SUPREME COURT NO. 97831-0
COA NO. 77561-8-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE RENE GOMEZ,

Petitioner.

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

The Honorable Judith Ramseyer, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Jose Rene Gomez asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Gomez requests review of the decision in State v. Jose Rene Rene-Gomez, Court of Appeals No. 77561-8-I (slip op. filed October 7, 2019), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. In determining whether a statement qualifies as hearsay, whether the proper standard of review is abuse of discretion or de novo, and whether the text message sent by the complaining witness was inadmissible as a prior consistent statement?

2. Whether the prosecutor committed reversible misconduct in closing argument by disparaging defense counsel?

3, Whether defense counsel was ineffective in failing to object to the prosecutor's misconduct or request a curative instruction?

4. Whether cumulative error violated petitioner's due process right to a fair trial?

D. STATEMENT OF THE CASE

Yessica Orozco-Garibay and Antonio Delgado had a daughter, DDO, born in 2001. RP 141-42. The parents broke up in 2010. RP 189.

DDO loved her father and took the breakup hard. RP 189. Jose Gomez began a relationship with Orozco and eventually came to live with her and DDO. RP 147-48, 150-51. DDO started acting out. RP 207-08. DDO didn't like Gomez because he tried to act like a father. RP 241, 304, 306. Gomez rarely gave her permission to do things, such as allowing her to go out with friends. RP 242, 308. Her biological father would let her go out whenever she wanted. RP 309. DDO wanted to move in with her father and asked him to let her, but he would decline. RP 272, 310.

In June 2015, DDO told her mother that Gomez touched her. RP 161-62. When confronted, Gomez denied the allegation. RP 174. DDO went to live with her father after she made the allegation and the authorities intervened. RP 172. DDO packed up her belongings to move in with her father before she made the allegation. RP 315, 383, 404. The investigating detective described DDO as happy to leave. RP 404.

At trial, DDO claimed Gomez touched her more than 100 times. RP 318. She said he touched her in front of her mother, but that her mother was probably looking the other way. RP 299. DDO asserted Gomez touched her breasts, butt and vagina during bouts of play-tickling. RP 244-45. She described a specific instance where he "tried" to touch her vagina while her mother was in the shower. RP 259-60. She described another time where he touched her breast, over her clothes, in

the living room. RP 262. She yelled for her mother, who did not respond. RP 261-64. She also described a time when Gomez came up behind her and was "trying" to touch her butt while she was washing dishes. RP 268.

DDO said Gomez would "try" to touch her. RP 259, 264-68, 359. Upon prompting from the prosecutor, she later claimed that when she said "try," she did not mean "try," but rather meant he actually touched her. See RP 297, 321-22, 351, 362-63. This was confusing. For example, referring to a park incident, DDO initially testified he actually touched her. RP 319. Then she said he tried but did not actually touch her. RP 320. Then she claimed she testified he actually touched her "Because to me try means yes, that he did touch me." RP 320. Referring to a bedroom incident, she testified he tried to touch her, but did not remember if he actually touched her, thus conveying that "try" really meant "try." RP 321.

DDO contradicted herself on what she said in a defense interview, where she explained "try" means he did not actually touch her. RP 362-63. At trial, DDO claimed "I told you and I told him that for me, try meant that he did touch me, but I would get away." RP 363. She also contradicted her trial testimony. Regarding a camping incident, she initially testified Gomez tried to kiss but she pulled away. RP 265-67. She was asked "Did you and Jose kiss on the lips?" RP 266. Her answer: "No." RP 266. On cross examination, she was asked: "If I recall correctly,

you were asked, 'Did he kiss you on the lips?' and you said 'No.'" RP 342. Her answer: "No. I did say 'yes.'" RR 342.

DDO's mother bought her some underwear in April 2015. RP 211-12, 253, 255. The day DDO told her mother about being touched, DDO and Gomez were arguing via text messaging about Gomez wanting her to send him a photo. RP 273. DDO testified she had received the underwear within a week of the ongoing text message exchange. RP 282. On April 21, he messaged "take a picture of the white shorts and send it to me please." RP 280-81. DDO believed he was referring to the recently purchased underwear. RP 280. She declined the request. RP 281. He offered to let her sleep at a friend's house and give her money for the weekend if she sent him the photo. RP 281-82.

On April 24, when she asked to go with a friend to a movie, Gomez responded "remember what you have to do if you want to go. If your answer is not mine is not too." RP 283. She said, "No because I can tell my mom because that's not a good thing." RP 283. He responded "It's okay. You can tell your mom and I will tell her what I know about you." RP 284. He was referring to DDO having a boyfriend. RP 284. He said he would talk to her mom that day. RP 285. She said she was going to tell her everything. RP 288. He said "Okay. No problem. I'm ready. Are you sure you want to do this just for one pic." RP 288. She told him she

didn't want to send him a picture and "You keep touching me when I told you to stop and you don't stop." RP 289. Defense objected to this text message as hearsay, but the trial court admitted it under the state of mind exception and under the rule of completeness. CP 32-33; RP 41-43, 47.

Gomez asked for a "pic" again on April 25 and May 10. RP 290-92. On May 20, he conditioned his permission for her to go to the park on her giving the photo. RP 293-94. DDO said she'd tell her mother. RP 295. He said if she did "You guys will have to leave my house." RP 295.

In a police interview, Gomez denied inappropriately touching DDO. RP 392. Gomez acknowledged he requested a photo of DDO wearing underwear. RP 399-400. DDO had told him her underwear was too small and he wanted proof that it was so. RP 399-400, 417.

After receiving the above evidence, the jury found Gomez guilty of two counts of second degree child molestation and one count of communication with a minor for immoral purposes. CP 60-62.

On appeal, Gomez argued the trial court erred in admitting the challenged text message, the prosecutor committed misconduct in disparaging defense counsel, and counsel was ineffective in failing to object to the misconduct or request a curative instruction. The Court of Appeals affirmed. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT WRONGLY ADMITTED A TEXT MESSAGE INTO EVIDENCE, REQUIRING REVERSAL OF THE CONVICTIONS.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Unless an exception or exclusion applies, hearsay is inadmissible. ER 802. The trial court admitted, over defense counsel's hearsay objection, a text message sent from DDO to Gomez in which she states that Gomez touched her. The trial court admitted the statement under the state of mind exception to the hearsay rule and the rule of completeness. The Court of Appeals affirmed admission on a different ground — that the text message qualifies as a prior consistent statement under ER 801(d)(1)(ii), which is not hearsay. Slip op. at 17-19.

The Court of Appeals reviewed the trial court's decision for abuse of discretion. Slip op. 18. Whether a statement qualifies as hearsay is reviewed de novo. State v. Gonzalez-Gonzalez, 193 Wn. App. 683, 688-89, 370 P.3d 989 (2016); State v. Hudlow, 182 Wn. App. 266, 281, 331 P.3d 90 (2014); Lynn v. Labor Ready, Inc., 136 Wn. App. 295, 306, 151 P.3d 201 (2006), State v. Edwards, 131 Wn. App. 611, 614, 128 P.3d 631, 632 (2006) (citing State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001)). The Court of Appeals decision, in relying on an abuse of

discretion standard, conflicts with prior precedent that review is de novo. Discretionary review is warranted under RAP 13.4(b)(2).

