as an appendix).

B. ISSUES PRESENTED FOR REVIEW

1. Is this Court's review warranted under RAP 13.4(b)(2) and (3) to determine whether a mother's opinion on her daughter's credibility, and thereby the defendant's guilt, is prejudicial so as to warrant reversal, where the case hinges on the daughter's credibility?

2. Is this Court's review warranted under RAP 13.4(b)(4) to determine to the proper scope of the statement of identification hearsay exemption, ER 801(d)(1)(iii)—an open question in Washington?

C. STATEMENT OF THE CASE

On June 26, 2017, the State charged Andre Vargas with four counts of third degree child rape, alleging he had sexual intercourse with his 14-year-old daughter, M.V., between June and December of 2012. CP 3-8. A jury found Vargas guilty as charged. CP 45-52.

M.V. lived with her father, Vargas, her mother, K.V., her older brother, and her twin brother. RP 63-64. M.V. explained she was very close with her father because her mother worked long hours. RP 68. M.V.

typically used the bathroom in her parents' bedroom and explained it was not unusual for her family to shower in front of each other. RP 69-71, 200.

M.V. testified, in June of 2012, around the end of eighth grade when she was 14, she began to take an interest in boys. RP 76-77. M.V. texted a photograph of herself in her underwear to a boy at school. RP 76-77. Her parents found out and were upset. RP 76-77.

M.V. explained this incident essentially spurred the alleged sexual abuse. RP 79-80. She testified it began when her father asked her if she knew what a "blow job" was. RP 79-80. Soon, M.V. explained, her father showed her his penis after getting out of the shower because she had never seen one before. RP 80-81. M.V. testified the next time he showed her his penis "it turned into him showing me how to do a hand job." RP 81. M.V. said this type of contact occurred approximately five to ten times that summer, always in her parents' bedroom or bathroom while her mother was away at work. RP 84-87.

M.V. also testified she had begun menstruating around that time and it hurt for her to wear tampons. RP 85-87. M.V. claimed her father said it would help if she stretched her vagina. RP 87. M.V. testified this led to him digitally penetrating her and then penetrating her vagina with his penis, but it hurt so they stopped. RP 87-89. The State relied on this first alleged incident of vaginal penetration for Count 1. RP 438-39, 444-45.

M.V. testified to another incident where she claimed her father ejaculated inside her during vaginal intercourse. RP 90-92. M.V. recalled being "super freaked out" about getting pregnant, but her father told her it would be fine because he was "fixed." RP 90-91. The State relied on this allegation for Count 2. RP 438-39, 445.

Another time, M.V. explained, her father penetrated her with his fingers and then put his mouth on her vagina. RP 102-03. The State relied on this instance or oral intercourse for Count 3. RP 438-39, 446.

M.V. also testified her father brought home a pornography DVD and a dildo that summer, which he showed her but did not use. RP 94-96. Another time, M.V. claimed, Vargas showed her a video on his phone of a woman performing fellatio on a horse. RP 96-97. M.V. also said her father showed her how to put a condom on him. RP 94, 97-98.

M.V. testified she finally reached a breaking point and told her father she was either going to kill herself or run away if the sexual activity continued. RP 103-06. M.V. and her father agreed the activity would stop if she performed oral sex on him. RP 106-08. M.V. testified this occurred in her parents' bedroom and lasted approximately three seconds, sometime in September of 2012, after the start of her ninth grade year. RP 107-08. The State relied on this allegation for Count 4. RP 438-39, 446. No further sexual activity occurred. RP 107-08.

M.V. did not disclose the allegations to anyone for several years. M.V. explained she did not want to ruin her family. RP 147. The first person M.V. told was her friend, M.M., though their testimony differed as to when M.V. disclosed. RP 141-44, 336. M.V. made M.M. promise not to tell anyone, though M.M. ultimately convinced M.V. to tell her mother. RP 338-40, 344.

M.V. saved some text messages from her father, exchanged well after the alleged incidents. Ex. 1. In August of 2015, M.V. told her father, "you didn't screw up my life you've done the world for me but I'm afraid to ever have a [boyfriend] because of what you've done." Ex. 1. She continued, "There's not a day that goes by that I don't think about that." Ex. 1. Vargas responded, "Me to[o] [and] I thought I was your [boyfriend]." Ex. 1; RP 132-33.

M.V. told her mother about the allegations in December of 2015, with M.M. present. RP 148-50, 219-22. K.V. testified she believed what her daughter told her. RP 228. M.V. explained her mother was "extremely supportive," but did not want to tell the police right away. RP 149-50, 224-25. M.V. explained they did not want to distract her twin from graduating and her grandmother had just been diagnosed with cancer. RP 150. M.V. did not tell anyone else for another five months. RP 244.

In May of 2016, M.V. told her high school education advisor, Ryan McIntosh, about the alleged abuse. RP 155, 293-95, 304-06. McIntosh reported the allegations to Child Protective Services (CPS). RP 304-10. Detective Jessica Whitehead then interviewed M.V. at school, with McIntosh present, on June 8, 2016. RP 156-58, 369-71.

Vargas's cell phone was seized and searched. RP 378-79. Nothing of evidentiary value was found on Vargas's cell phone. RP 380-81. When the rest of the Vargas family moved out of their home shortly thereafter, they did not find any pornography, sex toys, or condoms that M.V. claimed her father showed her. RP 171-72, 181-82, 199, 238.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. A MOTHER'S OPINION ON HER DAUGHTER'S CREDIBILITY IS HIGHLY PREJUDICIAL AND WARRANTS REVERSAL WHERE THE TRIAL HINGES ON THE DAUGHTER'S CREDIBILITY.

On direct examination of M.V.'s mother, K.V., the State asked about M.V.'s disclosure of the allegations to her. RP 228. The State ultimately asked, "Did you believe your daughter?" RP 228. K.V. answered, "Yes," without defense objection. RP 228.

On appeal, Vargas argued the State's question and K.V.'s answer amounted to (1) improper opinion testimony on M.V.'s credibility, as well as

(2) prosecutorial misconduct for purposefully eliciting forbidden opinion testimony. Br. of Appellant, 8-20; Reply Br., 1-3.

The court of appeals agreed on both counts. As to the first argument, the court held "the jury improperly learned [K.V.'s] opinion as to a fact that must be left for the jury." Opinion, 7. As to the second argument, the court reasoned "the prosecutor explicitly asked [K.V.] whether she believed M.V.'s accusations; in other words, whether M.V. was telling the truth." Opinion, 11. "This," the court held, "is clearly improper questioning under [State v. Jerrels, 83 Wn. App. 503, 925 P.2d 209 (1996)]." Opinion, 11.