Furthermore, the abuse of discretion standard is improper when the Court of Appeals relies on a basis for admission that the trial court did not rely on to affirm. At the trial level, the State did not seek admission of the statement as a prior consistent statement and the trial court did not admit it on that ground. It is incoherent to say the court did not abuse its discretion in admitting the evidence as a prior consistent statement when the court did not exercise its discretion to admit the evidence on that ground. See Colorado Structures, Inc. v. Blue Mountain Plaza, LLC, 159 Wn. App. 654, 660, 246 P.3d 835 (2011) ("It is impossible for a trial court to abuse discretion it was never called upon to exercise.").

This Court has stated "when reviewing for an abuse of discretion, we will not substitute our judgment for that of the trial court." In re Pers. Restraint of Duncan, 167 Wn.2d 398, 406, 219 P.3d 666 (2009). But when an appellate court affirms the admission of evidence on a ground that is different than used by the trial court, the appellate courts has substituted its judgment for that of the trial court. There is therefore no reason for the abuse of discretion standard to apply. In the absence of a trial court decision on the dispositive ground for admission, there is no decision calling for deference. Review should be de novo when the Court

of Appeals substitutes its judgment for that of the trial court in upholding the admission of evidence on a basis not relied on by the trial court.

Mere repetition of a statement does not imply veracity. State v. Purdom, 106 Wn.2d 745, 750, 725 P.2d 622 (1986). "The State, as proponent of admission of the prior consistent statement, must demonstrate that it was made before the time that the supposed motive to falsify arose." State v. Osborn, 59 Wn. App. 1, 5, 795 P.2d 1174, review denied, 115 Wn.2d 1032, 803 P.2d 325 (1990). Conversely, an out-of-court statement consistent with the witness's trial testimony is inadmissible if such statement was made *after* the motive to fabricate arose. State v. Harper, 35 Wn. App. 855, 857-58, 670 P.2d 296 (1983), review denied, 100 Wn.2d 1035 (1984).

DDO's prior consistent statement was made after her motive to fabricate arose and is therefore inadmissible as a prior consistent statement. In holding otherwise, the Court of Appeals misinterpreted the prior consistent statement rule. The Court of Appeals stated: "The record shows D.D.-O. and Rene-Gomez argued about her request to send a photograph of her in the underpants in April 2015, well before she told her mother in June 2015 that Rene-Gomez sexually abused her. Because her mother did not believe her, D.D.-O. told her father on June 30 that Rene-Gomez sexually abused her." Slip op. at 19. This does not answer the

question posed by the rule. The question is not whether a prior consistent statement was made before an ultimate disclosure was given, but whether "the prior consistent statement was made *before* the witness's motive to fabricate arose." State v. Thomas, 150 Wn.2d 821, 865, 83 P.3d 970, 992 (2004).

DDO's motive to fabricate arose after her biological father moved out and Gomez took his place by acting as a father figure. DDO resented Gomez, chafed at his discipline, bucked against restrictions imposed on her social life, and acted out. RP 189, 147-51, 207-08, 241-42, 272, 304-10. Her father, meanwhile, spoiled her. RP 198. As a result, DDO expressed her desire to move out and live with her father well before she sent the text message and later made the abuse allegation to her mother. DDO testified that she "always" asked her father if she could move in with him and that she first developed this desire about a year after Gomez moved. RP 272, 310. Gomez moved in around 2011, meaning the motive to fabricate arose around 2012, well before the text message at issue here. RP 142, 215, 240. DDO wanted to move out and be with her father and the abuse allegation provided a basis to get what she wanted.

The Court of Appeals said defense counsel's closing argument "focused on the timing of the argument and the disclosure to argue D.D.-O. was not credible." Slip op. at 19. Whatever the "focus" of argument,

defense counsel pointed out circumstances for why DDO had a motive to lie that predated the text message at issue here: "We know that [DDO] wanted to get out of the apartment. We knew that [DDO] didn't like Mr. Gomez. We know that [DDO] was acting out, that she was rebellious. She wanted to be out with her friends on the weekdays. We know that Yessica asked Mr. Gomez to take a more active role in enforcing the rules[.]" RP 535. Counsel then turned to the significance of the June 2015 argument, which represented the culmination of a process that started long before DDO sent the text message at issue. RP 535-36.

Counsel later returned to the reasons why DDO had a motivate to fabricate long before the June 2015 argument: "She doesn't care about Mr. Gomez. Mr. Gomez is not her real dad. Mr. Gomez doesn't spoil her like Antonio. Mr. Gomez doesn't let her do whatever she wants. Remember that [DDO] always asked Antonio if she could move in with him, and he said, 'Not now. I don't have room for you. Wait.' And then Antonio's sister moves to Mexico. She has room in her house. Antonio moves, and Diana begins packing before police are even involved. Then this allegation comes out. What a coincidence." RP 544-45. The motive to fabricate arose and endured after her father moved out and Gomez moved in. It was therefore inadmissible as a prior consistent statement.

Evidentiary error requires reversal if there is a reasonable probability that the error affected the outcome. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). The improperly admitted text message formed an important part of the State's case. The prosecutor said so in closing argument: "This message is incredibly important." RP 523. It was important because the text message corroborated the indecent liberties allegations. It existed independent of DDO's confusing trial testimony on the matter. Without the text message, all that is left is DDO's say-so, with no extrinsic evidence to back up the allegation. To convict on the indecent liberties charges, the jury needed to find DDO credible. The improperly admitted text message bolstered her credibility. And not just on the indecent liberties counts. As acknowledged by the prosecutor in closing, the text messages were relevant to all counts, and showed an overlap between sexual contact and sexual communication. RP 517, 534. The improperly admitted text message about touching made it more likely that the jury would disregard Gomez's defense to the communication charge — that he requested the photo for a non-sexual purpose, i.e., he wanted to see if the underwear fit. Under the circumstances, there is a reasonable probability the error affected the outcome on all charges, requiring their reversal.

2. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DEPRIVED GOMEZ OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct can violate the due process right to a fair trial. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. In this case, the prosecutor committed misconduct by disparaging defense counsel. The misconduct denied Gomez his right to a fair trial, requiring reversal of the convictions. In the alternative, defense counsel was ineffective in failing to object to the misconduct or request a curative instruction. Gomez seeks review under RAP 13.4(c) and (d).

a. The prosecutor committed misconduct in disparaging defense counsel.

In cross-examination, defense counsel questioned DDO about her claim that she successfully fought off Gomez's attempts to touch her even though Gomez was physically much larger. RP 325. In closing argument, the prosecutor addressed defense counsel's attempt to discredit DDO's version of events in this manner:

> Lastly, [DDO] was not molested because she was to fight off a larger defendant. And if you remember Mr. Cyr asked [DDO] about her size, she said she was about four feet, I believe, and under a hundred pounds. She agreed that Mr. Gomez was much bigger than her. And Mr. Cyr's questions sounded surprised that this small girl was able to fight off

> such a larger attacker. First, *it is fairly disgusting, disrespectful, and offensive to say that a sexual assault victim should not be believed because she was able to stop her attacker from further harming her.* Remember, many of these incidents, they occurred in the house, and it would be logical for Mr. Gomez not to put up much of a fight when he knows that all it takes is Yessica to round the corner at the wrong time, and then his cover is blown. This would have been a terrifying, horrifying experience for a young girl, and perhaps [DDO] even acted stronger than she knew possible when she started kicking at and flailing her limbs when Mr. Gomez grabbed her. So, it is possible that she was able to fight him off. And I want you to think about the opposite for a second. If Mr. Cyr asked her that question and [DDO] stated that she did not fight off Mr. Gomez, then the argument would likely be to you, "Well, she's lying because of course a victim would try to fight off her attacker." The fact is is that none of us are in a position to opine how [DDO], a sexual assault victim, should have behaved during that attack. She's the victim. The onerous is not on her to act in any certain way. RP 532-33 (emphasis added).

Every defendant in a criminal case has the due process and Sixth Amendment right to present a defense. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. VI and XIV; Wash. Const. art. 1, §§ 3, 22. No prosecutor may employ language that "limits the fundamental due process right of an accused to present a vigorous defense." Sizemore v. Fletcher, 921 F.2d 667, 671 (6th Cir. 1990). A prosecutor can argue the defense theory is unsupported by evidence, but "a prosecutor must not impugn the role or integrity of defense counsel." State v. Lindsay, 180 Wn.2d 423, 431-32, 326 P.3d 125 (2014).

The prosecutor's accusation that defense counsel's argument was "disgusting, disrespectful, and offensive" falls within the category of impermissible disparagement. RP 533. In effect, the prosecutor invited the jury to find defense counsel acted immoral in having the temerity to put on a defense by means of such a theory. The prosecutor cast defense counsel in the role of someone who has offended community values: how dare counsel act so unethically and unprofessionally as to attack the complaining child witness's credibility in this manner?

Prosecutorial statements that malign defense counsel are impermissible because they can damage a defendant's opportunity to present his case. Lindsay, 180 Wn.2d at 432. Such statements "strike at the very fundamental due process protections that the Fourteenth Amendment has made applicable to ensure an inherent fairness in our adversarial system of criminal justice." Bruno v. Rushen, 721 F.2d 1193, 1195 (9th Cir. 1983). The prosecutor's comment damaged Gomez's opportunity to put on a defense by casting the defense attack on DDO's credibility as morally corrupt and offensive.

There is another instance of misconduct. In closing argument, the prosecutor discounted defense counsel's attempt to make the lack of physical evidence, including DNA, rape kit, and forensic evidence, a factor in the case. RP 515-17. That portion of the argument is fine. But the prosecutor

later returned to the point and, in doing so, stepped over the line: "So, what exactly is the State's burden? During the course of any trial, you're going to receive a lot of information, a lot of facts, and much of that information will be useful in order to decide whether the defendant is guilty. *But some of that information, its sole purpose is to muddy the waters or to distract[.]*" RP 520. The prosecutor then went on to address what the State needed to prove. RP 520. And what the State did not need to prove, including DNA, a sexual assault kit, injury to DDO, additional eyewitnesses, corroborating evidence, a confession, a motive, DDO's anger, that she was a typical victim, that the text messages were or were not deleted. RP 520-21.

The prosecutor did not explicitly identify defense counsel as the one who gave information to the jury, the "sole purpose" of which was to "muddy the waters or to distract[.]" RP 520. But there were only two parties in the case. The prosecutor was not accusing himself of giving the jury misleading information. That leaves defense counsel as the culprit. In context, the prosecutor was telling the jury that defense counsel was purposefully trying to obfuscate the issues and confuse the jury.

The implication of deception and dishonesty on the part of defense counsel is improper. Lindsay, 180 Wn.2d at 433 (calling counsel's argument a "crock"); State v. Thorgerson, 172 Wn.2d 438, 451-52, 258 P.3d 43 (2011) (referring to defense counsel's presentation as "bogus" and

involving "sleight of hand"); State v. Warren, 165 Wn.2d 17, 29-30, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009) (prosecutor told the jury there were a "number of mischaracterizations" in defense counsel's argument as "an example of what people go through in a criminal justice system when they deal with defense attorneys" and described counsel's argument as a "classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing."). The prosecutor's comment qualifies as an attack on counsel's honesty and integrity because it conveyed the message that defense counsel tried to mislead the jury by muddying the waters and creating distraction.

Defense counsel did not object to the misconduct but appellate review remains available in the absence of objection if the misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). "[T]he failure to object will not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial." State v. Walker, 182 Wn.2d 463, 477, 341 P.3d 976, cert. denied, 135 S. Ct. 2844, 192 L. Ed. 2d 876 (2015). Disregard of a well-established rule of law is deemed flagrant and ill-intentioned misconduct. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018, 936

P.2d 417 (1997). A prosecutor's misconduct is also flagrant and ill-intentioned where case law and professional standards available to the prosecutor clearly warned against the conduct. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012). Case law in existence well before Gomez's trial, such as that cited here, clearly warned against the prosecutor's improper conduct in this case.

"Arguments that have an 'inflammatory effect' on the jury are generally not curable by a jury instruction." State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158, review denied, 175 Wn.2d 1025, 291 P.3d 253 (2012) (quoting Emery, 174 Wn.2d at 763). The prosecutor's expression that defense counsel's argument was "disgusting, disrespectful, and offensive" is inflammatory. RP 533. The statement is geared towards turning the jury against defense counsel and Gomez through invocation of morality. The prosecutor essentially called counsel immoral for putting on the defense. The prosecutor tried to make the jury angry at defense counsel. The danger is that he succeeded.

The remark about defense counsel eliciting information that muddied the waters and distracted from the real issues in the case is less inflammatory but should still be considered for its cumulative effect. RP 520. The cumulative effect of misconduct can overwhelm the power of instruction to cure. Glasmann, 175 Wn.2d at 707.

The evidence against Gomez was not overwhelming. DDO's testimony was shaky because she seemed to twist the meaning of her own words and contradicted herself. It was primarily her word against Gomez's denial that he touched her. The alleged sexual import of the text messaging, meanwhile, was susceptible to a non-sexual interpretation. RP 399-400, 417. Under these circumstances, there is a substantial likelihood that the prosecutor's misconduct affected the outcome.

b. Counsel was ineffective in failing to object to the misconduct or request curative instruction.