Despite these constitutional errors, the court of appeals refused to reverse, finding the improper testimony did not prejudice the outcome of Vargas's trial. The court emphasized K.V.'s "statement was fleeting and isolated, and it lacked the dramatic and inflammatory character of the protracted testimony of multiple witnesses from [State v. Johnson, 152 Wn. App. 924, 219 P.3d 958 (2009)]." Opinion, 9. The court further reasoned "[t]he single, isolated question from the prosecutor, which was never again referenced at trial was not 'so flagrant and ill intentioned' that [a] curative instruction could not have removed any prejudice." Opinion, 12 (quoting Jerrels, 83 Wn. App. at 508).

This Court's review is warranted under RAP 13.4(b)(2) and (3) to determine whether a mother's opinion on her daughter's credibility, and

thereby the defendant's guilt, is prejudicial where the case hinges on the daughter's credibility. The court of appeals relied on Jerrels and Johnson to hold the error was harmless in Vargas's case. But those cases demonstrate reversal is necessary under such circumstances.

In Jerrels, defense counsel did not object to questions of the mother about whether she believed her children. 83 Wn. App. at 506-08. The court concluded this misconduct was flagrant and ill-intentioned. Id. at 508. "A mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so." Id.

Notably, in Jerrels, there was medical evidence corroborating one of the children's allegations of sexual abuse. Id. at 508. The three children also corroborated each other's stories. Id. However, "there were no other witnesses to the abuse." Id. And, "[b]ecause credibility played such a crucial role, the prosecutor's improper questions were material and highly prejudicial." Id. The court therefore held Jerrels was denied a fair trial and reversed. Id.; see also State v. Jones, 117 Wn. App. 89, 92, 68 P.3d 1153 (2003) (reversing because "an instruction would not have cured the harm" from the officer's testimony that he did not believe Jones).

In Johnson, this Court reversed Johnson's conviction for child molestation because of improper opinion testimony. 152 Wn. App. at 934. Like Vargas's case, Johnson involved out-of-court statements by Johnson's

wife indicating she believed the complainant's allegations. Id. at 931. The complainant (T.W.), her mother, and her stepfather all related an incident where Johnson's wife confronted T.W. about the accusations and demanded T.W. prove they were true. Id. at 931-32. When T.W. recounted details of Johnson's intimate anatomy and sexual habits, Johnson's wife burst into tears, acknowledged it must be true, and hours later attempted suicide. Id. at 932-33. This improper opinion testimony was "highly prejudicial" because it showed "Johnson's own wife believed the accusations." Id. at 933-34. Reversal was required. Id. at 937.

Like Jerrels, there were no witnesses to the alleged incidents here. M.V. explained the incidents occurred in her parents' bedroom or bathroom, with the door locked. RP 84-85. Her mother was always away at work and her brothers in another room. RP 85. M.V.'s brothers did not testify. K.V. testified she never suspected anything. RP 208.

Unlike Jerrels, however, there was not even any corroborating evidence. No sexual assault examination was performed. RP 384. The pornography, dildo, and condoms were never found. RP 171-72, 181-82, 199, 238. Nothing of evidentiary value was discovered on Vargas's seized cell phone, despite there being 194 text messages between M.V. and Vargas since March of 2016. RP 380-81, 475. M.V. delayed disclosing to anyone

but her best friend and her mother for over three years. RP 155-58. There was even less evidence to support M.V.'s testimony than in Jerrels.

The case came down to M.V.'s credibility. The State acknowledged as much before trial: "We have a he said versus she said situation." RP 16. The ultimate issues for the jury were: Is M.V. telling the truth? Is she credible? Are her accusations to be believed? K.V. answered these questions for the jury. Like in Jerrels, the jury could not easily ignore a mother's opinion that her daughter's accusations were true. Like in Johnson, the testimony was highly prejudicial because Vargas's own wife and M.V.'s own mother believed the accusations. Where credibility plays a "crucial role" in the outcome of the trial, such improper opinion testimony necessitates reversal. Jerrels, 83 Wn. App. at 509.

The evidence that K.V. believed her daughter—whether manifest constitutional error or flagrant and ill-intentioned misconduct—deprived Vargas of a fair trial. This Court should grant review, reverse the court of appeals, and remand for a new trial.

2. ACCUSATIONS, MADE YEARS AFTER THE FACT, TO FRIENDS AND FAMILY, IDENTIFYING A KNOWN PERSON AS THE PERPETRATOR, ARE NOT PROPER STATEMENTS OF IDENTIFICATION UNDER ER 801(d)(1)(iii).

Under ER 801(d)(1)(iii), statements of identification, "made after perceiving the person," are not hearsay. Before trial, the State moved to

admit M.V.'s disclosure of the allegations and identification of her father to M.M., her mother, and her education advisor, McIntosh.[1] CP 96-97; RP 25-26. The State argued, "[w]hile the substantive details of M.V.'s disclosures are hearsay, her prior identification of the defendant as her perpetrator is not." CP 96-97. Defense counsel objected. RP 25.

The trial court admitted the disclosures "for identification purposes only." RP 26. The court emphasized the State's witnesses "can't be giving any details." RP 26. In a subsequent written ruling, the trial court specified it "granted the State's motion over the defense's objection to admit M.V.'s statements identifying the defendant as the perpetrator for identification purposes only." CP 13.

M.V. testified she first disclosed the allegations to her friend, M.M. RP 141-44. M.V. explained she then disclosed to her mother in December of 2015, and "told her everything." RP 148-49. Finally, M.V. testified she told her school counselor, McIntosh. RP 155.

M.M. testified on direct examination that M.V. "share[d] something with [her] that we're addressing here in court," and it involved Vargas. RP 336. M.M. said this disclosure occurred around November of 2015, during

[1] Detective Whitehead also testified that M.V. disclosed the allegations to her and identified her father as the "perpetrator." RP 371. On appeal, Vargas acknowledged this testimony was likely admissible to show "why an officer conducted an investigation," which is not for the truth of the matter asserted and therefore not hearsay. Br. of Appellant, 32.

their senior year. RP 336. M.M. explained she and M.V. were talking, and "then [M.V.] proceeded to tell me that she had something to tell me." RP 336. M.M. testified she "could tell it was pretty much like eating [M.V.] up inside." RP 336.

M.V.'s mother, K.V., testified M.V. made a disclosure to her "about something that had happened to her" and Vargas was the person who "had done something to her." RP 219. K.V. explained this occurred in December of 2015, at the Starbucks in Graham, with M.M. present. RP 219-20. K.V. reiterated M.V. "told [her] something about the defendant." RP 220. She said M.V. was "shaking and crying" when she did so. RP 221. K.V. likewise testified that M.V. disclosed to a counselor in May, who contacted the police. RP 229.

The high school education advisor, McIntosh, likewise testified M.V. disclosed the allegations to him. McIntosh explained he and M.V. were talking about her family life in mid-May of 2016 when she told him, paraphrasing, "Mr. Mac, had you really known, X, Y, and Z, your perspective might be different and you might think differently." RP 304-05. McIntosh said he reminded M.V. he was a mandatory reporter. RP 305-06. He testified M.V. then told him something happened with "[h]er father" and the disclosure "alarmed" him." RP 304-05. McIntosh explained he then

spoke with the school's guidance counselor, who instructed him to report it to CPS, which he did. RP 305.

Vargas argued on appeal that M.V.'s disclosures were improperly admitted as statements of identification and no other hearsay exception applied. Br. of Appellant, 20-38; Reply Br., 3-7. The fact of complaint doctrine, for instance, provides a hearsay exception for disclosures of sexual assault when "timely made." State v. Chenoweth, 188 Wn. App. 521, 532, 354 P.3d 13 (2015). Details of the complaint, "including the identity of the offender and the specifics of the act," are not permitted. State v. Alexander, 64 Wn. App. 147, 151, 822 P.2d 1250 (1992). "[D]isclosures made nearly a year later cannot reasonably be considered 'timely.'" Id. at 533. The disclosures here were obviously not "timely" and also contained the Vargas's identity.

The State agreed statement of identification was the only potential hearsay exception. Br. of Resp't, 18. The court of appeals ultimately did not reach the legal issue, holding any error was harmless. Opinion, 14. This Court's review is nevertheless warranted under RAP 13.4(b)(4), to provide definitive guidance to trial courts and practitioners as to the proper scope of the identification hearsay exemption, ER 801(d)(1)(iii). Use of the exemption appears frequently in sexual assault cases, to get around the limitations of the fact of complaint doctrine.

Tegland explains the exemption "is based upon the belief that an out-of-court statement of identification, which necessarily occurs closer in time to the witness's perception of the person, is more reliable than a later identification in the courtroom." 5B KARL B. TEGLAND, WASH. PRACTICE: EVIDENCE LAW & PRACTICE § 801.29 (6th ed. 2017). The U.S. Supreme Court has likewise noted "[t]he premise for [Fed. R. Evid.] 801(d)(1)(C)[2] was that, given adequate safeguards against suggestiveness, out-of-court identifications were generally preferable to courtroom identifications." United States v. Owens, 484 U.S. 554, 562, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988). Thus, the rule allows for "an out-of-court statement identifying a person in a lineup, photograph, at the scene of a crime, or the like." TEGLAND, supra, § 801.29 (citing illustrative federal cases).

As applied in this case, there is an obvious conflict between the fact of complaint doctrine, which prohibits identification of the perpetrator, and statements made for the purposes of identification. But there need not and should not be such a conflict, if admission (or exclusion) of such evidence is actually tethered to the language and purpose of the two hearsay exceptions.

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[2] Fed. R. Evid. 801(d)(1)(C) is functionally identical to ER 801(d)(1)(iii), providing that a statement is not hearsay when it "identifies a person as someone the declarant perceived earlier." Where a Washington rule of evidence mirrors its federal counterpart, courts may look to federal case law interpreting the federal rule as persuasive authority. In re Det. of Pouncy, 168 Wn.2d 382, 392, 229 P.3d 678 (2010).

Considering the dictionary definition of the word "perceive" is useful. "Perceive" means "to become conscious of"; "to recognize or identify esp. as a basis for or as verified by action"; and "to become aware of through the senses." WEBSTER'S THIRD NEW INT'L DICTIONARY 1675 (1993). These definitions suggest "perceiving a person," as required under the identification rule, means to become aware of or recognize a person. It does not broadly mean to name or accuse someone.

The case law on ER 801(d)(1)(iii) is consistent with this narrower view of "perceive," like seeing the defendant at the crime scene and then identifying him to the police, in a photograph, or a lineup. See e.g., State v. McDaniel, 155 Wn. App. 829, 877-78, 877, 230 P.3d 245 (2010) (photomontage identification).

For instance, the State relied on State v. Grover, 55 Wn. App. 252, 777 P.2d 22 (1989), to argue for admission of M.V.'s disclosures identifying her father. CP 96-97. In Grover, a detective was allowed to testify that a woman present during a home invasion robbery identified the robbers, who were known to the woman, immediately after the incident. Grover, 55 Wn. App. at 254-55. The court held this statement of identification was properly admitted, declining to apply ER 801(d)(1)(iii) to "only statements of identification made by a witness during a line-up or upon viewing a photographic montage." Grover, 55 Wn. App. at 256-57.

The woman's identification in Grover was made to the police immediately after perceiving the robbers. Id. at 254. In other words, she became aware of and recognized the individuals who robbed the house when she observed them doing so. This is consistent with the definition of "perceive." It is also consistent with the purpose of the rule—statements of identification made soon after the incident are considered "more reliable than a later identification in the courtroom." TEGLAND, supra, § 801.29.

What is not consistent with the identification rule is any accusation, made any time after the purported offense. This blurs the line between a more reliable, contemporaneous identification upon perceiving the person and an after-the-fact accusation. Indeed, were it so, exclusion of the perpetrator's identity under the fact of complaint doctrine would be meaningless. Essentially all witness accusations made out of court would be admissible in court. The identification exception would swallow the hearsay rule.

Tegland notes this very problem, explaining "[a] few courts have stretched the rule to allow out-of-court statements that arguably identify a person (typically the defendant in a criminal case) but that really describe facts that occurred in the past and implicate the defendant in the crime charged." TEGLAND, supra, § 801.29. For instance, "'My friend John Doe robbed the bank on Tuesday night.'" Id. Tegland explains McCormick on

Evidence "calls this interpretation of the rule 'erroneous,' saying it 'ignores the purpose and language of the rule.'" Id (citing MCCORMICK ON EVIDENCE § 251, at 218 (7th ed. 2013)).