Gomez is guaranteed the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const., art. I, § 22. If a proper objection or request for a curative instruction could have cured the prejudice resulting from the misconduct, then defense counsel was ineffective in failing to take such action.

Defense counsel is ineffective where (1) the attorney's performance is deficient and (2) the deficiency prejudices the defendant. Strickland, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. Only legitimate trial strategy or tactics constitute reasonable

performance. State v. Kyllo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). "If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance." In re Pers. Restraint of Cross, 180 Wn.2d 664, 722, 327 P.3d 660 (2014).

The prosecutor's comments were improper. If an objection and instruction could have redirected the jury to the proper considerations and cured the prejudice resulting from the improper comments, then counsel had no legitimate tactical reason for not objecting. See State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (defense counsel deficient in failing to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument). Instead of a timely objection and curative instruction to disregard the improper argument, the jury was left to consider them as a proper part of deliberations. No conceivable legitimate tactic explains this choice. See Burns v. Gammon, 260 F.3d 892, 895-96 (8th Cir. 2001) (had counsel objected and prompted a curative instruction in response to the prosecutor's improper comment, prejudice would have been avoided).

The less than overwhelming case presented by the State rendered Gomez's trial vulnerable to prejudicial comments unfairly tipping the jury in favor of the State. See section E.1., supra. Reversal is required because the deficiency undermines confidence in the outcome.

3. CUMULATIVE ERROR DEPRIVED GOMEZ OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

Gomez has the due process right to a fair trial. Davenport, 100 Wn.2d at 762; U.S. Const. Amend. XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a new trial is required when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). An accumulation of errors affected the outcome in Gomez's case, including (1) improper admission of the text message (section E.1., supra); (2) prosecutorial misconduct (section E.2.a., supra); and (3) ineffective assistance of counsel (section E.2.b., supra).

F. CONCLUSION

For the reasons stated, Gomez requests that this Court grant review.

DATED this 6th day of November 2019.

Respectfully submitted,

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State of Washington

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

THE STATE OF WASHINGTON, Respondent, v. JOSE RENE RENE-GOMEZ, Appellant	)	No. 77561-8-I UNPUBLISHED OPINION FILED: October 7, 2019

SCHINDLER, J. — A jury convicted Jose Rene Rene-Gomez of two counts of child molestation in the second degree and communication with a minor for immoral purposes. Rene-Gomez seeks reversal, arguing (1) the information omitted an essential element of the crime of communication with a minor for immoral purposes, (2) the court erred in admitting a text message into evidence, and (3) prosecutorial misconduct during closing argument and cumulative error violated his right to a fair trial. Rene-Gomez also challenges imposition of a number of community custody conditions. We affirm the jury convictions and the judgment and sentence.

FACTS

Y.O.-G. and A.D.G. are the parents of D.D.-O. and her younger sister B.D. Y.O.-G. and A.D.G. separated in 2010 when D.D.-O. was in the third grade. D.D.-O. "loved

her dad very much" and was very upset and "sad" when her parents separated. D.D.-O. spent time with A.D.G. every month.

In 2011, Y.O.-G. and her two daughters moved into an apartment with her boyfriend Jose Rene Rene-Gomez. Rene-Gomez assumed a parenting role with D.D.-O. and B.D. and insisted they "call him Dad."

Rene-Gomez would often wrestle or "play fight[ ]" with the girls and tickle them on the stomach. After D.D.-O. turned 11, when Rene-Gomez wrestled with her, he "started touching other places" such as her breasts, buttocks, and vagina. D.D.-O. "didn't like it" and "tried to stop playing around like that with him." D.D.-O. would get away from Rene-Gomez "[a]s fast as [she] could" or avoid him by locking herself in the bathroom. Sometimes, Rene-Gomez would hold down D.D.-O.'s arms to prevent her from getting away.

D.D.-O. said that "whenever my mom wasn't around," Rene-Gomez would try to touch her breasts with his hands over her clothes. One time, Rene-Gomez tried to put his hands down D.D.-O.'s shorts to touch her vagina. Another time while on a camping trip, Rene-Gomez kissed D.D.-O. on the lips, not "like a dad kissing a daughter." D.D.-O. tried to avoid Rene-Gomez at home by spending most of the time in her bedroom.

When D.D.-O. was approximately 13 years old, Y.O.-G. asked Rene-Gomez to help her enforce the rules with D.D.-O. D.D.-O. had to ask Rene-Gomez for permission to do certain things. D.D.-O. and Rene-Gomez often exchanged text messages in Spanish and in English when she asked for permission to do "something or go[ ] somewhere."

In April 2015, Y.O.-G. purchased underwear for 13-year-old D.D.-O., including a pair of white "boy cut" underpants. On April 20, D.D.-O. sent a text message to Rene-

Gomez saying she was delayed but was on her way home. In response, Rene-Gomez said, "[I]s ok I want you to send me a pic of you." D.D.-O. sent Rene-Gomez a photograph of her face. Rene-Gomez responded, "Thank u for the pic" with three "kissy face" emojis.[1]

The next day on April 21, Rene-Gomez sent D.D.-O. a text at 4:57 p.m. asking, "Are you there??" D.D.-O. responded, "I was fixing my room why." Rene-Gomez responds, "Ahhh ok good. Are you in your room?" D.D.-O. said, "No," she was in the bathroom. Rene-Gomez sent a text message asking D.D.-O. to send him a picture of her in the white boy-cut underpants—"[Take] a pic of you with the white short and send to me please." D.D.-O. asked, "Why." Rene-Gomez responded, "Cause I want tha pic[ ]please. . . . Send to me!! Please." D.D.-O. said, "I can't." Rene-Gomez insisted, "Yes you can!!" Rene-Gomez then sent a text message telling her, "Ok. [L]et make a deal! If you send the pic [I] will let you sleep over in joselin house and will give you money for tha night, this weekend!!" D.D.-O. responded, "I want to sleep at josselins but I'm not sending no pic." Rene-Gomez sent a text message saying, "Just think about it! Is your choi[c]e."

At 10:00 a.m. on April 24, D.D.-O. sent Rene-Gomez a text message asking for permission to go to a movie: "Dad can I go see a movie today with josselin?" Rene-Gomez responded, "Remember what you has to do if you want to go!! If you answer is not! [M]y is not too." D.D.-O. replied, "No because I can tell my mom what you want because that's not a good thing." Rene-Gomez then texted, "Is ok you can tell your mom . . . [a]nd I will tell her what [I] [k]now about you." D.D.-O. replied, "I will tell her

[1] An "emoji" is a small symbol or image used in electronic communication, including text message, to convey information or the writer's emotions.

everything." Rene-Gomez asked, "Are you sure you want to do this?? Just for one pic?" D.D.-O. replied, "I don't want to send a pic and you keep touching me when I told you to stop and you don't stop and you get mad because I don't like it and take it out on me even though I [b]ehave well." D.D.-O. did not tell Y.O.-G. that day about Rene-Gomez touching her because she was "scared" he would kick them out of the apartment.

On April 25, Rene-Gomez asked D.D.-O. again to send the photograph—"I want a pic of you!! Please . . . . Please!!!"—followed by more text messages that said, "Please please please" with four "[c]rying" emojis and, "Some day you gonna need something from me." D.D.-O. refused the repeated requests to take a photograph of herself in the white underpants.

On May 20, D.D.-O. sent a text message to Rene-Gomez asking for permission to go to the park with a friend. Rene-Gomez responded, "You know my answer!! . . . When I asked you to send me a pic and you said no. . . . My answer will be no whenever you want to go out, do you remember??" D.D.-O. responded, "Please[ ] dad . . . . Or I will tell mom everything because what you do is not right." Rene-Gomez responded, "Ok tell her, and you will have to get out of my house . . . . Good luck!!"

In mid- to late-June, D.D.-O. told her mother about Rene-Gomez inappropriately touching her. Y.O.-G. did not believe D.D.-O. Y.O.-G. planned to talk to Rene-Gomez about whether D.D.-O. was telling the truth.

On June 30, D.D.-O. told her father that Rene-Gomez was inappropriately touching her. A.D.G. called Y.O.-G. and Rene-Gomez before reporting the sexual abuse to Kent Police Officer Samuel Steiner. Officer Steiner and Detective Tami Honda went to the apartment to interview Y.O.-G. and D.D.-O. on June 30. Detective Honda

and Officer Steiner interviewed D.D.-O. and Y.O.-G. separately. Detective Honda took D.D.-O. and B.D. into protective custody. Child Protective Services placed D.D.-O. and B.D. with their father A.D.G.

On July 9, Detective Honda and the prosecutor interviewed D.D.-O. for approximately an hour. During the interview, D.D.-O. talked about the "inappropriate text messages" Rene-Gomez sent her but said she deleted the messages. Detective Honda asked D.D.-O. to bring her cell phone to the police station so a computer forensic detective could examine the phone and retrieve the messages. A.D.G. and D.D.-O. later delivered the cell phone to Detective Honda. A.D.G. gave the police permission to search the cell phone.

The police were able to retrieve and take "screenshots" of the text messages between D.D.-O. and Rene-Gomez from April 2, 2015 through June 3, 2015. After reviewing the screenshots, on August 11, Detective Honda went to the apartment to interview Rene-Gomez.

By amended information, the State charged Rene-Gomez with two counts of child molestation in the second degree in violation of RCW 9A.44.086 and communication with a minor for immoral purposes in violation of RCW 9.68A.090(2) between October 7, 2013 and June 1, 2015. Rene-Gomez pleaded not guilty.

The seven-day jury trial began August 8, 2017. The defense theory was D.D.-O. was not credible and her allegation of sexual abuse was "a lie." The State called A.D.G., Officer Steiner, Y.O.-G., D.D.-O., Detective Honda, and Detective Eric Moore to testify. The court admitted a number of exhibits into evidence, including the white boy-cut underpants; screenshots of the text messages retrieved from D.D.-O.'s cell phone, exhibit 6; and exhibit 15, a spreadsheet of 309 text messages between D.D.-O. and

Rene-Gomez from April 2, 2015 until June 3, 2015. Exhibit 15 includes the date, the time sent and received, and the content of the messages. Certified Spanish interpreter Claudia A'Zar testified that she translated the text messages that were in Spanish into English. The court admitted the screenshots with the translated text messages as exhibit 12.

A.D.G. testified that he and Y.O.-G. were together for 10 ½ years. A.D.G. said that after he and Y.O.-G. separated, A.D.G. spent time with his daughters on the weekends.

A.D.G. testified that on June 30, 2015, D.D.-O. called and asked him to come meet her outside the apartment building where she lived. A.D.G. said D.D.-O. was "worried, crying. And, well, that's what concerned me quite a bit to see her like that" because "I've seen her cry very few times." D.D.-O. told A.D.G. that "her mom's boyfriend" was inappropriately touching her. A.D.G. did not ask about "specific details." A.D.G. called Y.O.-G. because "I wanted to know why she hadn't done anything if she knew about it before I did." A.D.G. contacted Rene-Gomez and told him that he "would pay for it. . . . I had to do the right thing as a father" and planned to "go to the police."

A.D.G. testified that the police contacted him later that same day to come get the two girls. A.D.G. said D.D.-O. "was like broken down. You could see her eyes were all watery from crying," and B.D. "didn't know what was going on."

A.D.G. noticed a "drastic change" in D.D.-O.'s behavior:

> For example, that she was always late to some classes, and the other thing is, that at my house, she didn't want to eat, and she was showing that she wasn't happy. . . . [H]er personality changed, or her character changed way too much, and she no longer wanted to spend time sharing with my family.

After approximately a year, B.D. returned to live with Y.O.-G. A.D.G. testified that "a few months ago," D.D.-O. decided to live with Y.O.-G. A.D.G. testified that D.D.-O. sometimes followed the rules and sometimes she did not. A.D.G. denied he and D.D.-O. "c[a]me up with this idea to accuse" Rene-Gomez.

On cross-examination, A.D.G. testified that he was angry with Rene-Gomez about the separation from Y.O.-G. and his daughters. A.D.G. admitted telling Rene-Gomez more than one time that "he was going to regret being with" Y.O.-G. A.D.G. admitted he told Rene-Gomez that "if he were to touch one of my daughters, I was going to kill him."

A.D.G. testified that when he called Y.O.-G. on June 30, 2015, he told her that if the children came to live with him to keep them "safe," Y.O.-G. and Rene-Gomez "could go on with their lives." Y.O.-G. would not agree. A.D.G. admitted that when he talked to Rene-Gomez on June 30, he threatened to kill him.

Officer Steiner testified he met with A.D.G. at the Kent police station on June 30, 2015. Based on A.D.G.'s report of sexual abuse, Officer Steiner contacted Detective Honda to conduct a "welfare check" at the apartment. Officer Steiner testified Rene-Gomez, Y.O-G., D.D.-O., and B.D. were at the apartment. Officer Steiner briefly interviewed Y.O.-G. while Detective Honda interviewed D.D.-O. After the interviews, Officer Steiner and Detective Honda agreed "there was a safety concern and we needed to do an emergency removal of the children." Officer Steiner testified D.D.-O. and B.D. "seemed happy" to stay with A.D.G. On cross-examination, Officer Steiner testified he and Detective Honda did not "refer [D.D.-O.] to a hospital" or "gather any physical evidence regarding a sexual assault."

Y.O.-G. testified that in June 2015, D.D.-O. "was very rebellious, staying quite away from the family." Y.O.-G. said D.D.-O. "didn't want to eat with all of us, she didn't want to go out with us. On weekends, it wasn't too often, but she would rather spend time at her girlfriends' houses, or sometimes she would like to go to her dad's." Y.O.-G. said that "sometimes" D.D.-O. was "a little disrespectful" and was not "nice" to Rene-Gomez.