McCormick on Evidence goes into more detail on this point. It explains the justification for the rule "is found in the unsatisfactory nature of courtroom identification and by the constitutional safeguards that regulate out-of-court identifications arranged by police." MCCORMICK, supra, at 218 (footnotes omitted). McCormick emphasizes the rule should not be used to "allow[] testimony that a certain person, known to the witness, committed a crime." Id. at 218 n.36.

A review of Washington cases addressing ER 801(d)(1)(iii) reveal they are consistent with McCormick's noted justification for the rule. They involve "out-of-court identifications arranged by police" where identity is at issue, making a delayed courtroom identification unsatisfactory.[3] See, e.g., McDaniel, 155 Wn. App. at 837-38 (police photomontage); State v. Stratton, 139 Wn. App. 511, 517, 161 P.3d 448 (2007) (describing defendant's clothing to the police); State v. Jenkins, 53 Wn. App. 228, 232, 766 P.2d 499 (1989) (pointing out a photograph of the defendant to the police); Grover, 55 Wn. App. at 254 (statement to the detective). Applying the identification

[3] See also United States v. Lopez, 271 F.3d 472, 484 (3d Cir. 2001) (reporting suspects' identities to police a day after the crime); United States v. Anglin, 169 F.3d 154, 159 (2d Cir. 1999) (identifying bank robber from police photo array).

rule in these more limited circumstances resolves the conflict with the fact of complaint doctrine.

M.V.'s "statements of identification" do not fall within the proper scope of ER 801(d)(1)(iii). She did not identify her father as the perpetrator shortly after perceiving or becoming aware of him for the first time. Rather, she accused her father, a person known to her for her entire life, of sexual abuse to M.M., her mother, and McIntosh, more than three years after the purported abuse. These were not police-arranged identifications where identity was at issue, but disclosures of a known person to friends and family.

None of the justifications for ER 801(d)(1)(iii) are present in this case. There were no procedural safeguards in place to protect against an impermissibly suggestive identification. There was no concern that M.V.'s memory would fade over time and she would be unable to identify her own father in court. Nor were identifications made close in time to the alleged incidents, when M.V. would have perceived her father to be the perpetrator. Admission of M.V.'s identifications was completed untethered from the language and purpose of the hearsay exemption.

Testimony regarding M.V.'s disclosures falls on the improper accusation side of the line rather than the proper identification side of the line. Her statements were not an identification of a person in a lineup,

photomontage, or similar type of reasonably contemporaneous identification required by the rule. The fact of complaint doctrine does not allow identification of the perpetrator to a friend, family member, teacher, and so on, particularly when made years after the incident. Otherwise, the hearsay is simply bolstering the complaining witness's accusations.

The trial court admission of M.V.'s disclosures in this case stretches the identification rule beyond all recognition. To uphold admission of the evidence would essentially sanction witness testimony regarding out-of-court accusations made years after the fact—ignoring the language and purpose of ER 801(d)(1)(iii). M.V. did not identify her father after perceiving him. Rather, she accused him of a crime. Her accusations were then repeated in court by M.M., M.V.'s mother, and McIntosh. This testimony was classic, inadmissible hearsay. This Court should grant review to answer this open question of law.

Finally, Vargas maintains the error in admitting M.V.'s disclosures to her mother, her best friend, and her education advisor prejudiced the outcome of his trial. Br. of Appellant, 36-38. "A witness may not fortify his testimony or magnify its weight by showing that he has previously told the same story on another occasion out of court." State v. Lynch, 176 Wash. 349, 351, 29 P.2d 393 (1934). The repetition of M.V.'s allegations suggested their truth. This improperly bolstered M.V.'s credibility, which

was the State's entire case. Contrary to the conclusion of the court of appeals, there is a reasonable probability that the improper hearsay evidence altered the outcome of Vargas's trial.

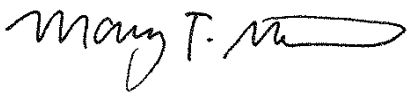
E. CONCLUSION

For the reasons discussed above, this Court should grant review, reverse the court of appeals, and remand for a new trial.

DATED this 16th day of July, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Appendix

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDRE VARGAS, Appellant.	No. 50892-3-II UNPUBLISHED OPINION

GLASGOW, J. — Andre Vargas was convicted of four counts of third degree child rape for raping his daughter during the summer before her ninth grade year when she was 14. At trial, the State presented testimony from the victim, people she had told about the sexual abuse when she was a senior in high school, and an expert on delayed disclosure. The State presented no physical evidence and Vargas did not testify.

Vargas argues that (1) improper opinion testimony deprived him of a fair trial, (2) the trial court erred by admitting hearsay evidence, (3) cumulative error deprived him of a fair trial, (4) the court erred in imposing several conditions of community custody, and (5) the court erred in imposing a $200 criminal filing fee. He also filed a statement of additional grounds.

We affirm Vargas's convictions and remand for the trial court to strike certain invalid conditions of community custody and the criminal filing fee.

FACTS

MV is the daughter of Andre and Kimberly Vargas. MV claimed that in the summer before her freshman year of high school, when she was 14 years old, Vargas sexually abused her for a period of about three months.

According to MV, the abuse always occurred in her parents' bedroom or bathroom while Kimberly was away at work. The abuse included four separate incidents that formed the bases for four counts of child rape. MV also claimed that Vargas showed her a dildo, condoms, a pornographic DVD, and a pornography video on his cell phone showing a woman performing fellatio on a horse.

MV did not immediately tell anyone about the abuse. She first told her friend MM at least several months after the abuse stopped.[1] MV testified that she did not want MM to report the abuse because MV did not want to ruin her family, especially because her brothers were still in school.

It was not until her senior year that MV told her mother, Kimberly. MV said she wanted to tell the police, but she and Kimberly decided to wait. MV explained that Kimberly was "really stressed out" because around the same time, they learned that MV's grandmother had cancer and that one of her brothers was in danger of not graduating. Verbatim Report of Proceedings (VRP) (Vol. 3) at 150-55.

In the spring of her senior year, MV told her school counselor, Ryan McIntosh, about the abuse, who reported the allegations to Child Protective Services. Detective Jessica Whitehead then interviewed MV at school, where MV again told the detective about the abuse.

[1] MV and MM's testimony conflicted about when this conversation occurred.

Following MV's graduation, Whitehead contacted Vargas and seized and searched his cell phone, but found nothing of evidentiary value. The rest of the Vargas family had moved out of their home. Before leaving, MV searched for, but did not find, the pornography, sex toys, and condoms that Vargas had shown her.

The State charged Vargas with four counts of third degree child rape, alleging that Vargas had raped MV on four occasions when she was 14.