Y.O.-G. testified that when D.D.-O. told her that Rene-Gomez inappropriately touched her, D.D.-O. "was crying" and "I had not seen her cry before." Y.O.-G. testified, "I got angry and I told her that I could not believe it; that I would have to talk to him and ask him whether she was saying the truth." Y.O.-G. said, "I did not believe her because she was very mad." Y.O.-G. asked D.D.-O. to "provide . . . proof." D.D.-O. told Y.O.-G. that she wanted to move out and live with her father.

Y.O.-G. testified that D.D.-O. was currently living with her. Y.O.-G. described her behavior as "[v]ery good" and said D.D.-O. was doing well at school.

On cross-examination, Y.O.-G. testified that while living with Rene-Gomez, she did not work outside the home and was "pretty much in the apartment all the time." Y.O.-G. said that during the five years she was with Rene-Gomez, she never saw him inappropriately touch D.D.-O. Y.O.-G. testified that "right before" D.D.-O. told her about the inappropriate touching, "there was an argument between" D.D.-O. and Rene-Gomez about not letting her go out.

Y.O.-G. testified that on the weekends, D.D.-O. "wanted to spend time at her girlfriends' homes, or with her dad." Y.O.-G. said that during the week, D.D.-O. spent most of the time in her room or asking to go out with friends. Y.O.-G. testified that A.D.G. "spoiled" D.D.-O. and "pretty much let her do what she wanted."

D.D.-O. testified that "at first," she liked Rene-Gomez. D.D.-O. thought "he was nice" and "called him by his name." But then "he started making us call him Dad." D.D.-O. testified Rene-Gomez "said if we ever ask him for something and we don't call him Dad that we don't get it," and that made her "mad" because "he was trying to act like our dad when he wasn't." D.D.-O. said Y.O.-G. told her that she had to ask Rene-Gomez for "permission to go do something."

D.D.-O. testified that when they first started living with Rene-Gomez in 2011, she and Rene-Gomez would often engage in "wrestling or tickling fights." D.D.-O. testified that beginning in 2012, Rene-Gomez started touching her on her breasts, buttocks, and vagina. D.D.-O. testified that Rene-Gomez inappropriately touched her more than 100 times between the age of 11 and 13.

D.D.-O. testified about the text messages with Rene-Gomez from April 2, 2015 through June 3, 2015. D.D.-O. said that in April 2015, her mother bought her underwear, including a white pair of underpants. D.D.-O. testified Rene-Gomez sent her a text message asking her to take a photograph "of you with the white short and send to me please." D.D.-O. stated she never showed Rene-Gomez the white underpants. D.D.-O. testified she never talked to Rene-Gomez about her "underwear not fitting" and Rene-Gomez "brought up the underwear first." D.D.-O. testified that Rene-Gomez repeatedly asked and she refused to send him a photograph of her in the white underpants.

When D.D.-O. asked Rene-Gomez on April 24, 2015 if she could go to a movie with her friend, he again requested a photograph of D.D.-O. in the white underpants. D.D.-O. told him, "I can tell my mom what you want because that's not a good thing." Rene-Gomez replied, "And I will tell [your mom] what I [k]now about you." D.D.-O.

testified that Rene-Gomez was referring to the boyfriend her mother did not know about at the time.

D.D.-O. said she did not tell Y.O.-G. about the sexual abuse in April because "I was scared of what he was gonna do" because "he threatened to take us out of the apartment."

Q: How come you didn't already tell your mom in April what [Rene-Gomez] was doing to you?
A: I was scared of what he was gonna do.
Q: What do you mean?
A: Because he threatened to take us out of the apartment and all that.
Q: Was your mom working at this time, or working consistently?
A: No.
Q: Did she do occasional jobs?
A: No, not at that time.
Q: Who was really bringing the money into the house?
A: Both.
Q: Both who?
A: Him and my mom.
Q: How was your mom bringing money into the house?
A: She used the money my dad would give her to pay bills and food.

D.D.-O. testified that after she disclosed the sexual abuse to Y.O.-G. and Y.O.-G. did not believe her, she told her dad.

On cross-examination, D.D.-O. admitted, "I just didn't like [Rene-Gomez] because he wanted us to call him Dad when he wasn't our dad" and he "tried to act like" her dad. D.D.-O. testified she was "mad" at Rene-Gomez because he "wouldn't let" her "go out with" friends. D.D.-O. said she wanted to live with her father A.D.G. D.D.-O. said her dad would let her go out and do whatever she wanted and she "would be able to go out all day." D.D.-O. testified that during the five years Rene-Gomez and Y.O.-G. were together, she "wanted to move back in with" A.D.G. for approximately four years.

Defense counsel asked D.D.-O. how she was able to fend off Rene-Gomez. D.D.-O. answered, "I would try to kick and move my arms to get him to let go of me."

D.D.-O. said she and Rene-Gomez argued in June 2015 because he would not let her go out with friends. But D.D.-O. testified that she was not "mad." D.D.-O. said she "felt bothered. . . . [J]ust because I didn't send him a picture, he was taking it out on me and [not] letting me go out, and then he was threatening me to do things too."

D.D.-O. admitted that when she told Y.O.-G. about Rene-Gomez, she had already packed a bag to move in with A.D.G.

Detective Honda testified about the interviews she conducted with D.D.-O., Y.O.-G., and Rene-Gomez. Detective Honda testified that when she interviewed D.D.-O. at the apartment on June 30, D.D.-O. "was really upset. She was sobbing, just shaking, nervous." Detective Honda said, "I was sitting with her. I just kinda let her talk through the crying." When Detective Honda told D.D.-O. that she and B.D. would be placed in the custody of their father, D.D.-O. was "upset to be leaving her mom, but she also was happy to be leaving the apartment." Detective Honda said D.D.-O. "was already packed" and helped Detective Honda "pack up her sister to leave."

Detective Honda said that during the hour-long second interview on July 9, D.D.-O. "was quiet" and "seemed a little bit scared." But D.D.-O. provided more specific information about the touching and the underpants and talked about the text messages.

After reviewing screenshots of the text messages from D.D.-O.'s cell phone, Detective Honda interviewed Rene-Gomez at the apartment on August 11. When Detective Honda asked whether he inappropriately touched D.D.-O., Rene-Gomez "said no, that he wouldn't do anything on purpose to hurt her." Rene-Gomez admitted that "a couple months prior to when we were talking to him that he had been tickling, wrestling, play fighting with [D.D.-O.] on the couch and had accidently touched her breast." Detective Honda asked Rene-Gomez about the white underpants. Rene-Gomez said

Y.O.-G. "asked him if she could buy" some underpants for D.D.-O. "and he said yes." Rene-Gomez told Detective Honda that the white underpants "looked like shorts." Rene-Gomez said that he sent D.D.-O. a text message asking for a photograph of her wearing the white underpants because D.D.-O. "told him that her underwear and bras were too small and he needed proof to see that they were too small." Rene-Gomez told Detective Honda that he "barely texted" with D.D.-O. Rene-Gomez said D.D.-O. "would ask about doing something or going somewhere via text, but other than that he did not text her much."

Detective Eric Moore is trained in digital forensics. Detective Moore testified he conducted a forensic search of D.D.-O.'s cell phone "to recover text messages, including deleted text messages." Detective Moore created a spreadsheet of the text messages he retrieved from April 2, 2015 to June 3, 2015, exhibit 15. The spreadsheet identifies the date the text message is sent and received as well as the content of the text message.

The jury found Rene-Gomez guilty of two counts of child molestation in the second degree and communication with a minor for immoral purposes. The court imposed a low-range concurrent sentence of 57 months, community custody conditions, and no contact with D.D.-O. for 10 years.

ANALYSIS

Rene-Gomez seeks reversal. Rene-Gomez argues the information omitted an essential element of the crime of communication with a minor for immoral purposes, the court erred in admitting a text message into evidence, prosecutorial misconduct during closing argument, and cumulative error violated his right to a fair trial. Rene-Gomez also challenges imposition of a number of community custody conditions.

Sufficiency of the Charging Document

For the first time on appeal, Rene-Gomez claims the amended information omitted an essential element of communication with a minor for immoral purposes in violation of RCW 9.68A.090(2). A defendant may raise a challenge to the constitutional sufficiency of a charging document for the first time on appeal. State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). We review the adequacy of a charging document de novo. State v. Johnson, 180 Wn.2d 295, 300, 325 P.3d 135 (2014).

The accused has the constitutional right to know the charges alleged against him. Johnson, 180 Wn.2d at 300 (citing U.S. CONST. amend. VI; WASH. CONST. art. I, § 22). Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, "[a]ll essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." Kjorsvik, 117 Wn.2d at 97. "The information is constitutionally sufficient 'only if all essential elements of a crime, statutory and nonstatutory, are included in the document.' " Johnson, 180 Wn.2d at 300 (quoting State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995)).

The "essential elements rule exists 'to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense.' " Johnson, 180 Wn.2d at 300 (quoting Vangerpen, 125 Wn.2d at 787). "If the State fails to allege every essential element, then the information is insufficient and the charge must be dismissed without prejudice." Johnson, 180 Wn.2d at 300-01. " 'An essential element is one whose specification is necessary to establish the very illegality of the behavior

charged.' " State v. Zillyette, 178 Wn.2d 153, 158, 307 P.3d 712 (2013)[2] (quoting State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003)); Johnson, 180 Wn.2d at 300.

Where the defendant challenges the sufficiency of the information for the first time on appeal, we "liberally construe the language of the charging document in favor of validity." Zillyette, 178 Wn.2d at 161. Liberal construction requires determining whether "the necessary elements appear in any form, or by fair construction, on the face of the document and, if so," whether "the defendant [can] show he or she was actually prejudiced by the unartful language." Zillyette, 178 Wn.2d at 162 (citing Kjorsvik, 117 Wn.2d at 105-06). "Under this rule of liberal construction, even if there is an apparently missing element, it may be able to be fairly implied from language within the charging document." Kjorsvik, 117 Wn.2d at 104. We read the language of a charging document as a whole and include facts which are necessarily implied. Kjorsvik, 117 Wn.2d at 109. Definitions of terms that establish the elements of a crime are not essential elements. State v. Smith, 159 Wn.2d 778, 787-88, 154 P.3d 873 (2007); State v. Lorenz, 152 Wn.2d 22, 34-35, 93 P.3d 133 (2004).

The information alleged Rene-Gomez committed the crime of communication with a minor for immoral purposes in violation of RCW 9.68A.090(2). RCW 9.68A.090(2) states, in pertinent part:

> A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if . . . the person communicates with a minor . . . for immoral purposes . . . through the sending of an electronic communication.

RCW 9.68A.090(3) expressly provides that "[f]or the purposes of this section, 'electronic communication' has the same meaning as defined in RCW 9.61.260." RCW

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[2] Internal quotation marks omitted.

9.61.260(5) defines "electronic communication" to mean "the transmission of information by . . . electronic text messaging."[3] RCW 9.68A.011(5) defines "minor" as "any person under eighteen years of age." "Immoral purposes" refers to "sexual misconduct." State v. McNallie, 120 Wn.2d 925, 932-33, 846 P.2d 1358 (1993) (citing State v. Schimmelpfennig, 92 Wn.2d 95, 102-03, 594 P.2d 442 (1979)).

In McNallie, the Washington Supreme Court held RCW 9.68A.090 "prohibits communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct." McNallie, 120 Wn.2d at 933. In State v. Hosier, 157 Wn.2d 1, 8-9, 133 P.3d 936 (2006), the court defined "communicate" to mean both the transmission of the defendant's message and the receipt by the minor of an inappropriate message. "[A] defendant communicates with a minor under RCW 9.68A.090 if he or she invites or induces the minor to engage in prohibited conduct." State v. Jackman, 156 Wn.2d 736, 748, 132 P.3d 136 (2006).[4]

The amended information charging Rene-Gomez with communication with a minor for immoral purposes in violation of RCW 9.68A.090(2) tracks the language of the statute and case law. The amended information alleged:

> That the defendant Jose Rene Rene-Gomez in King County, Washington, between October 7, 2013 and June 1, 2015, did communicate with D.D.-O. (10/7/01), a person he believed to be a minor, for immoral purposes of a sexual nature and such communication occurred through the sending of an electronic communication;
> Contrary to RCW 9.68A.090(2).

Rene-Gomez contends the language of the amended information does not include the nonstatutory element of intent to communicate with a minor. Specifically, that the amended information did not allege that he intended the communication to

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[3] Emphasis added.

[4] Emphasis in original.

reach D.D.-O. Rene-Gomez cites Hosier to argue alleging intent that the communication reached the minor is an essential element of the crime. The Supreme Court in Hosier held, "Foreseeability is not an element of the crime of communicating with a minor for immoral purposes. Rather, the State must prove that the defendant intended that the communication reach the child." Hosier, 157 Wn.2d at 15.

The question is whether all of the words used in the information charging Rene-Gomez with communication with a minor for immoral purposes would reasonably apprise him of the elements of the crime charged. Kjorsvik, 117 Wn.2d at 109. "Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied." Kjorsvik, 117 Wn.2d at 109. Liberally construed, the language of the amended information fairly implies that Rene-Gomez intended the communication to reach D.D.-O. The amended information alleged Rene-Gomez communicated with D.D.-O., a minor, for immoral purposes of a sexual nature by sending D.D.-O. an electronic communication. The language "through the sending of an electronic communication" to D.D.-O., "a person he believed to be a minor," for immoral purposes of a sexual nature fairly implies that Rene-Gomez intended the communication to reach D.D.-O.