Before trial, the State moved to allow MM, Kimberly, McIntosh, and Whitehead to testify about what MV had told them about the abuse. The State relied on ER 801(d)(1)(iii), which establishes that a testifying declarant's earlier out of court statement "of identification of a person made after perceiving the person" is not hearsay. The State asserted that as a result, MV's identification of Vargas as the perpetrator was admissible. Vargas objected on the basis that identification was not at issue in his case, because the alleged perpetrator was MV's father and MV would be testifying. The trial court admitted the statements for identification purposes only, cautioning the State to frame its questions carefully and to warn those witnesses in advance not to provide details of what MV had told them, just the identification.

Also before trial, the State moved to admit several text messages between Vargas and MV. In one exchange at the end of the summer when the abuse occurred, MV told Vargas: "And you didn't screw up my life you've done the world for me but I'm afraid to ever have a [boyfriend] because of what you've done. There's not a day that goes by that I don't think about that." Ex. 1. Vargas replied: "Me too. And I thought I was your boyfriend." Ex. 1; VRP (Vol. 3) at 133.

In December of that year, a few months after the abuse ended, MV sent and saved another text message to Vargas that read: "I honestly just lost most of my respect for you after you did what you did. My whole life has changed and perspective because of that. I see no value anymore." Ex. 1; VRP (Vol. 3) at 139-40. MV's testimony indicates that Vargas was trying to call her around the same time but she did not answer. There is no other evidence that Vargas acknowledged or responded to that message.

The State argued that if the text messages were authenticated they would be admissible as an admission by a party opponent under ER 801(d)(2). Defense counsel replied: "I have a problem with the alleged victim in this case being the one to authenticate, obviously, text messages. . . . I know the Court hasn't seen the text—but I think it would be hard for anyone to say that it's an admission by a party opponent." VRP (Vol. 2) at 40. The trial court then responded: "I'm leaning towards admissibility, but I think it all really hinges on a very strong foundation being laid as far as where the messages came from. . . . And so if the State can satisfy that and we can get through any potential motions by the defense, I would be inclined to admit this." VRP (Vol. 2) at 45.

At trial, the State offered the text messages and Vargas objected as to foundation for authentication. The State then laid foundation for the text messages and the court admitted them without further objection from Vargas. The court then took a brief recess, at which time defense counsel told the court that she "wanted to put on the record" that although she did not object after the State laid foundation for authenticity, she "wasn't negating [her] objections" from the pretrial motions. VRP (Vol. 3) at 128. The court acknowledged her statement, and neither side pursued the matter further.

At trial, MV explained in detail the progression of sexual abuse over the course of several months when she was 14 years old, including the four charged instances of rape. She recounted that her father told her he was teaching her about boys and sex. She explained that her father stopped after she threatened to kill herself or run away, but only after one last sexual encounter. MV testified that she did not initially tell anyone about the abuse, but her grades suffered dramatically and she abandoned volleyball, which she had previously excelled in. It was not until at least several months later when she reported the abuse to her friend, and then her senior year when she told her mother, a school counselor, and finally the police.

Kimberly, MM, McIntosh, and Whitehead all testified about MV's identification of her father as her abuser. They described her demeanor when doing so, without providing details about what she said. MM testified that MV shared something involving Vargas and that "[y]ou could tell it was pretty much like eating her up inside like she needed to spit it out." VRP (Vol. 4) at 337.

Kimberly testified that MV told her that Vargas "had done something to her" and that MV was "shaking and crying" when she told Kimberly. VRP (Vol. 3) at 219-21. During a series of questions exploring why Kimberly did not immediately go to the police when MV disclosed the abuse, the State asked Kimberly: "Did you believe your daughter?" VRP (Vol. 3) at 228. Kimberly replied: "Yes." VRP (Vol. 3) at 228. Vargas did not object.

McIntosh, the school counselor, testified that MV shared "something" with him involving her father and that the information alarmed him. He reported what he learned to Child Protective Services. McIntosh also described MV's demeanor during this disclosure as "ready and willing

to share something, but it was clearly difficult for her to share. She wasn't shedding tears or overly emotional about it. She was pretty matter of fact." VRP (Vol. 4) at 307.

Whitehead also testified that MV made a disclosure to her, identifying the perpetrator as Vargas. Whitehead further testified that after she interviewed MV she obtained copies of text messages between MV and her father from MV's cell phone. Whitehead interviewed Kimberly, and then contacted Vargas.

The jury found Vargas guilty on all four counts. The court sentenced Vargas to 60 months of confinement and imposed several conditions of community custody upon his release, including prohibitions on using or consuming alcohol, being in areas where children's activities regularly occur, using the Internet, and using any computer, phone, or computer-related device with access to the Internet. The court also imposed a $200 criminal filing fee on Vargas, who was indigent.

Vargas appeals his convictions, the imposition of certain community custody conditions, and the criminal filing fee.

ANALYSIS

I. OPINION TESTIMONY

Vargas argues that Kimberly improperly testified about her opinion of MV's truthfulness and this deprived him of a fair trial. Specifically, he challenges one exchange in which the State asked Kimberly: "Did you believe your daughter?" and she replied: "Yes." VRP (Vol. 3) at 228.

Vargas did not object to the State's question, and we generally do not review issues not preserved in the trial court. RAP 2.5(a). Vargas presents two theories to assert that this

testimony warrants reversal despite the lack of objection: (1) the admission of Kimberly's improper opinion testimony was manifest constitutional error reviewable under RAP 2.5(a)(3), and (2) the question constituted prosecutorial misconduct that was so flagrant and ill-intentioned that it could not have been cured by a jury instruction. We disagree.

A. Improper Opinion Testimony

A witness cannot express his or her personal opinion or belief "as to the defendant's guilt, the intent of the accused, or the veracity of witnesses." *State v. Quaale*, 182 Wn.2d 191, 200, 340 P.3d 213 (2014). Here, the State appropriately concedes that Kimberly improperly testified that she believed MV when MV told her about the abuse, a question that should have been left solely for the jury.

The State maintains that nevertheless, Kimberly was not vouching for MV's credibility, but rather establishing her own state of mind at the time MV first disclosed to her. But in *State v. Jones*, we determined that there was "no meaningful difference between allowing an officer to testify directly that he does not believe the defendant and allowing the officer to testify that he told the defendant during questioning that he did not believe him." 117 Wn. App. 89, 92, 68 P.3d 1153 (2003). Regardless of *why* a witness opines on another witness's credibility, the jury improperly learned Kimberly's opinion as to a fact that must be left for the jury.

Even so, because Vargas failed to object at trial, he raises this issue for the first time on appeal and therefore must demonstrate that the brief question and answer amounted to manifest error affecting a constitutional right. RAP 2.5(a)(3). Impermissible opinion testimony implicates the defendant's constitutional right to a jury trial, which includes a jury's independent determination of the facts. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). For a

constitutional error to be "manifest" there must be "a showing of actual prejudice." *Id.* at 935. "'Essential to this determination is a plausible showing . . . that the asserted error had practical and identifiable consequences in the trial of the case.'" *Id.* (quoting *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

"Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed." *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008). We presume the jury followed the court's instructions absent evidence to the contrary. *Id.* at 596. In *Kirkman*, for example, the court concluded there was no prejudice in large part because the jury was properly instructed that jurors "'are the sole judges of the credibility of the witnesses.'" 159 Wn.2d at 937 (quoting Clerk's Papers).

Vargas argues that Kimberly's statement that she believed her daughter certainly swayed the jury, relying on *State v. Johnson*, 152 Wn. App. 924, 219 P.3d 958 (2009). In *Johnson*, multiple witnesses testified that the wife of a man accused of sexually abusing a teenaged neighbor had said that she believed the victim's allegations. *Id.* at 931-33. We held that revealing this fact to the jury "served no purpose except to prejudice the defendant," and that manifest error denied the defendant his right to a fair trial. *Id.* at 934. But in *Johnson*, the witnesses testified about the defendant's wife's emotional reaction to the teenager's allegations, saying that she was "hysterical" and "freaked out." *Id.* at 932-33. The victim also testified that the defendant's wife attempted suicide several hours after she learned of the abuse. *Id.* at 931-32. The *Johnson* court reasoned that the witness statements "were highly prejudicial" because the defendant's "own wife believed the accusations." *Id.* at 933-34.

Although this case is similar in that there was testimony that the victim's mother believed the allegations against her own husband, Kimberly's testimony simply did not produce the same prejudicial effect as the testimony in *Johnson.* That case involved several witness statements describing in detail the wife's intense reaction to the allegations, including a suicide attempt. *See id*. at 931-33. This case, on the other hand, presents only a fleeting and isolated statement that Kimberly believed MV. There were no other references to this statement, even in closing argument, and no other witness testified as to whether Kimberly believed the allegations.

Moreover, the jury here received the same instruction as the juries in *Montgomery* and *Kirkman*, that jurors are the sole judges of witness credibility. We presume the jury followed the instruction absent any evidence to the contrary. *Montgomery*, 163 Wn.2d at 595. Vargas has not presented any evidence that the jury in this case failed to follow the trial court's instructions, and it is his burden on appeal to make a "plausible showing" of prejudice. *Kirkman*, 159 Wn.2d at 927.

Kimberly's statement was fleeting and isolated, and it lacked the dramatic and inflammatory character of the protracted testimony of multiple witnesses from *Johnson*. We accordingly hold that Vargas has not made a plausible showing that this error, on its own, had practical consequences that affected the trial. Kimberly's improper testimony did not amount to a manifest error requiring reversal.

B. Prosecutorial Misconduct

Alternatively, Vargas argues that the prosecutor improperly elicited Kimberly's assessment of MV's credibility and this amounted to prosecutorial misconduct.

To prevail on this claim, Vargas must show "'that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.'" *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003)). Where, as here, the defendant failed to object, the error is reversible only if it is material to the trial's outcome and could not have been remedied. *State v. Jerrels*, 83 Wn. App. 503, 508, 925 P.2d 209 (1996). The defendant is deemed to have waived any error unless he or she shows the comments were "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). To meet this heightened standard, "the defendant must show that (1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

Cross examination is improper when it seeks to compel a witness's opinion as to whether another witness is telling the truth, because such questioning invades the jury's role and is unfair and misleading. *Jerrels*, 83 Wn. App. at 507. Vargas argues this case is analogous to *Jerrels*, where we held it was misconduct for the prosecutor to ask the victims' mother whether she believed they were telling the truth. *Id.* at 508. Jerrels's daughter and stepchildren, all between the ages of 6 and 11, testified that he had raped and molested them. *Id.* at 505. A doctor from the sexual assault clinic testified that one child showed no medical evidence of sexual abuse, but that she observed scarring on one of the other children consistent with sexual abuse. *Id.* at 505-06. Jerrels's wife testified that she never observed any inappropriate activity or had any suspicions of sexual abuse. *Id.* at 506. On cross-examination, the prosecutor repeatedly asked

her whether she believed her children were telling the truth, and she said that she believed that they were. *Id.* at 506-07.

Here, the prosecutor explicitly asked Kimberly whether she believed MV's accusations; in other words, whether MV was telling the truth. This is clearly improper questioning under *Jerrels*. Therefore, because Vargas did not object, the question here is whether the misconduct was material to the trial's outcome and could not have been remedied. *Id.* at 508. In *Jerrels*, we held that the prosecutor's questions were material and highly prejudicial because credibility played such a crucial role in the case. *Id.* We reasoned that "[a] mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so." *Id.* We also noted that no definitive medical evidence linked Jerrels to the abuse, and although two of the young victims provided some corroboration for each other's testimony, there were no other witnesses to the abuse. *Id.*

Although some of the same issues are present here, this case is distinguishable from *Jerrels*. Here, the prosecutor asked only once whether Kimberly believed MV, whereas the prosecutor in *Jerrels* asked several times whether the victims' mother believed them. *See id.* at 507. Vargas's text message to MV stating "I thought I was your boyfriend," was corroborating evidence of MV's accusations, as it suggests some level of inappropriate relationship between them. VRP (Vol. 3) at 133. This case also differs from *Jerrels* because the victims there were 6 and 11 years old, whereas MV had just graduated from high school at the time of trial. The mother's evaluation of her young children's veracity in *Jerrels* would likely have carried more weight than Kimberly's statement here, because the jury could more easily evaluate MV's credibility without relying on a mother's special knowledge of her young children.

The single, isolated question from the prosecutor, which was never again referenced at trial, was not "'so flagrant and ill intentioned'" that the curative instruction could not have removed any prejudice. *Id.* at 508 (quoting *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994)). And the trial court did instruct the jury that it was the sole judge of witness credibility. Accordingly, we hold that this allegation of prosecutorial misconduct does not require reversal.

II. ADMISSION OF OUT-OF-COURT STATEMENTS

Vargas argues that the improper admission of hearsay evidence affected the outcome of his trial. We disagree.

A. The Hearsay Rule and Standard of Review for Evidentiary Error

Hearsay is inadmissible unless otherwise provided by the rules of evidence, statute, or court rule. ER 802. Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted." ER 801(c). Conversely, a statement is not hearsay if it is not offered for the truth of the matter asserted. ER 801(c). And a statement is not hearsay if it is "one of identification of a person made after perceiving the person," the declarant testifies at trial, and the declarant is subject to cross examination concerning the statement. ER 801(d)(1)(iii).

We review de novo a trial court's interpretation of an evidentiary rule. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). When the court has correctly interpreted the rule, we review the decision to admit evidence for abuse of discretion. *Id.* A court abuses its discretion if its decision is based on untenable grounds or made for untenable reasons, which may include a failure to adhere to the requirements of an evidentiary rule. *Id.*

Further, an evidentiary error that does not result in prejudice is not grounds for reversal. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). "'The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.'" *Id.* (quoting *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). Whether a nonconstitutional error is harmless depends on whether, "'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

B. MV's Disclosures

The trial court admitted testimony from Kimberly, MM, McIntosh, and Whitehead under ER 801(d)(1)(iii), explaining that MV had identified her father as her abuser.

Vargas acknowledges that MV's disclosures to McIntosh and Whitehead were admissible because they explained why each took some subsequent action. McIntosh, the school counselor, reported the abuse to authorities and Whitehead began an investigation. Thus, their statements were not offered for the truth of the matter asserted. Although Vargas asserts that these witnesses should not have testified as to MV's demeanor during their conversations with her, her demeanor is not a hearsay "statement" as defined by ER 801. *See State v. Hieb*, 107 Wn.2d 97, 105, 727 P.2d 239 (1986) (mother's testimony of her observations of daughter's demeanor was not hearsay). Nor is there any indication that MV's demeanor when disclosing the abuse was intended as an assertion through nonverbal conduct under ER 801(a)(2).

On the other hand, Vargas argues that Kimberly's and MM's testimony about MV's disclosures to them were improperly admitted.[2] He claims that ER 801(d)(1)(iii) does not apply to MV's disclosures to Kimberly and MM because identity was not at issue in this case. But even if we assume without deciding that these disclosures were improperly admitted as statements of identification, the error was harmless.

MV testified directly and extensively about the four charged incidents of rape and her testimony was unrebutted. We cannot say that additional testimony establishing only that she told her mother and best friend that her father had sexually abused her, without more detail, impacted the outcome of the trial. Indeed, defense counsel could have objected to any of those statements under ER 403 if counsel thought their descriptions of MV's disclosures were overly prejudicial, but no such objections were made. Because there is not a reasonable probability that exclusion of any improperly admitted testimony would have changed the outcome of the trial, we hold that any error was harmless. *See Gresham*, 173 Wn.2d at 433.

C. Text Messages

Vargas argues the trial court improperly admitted a text sent from MV to him that read: "I honestly just lost most of my respect for you after you did what you did. My whole life has changed and perspective because of that. I see no value anymore." VRP (Vol. 3) at 140.

[2] Although Vargas raises and then argues we should decline to apply several other hearsay exceptions, the State concedes that the statements at issue are admissible only as statements of identification pursuant to ER 801(d)(1)(iii) and that Vargas preserved the issue by arguing against their admission at trial. We accordingly accept the State's concessions that no other exceptions to the hearsay rule apply to these statements, and conclude that Vargas preserved the issue for appeal.

Although the testimony reflects that Vargas may have tried to call MV in response, he did not respond by text.

Under ER 801(d)(2)(ii) a statement is not hearsay when it is offered against a party and the opposing party "has manifested an adoption or belief in its truth." A party may manifest adoption of a statement by silence or acquiescence. *State v. Hill*, 6 Wn. App. 2d 629, 640-41, 431 P.3d 1044 (2018), *review granted in part*, 438 P.3d 115 (2019). "Because of the inherently equivocal nature of silence, 'such evidence must be received with caution.'" *Id.* at 641 (quoting *State v. Neslund*, 50 Wn. App. 531, 551, 749 P.2d 725 (1988)). Silence constitutes an admission if (1) the party-opponent heard the accusatory or incriminating statement, (2) the party-opponent was able to respond, and (3) the circumstances were such that it is reasonable to conclude the party-opponent "'would have responded had there been no intention to acquiesce.'" *Hill*, 6 Wn. App. 2d at 641 (quoting *Neslund*, 50 Wn. App. at 551).

Vargas claims this text message was inadmissible hearsay because it was MV's out-of-court statement used to prove the truth of the matter asserted, that he had sexually abused her. Because there is no evidence of how or whether Vargas ever responded to this text message, he claims his failure to respond cannot amount to a statement of a party-opponent by acquiescence under ER 801(d)(2) and is therefore inadmissible.

1. Sufficiency of Objection

At the outset, the State argues that Vargas did not make a reasonably specific objection to preserve this issue for appeal. "The propriety of an evidence ruling will be examined on appeal if the specific basis for the objection is 'apparent from the context.'" *State v. Braham*, 67 Wn.

App. 930, 935, 841 P.2d 785 (1992) (quoting *State v. Pittman*, 54 Wn. App. 58, 66, 772 P.2d 516 (1989)).

"'[W]hen a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling.'" *State v. Powell*, 126 Wn.2d 244, 257, 893 P.2d 615 (1995) (quoting *State v. Carlson*, 61 Wn. App. 865, 875, 812 P.2d 536 (1991)). In other words, when a trial court "'makes only a tentative ruling [on the admission of evidence] subject to evidence developed at trial, the parties are under a duty to raise the issue at the appropriate time with proper objections at trial.'" *Id.* at 256 (quoting *State v. Koloske*, 100 Wn.2d 889, 896, 676 P.2d 456 (1984)).

The trial court tentatively determined the messages were admissible under ER 801(d)(2), contingent on the State laying proper foundation, which the State ultimately did at trial. Vargas contends that this constituted a final ruling on whether the hearsay exception applied, because counsel had articulated her concerns on that front and the court stated it would admit the messages so long as the State laid proper foundation. The State counters that the messages' admissibility was not addressed until trial, at which point Vargas was obligated to renew his objection. Because he did not, the State argues, he failed to preserve the issue for appeal.

The trial court's ruling here was tentative and did not squarely address Vargas's concerns about the admission of a party-opponent issue. Vargas was therefore obligated to renew any objection on that basis at the appropriate time at trial. *See Powell*, 126 Wn.2d at 256. When the State offered the messages for admission and publication at trial, after satisfying Vargas's objection for authentication, Vargas did not object. However, Vargas did signal a desire to preserve his other objections from the parties' pretrial discussions, including presumably his

concern that his lack of response to this text message did not constitute an admission sufficient to trigger the hearsay exception. By notifying the trial court of his other continuing objections, Vargas arguably preserved this claimed error for appeal.

2. Harmless Error

However, even if we assume both that Vargas preserved this alleged error for appeal and the trial court did in fact err by admitting the text message, any error was harmless. The improper admission of evidence constitutes harmless error if the evidence is of minor significance compared with the overall body of evidence. *Hill*, 6 Wn. App. 2d at 647.

We hold the outcome of the trial would not have been materially affected had this text message been excluded. MV gave consistent, unwavering testimony describing multiple incidents of abuse, and Vargas did not raise any serious doubt as to her credibility. Furthermore, this specific text message from MV was far less damaging to his case than the other text messages that were properly admitted, particularly Vargas's message saying that he thought he was MV's boyfriend. Because any alleged error was insignificant compared with the overall body of evidence, we hold that any error was harmless.[3]

III. CUMULATIVE ERROR

Vargas argues that cumulative error deprived him of his right to a fair trial. He contends that the combined effect of the alleged errors discussed above unfairly bolstered MV's credibility to the point that reversal is required.

[3] Vargas also argues, in the alternative, that his counsel's failure to provide an adequate objection constituted ineffective assistance of counsel. Because we assume that counsel's objection was sufficient to preserve the alleged evidentiary error, we reject this ineffectiveness claim.

Under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of errors during trial effectively denied him his 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). The doctrine does not require reversal where the errors are few and have little or no effect on the trial's outcome. *Id.*

After carefully reviewing the entire record, we do not believe cumulative error warrants reversal. In light of MV's unwavering testimony describing the multiple incidents of sexual abuse, Vargas's failure to raise significant concerns about her credibility or truthfulness, and the text message from Vargas saying he thought he was her boyfriend, cumulative error does not warrant reversal. We affirm the convictions on all counts.

IV. COMMUNITY CUSTODY CONDITIONS

Vargas argues that several of his community custody conditions should be stricken because they are not crime-related. Specifically, Vargas challenges conditions prohibiting him from using or consuming alcohol, being in areas where children's activities regularly occur, using the Internet, and using any computer, phone, or computer-related device with access to the Internet. The State concedes Vargas's arguments relating to alcohol use and being in areas where children's activities regularly occur were improperly imposed. We accept the State's concessions.

Sentencing courts have the authority to require offenders to comply with "any crime-related prohibitions" during their term of community custody. RCW 9.94A.703(3)(f). A crime-related prohibition is one that "directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).

We review a sentencing court's imposition of crime-related conditions of community custody for abuse of discretion. *State v. Irwin*, 191 Wn. App. 644, 656, 364 P.3d 830 (2015). We review the factual basis for a crime-related condition for substantial evidence. *Id.*

The trial court imposed a condition prohibiting Vargas from using or consuming alcohol. This condition was not imposed as a "crime-related" condition but rather as a special condition for sex offenses under RCW 9.94A.703. CP at 91. RCW 9.94A.703(3)(e) permits sentencing courts to prohibit offenders from "possessing or consuming alcohol." However, Division One of this court has recognized that *using* alcohol is different than *consuming* alcohol, and the statute only authorizes restrictions on the latter and not the former. *State v. Norris*, 1 Wn. App. 2d 87, 99-100, 404 P.3d 83 (2017), *aff'd in part, rev'd in part on other grounds by State v. Nguyen*, 191 Wn.2d 671, 425 P.3d 847 (2018). Hence, the words "use or" should be stricken from this condition.[4]

The trial court imposed a condition that would prohibit Vargas from being in areas where children's activities regularly occur. Here, all of the incidents of abuse occurred in Vargas's home and there was no evidence that he ever sought contact with children who were strangers to him. This condition is not crime-related and should be stricken, consistent with the State's concession.

Vargas challenges conditions that prohibit him from using the Internet or any computer, phone, or computer-related device with access to the Internet. He reasons that there is no evidence that he used the Internet or a computer to carry out the offenses against MV. The State

[4] Although the State also concedes that a condition requiring Vargas to obtain an alcohol dependency evaluation should be stricken, it appears the trial court did not check the box to impose this condition in this case.

counters that Vargas used his phone to show MV a video of a woman performing fellatio on a horse during the period of abuse. The State argues that the conditions are appropriate because a modern cell phone is essentially a computer, and Vargas presumably used the Internet to "pull up" the video of the horse. Br. of Resp't at 28-29.

We hold that these conditions are sufficiently connected to the facts underlying Vargas's crime such that it was within the trial court's discretion to impose the condition. Even if Vargas did not use his phone or the Internet during the specific instances of rape, he did use his phone to show MV a pornography video during the time period he was abusing her. This incident formed part of the pattern of abuse, and was arguably relevant to Vargas's "grooming" of MV. Hence, Vargas's phone and Internet use "contributed" to the crime and so the conditions prohibiting their use are sufficiently crime-related. *State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008). The trial court did not abuse its discretion in imposing these conditions.

V. CRIMINAL FILING FEE

Vargas argues the $200 criminal filing fee was improperly imposed. We agree.

In 2018 the legislature amended RCW 36.18.020(2)(h) to bar imposition of the mandatory criminal filing fee for defendants who were indigent at the time of sentencing under RCW 10.101.010(3)(a)-(c). LAWS OF 2018, ch. 269, § 17. This amendment applies prospectively to cases on direct appeal when the law changed. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

The court found Vargas to be indigent for purposes of appeal. Thus, as Vargas was indigent at the time of sentencing, the $200 criminal filing fee violates the amendment to RCW 36.18.020(2)(h) and should be stricken.

VI. STATEMENT OF ADDITIONAL GROUNDS

In his statement of additional grounds, Vargas references one text he received from MV and one text he received from Kimberly, but does not include any argument as to their relevance. Although RAP 10.10 does not require Vargas to refer to the record or cite authority, he is required to inform us of the "nature and occurrence of [the] alleged errors." These assertions of error are too vague to allow us to identify the issues and we do not reach them.

CONCLUSION

We affirm Vargas's convictions and remand for the trial court to strike the improper conditions of community custody as described above and to strike the $200 criminal filing fee.

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.

Glasgow, J.

We concur:

Worswick, J.

Maxa, C.J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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