Kjorsvik is analogous. In Kjorsvik, a defendant challenged the robbery conviction because the charging document omitted the implied essential element of "intent to steal." Kjorsvik, 117 Wn.2d at 96, 98. The court held it would be "hard to perceive how the defendant" could have forcefully taken money from the shopkeeper while brandishing a weapon but did not intend to steal the money. Kjorsvik, 117 Wn.2d at 110. Likewise, here, because the charging document alleges Rene-Gomez sent

electronic communication to D.D.-O., a person he believed to be a minor, a fair reading is that through that volitional act, he intended the text message to reach D.D.-O.

Liberally construed, the language of the charging document contained all the necessary facts to apprise Rene-Gomez of the elements of communication with a minor for immoral purposes in violation of RCW 9.68A.090(2).[5]

Text Message

Rene-Gomez contends the court erred in admitting a portion of the text message response from D.D.-O. to Rene-Gomez on April 24, 2015. In the days leading up to April 24, Rene-Gomez repeatedly asked D.D.-O. to send him a photograph of her wearing the white underpants and D.D.-O. repeatedly refused to do so. On April 24, D.D.-O. sent a text to Rene-Gomez asking if she could go to a movie with a friend. In response, Rene-Gomez states, "Remember what you has to do if you want to go!! If you answer is not! [M]y is not too." In response, D.D.-O. told Rene-Gomez, "I don't want to send a pic and you keep touching me when I told you to stop and you don't stop and you get mad because I don't like it and take it out on me even though I [b]ehave well."

Pretrial, the defense moved to exclude the portion of the April 24 text message that states, "I don't want to send a pic and you keep touching me when I told you to stop and you don't stop and you get mad because I don't like it and take it out on me even though I [b]ehave well." Defense counsel argued the text message was inadmissible hearsay and unfairly prejudicial.

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[5] We note Rene-Gomez does not argue that he was actually prejudiced by the charging language. See State v. Nonog, 169 Wn.2d 220, 231, 237 P.3d 250 (2010) (citing Kjorsvik, 117 Wn.2d at 106).

The prosecutor argued the text message was admissible under the rule of completeness under ER 106, as an expression of "her then existing state of mind and intent" under ER 803(a)(3), and as a prior consistent statement under ER 801(d)(1)(ii) "to rebut the defense's claim" that D.D.-O. "made this up." The trial court ruled the text message was admissible "as an expression of the young woman's then existing state of mind" and under the rule of completeness.

Rene-Gomez argues the trial court erred by ruling the text message was admissible under the state of mind exception to hearsay and the rule of completeness.

The State argues the text message is admissible as an expression of D.D.-O.'s existing state of mind under ER 803(a)(3) and as a prior consistent statement to rebut a claim of fabrication under ER 801(d)(1)(ii). The State concedes the rule of completeness does not apply. We accept the concession.

We review evidentiary rulings for an abuse of discretion. Peralta v. State, 187 Wn.2d 888, 894, 389 P.3d 596 (2017); State v. Brush, 183 Wn.2d 550, 560, 353 P.3d 213 (2015). "A trial court's determination that a statement is admissible pursuant to a hearsay exception is reviewed by this court under an abuse of discretion standard." State v. Woods, 143 Wn.2d 561, 595, 23 P.3d 1046 (2001). A court abuses its discretion if the decision is based on untenable grounds or untenable reasons. State v. Athan, 160 Wn.2d 354, 375-76, 158 P.3d 27 (2007). We can affirm an evidentiary ruling on any ground supported by the record. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

The record supports the admission of the text message under ER 801(d)(1)(ii) as a prior consistent statement that is offered to rebut a claim of recent fabrication. ER

801(d)(1)(ii) provides:

> A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

"The prior statement must have been made before the motive to falsify has arisen." State v. Bargas, 52 Wn. App. 700, 703, 763 P.2d 470 (1988).[6]

The defense theory at trial was that D.D.-O. was not credible and lied about the allegations of sexual abuse. The record shows D.D.-O. and Rene-Gomez argued about her request to send a photograph of her in the underpants in April 2015, well before she told her mother in June 2015 that Rene-Gomez sexually abused her. Because her mother did not believe her, D.D.-O. told her father on June 30 that Rene-Gomez sexually abused her. We also note that during closing argument, defense counsel focused on the timing of the argument and the disclosure to argue D.D.-O. was not credible:

> We know that [D.D.-O.] wanted to get out of the apartment. We knew that [D.D.-O.] didn't like Mr. [Rene-]Gomez. We know that [D.D.-O.] was acting out, that she was rebellious. She wanted to be out with her friends on the weekdays. . . . [W]e know that there is an argument between [D.D.-O.] and Mr. [Rene-]Gomez because he wouldn't let her go out with her friends right before the allegation. . . . [I]t is undisputed that this argument happened right before the allegation. . . .
>
> . . . .
>
> . . . [D.D.-O.] begins packing before police are even involved. Then this allegation comes out. What a coincidence.

The April 24, 2015 text message was admissible as a prior consistent statement under ER 801(d)(1)(ii) to rebut the claim of recent fabrication.

[6] Emphasis in original.

Prosecutorial Misconduct

Rene-Gomez contends prosecutorial misconduct during closing argument violated his constitutional right to a fair trial. In the alternative, Rene-Gomez asserts his attorney provided ineffective assistance of counsel by failing to object.

"The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. Glasmann, 175 Wn.2d at 703-04.

We review allegations of prosecutorial misconduct during closing argument for abuse of discretion. State v. Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). To prevail on a claim of prosecutorial misconduct, the defendant must "show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial." Glasmann, 175 Wn.2d at 704; State v. Emery, 161 Wn. App. 172, 192, 253 P.3d 413 (2011). If the conduct was improper, we determine whether the prosecutor's improper conduct resulted in prejudice. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Prejudice is established by showing a substantial likelihood the misconduct affected the verdict. Emery, 161 Wn. App. at 192.

A prosecutor has wide latitude during closing argument to draw reasonable inferences from the evidence. State v. Magers, 164 Wn.2d 174, 192, 189 P.3d 126 (2008). We review a prosecutor's comments in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions." Emery, 161 Wn. App. at 192. "In analyzing prejudice, we do not look at the comments in isolation, but in the context of the total argument, the issues in the case, the

evidence, and the instructions given to the jury." State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

Where, as here, a defendant does not object at trial, any error is waived unless the prosecutor's misconduct was so flagrant and ill intentioned that an instruction could not have cured any resulting prejudice. Emery, 174 Wn.2d at 760-61. Under this heightened standard of review, 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.' " Emery, 174 Wn.2d at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). In making that determination, we "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." Emery, 174 Wn.2d at 762.

"[A] prosecutor must not impugn the role or integrity of defense counsel." Lindsay, 180 Wn.2d at 431-32. However, it is not misconduct for the prosecutor to argue that evidence does not support the defense theory or is a fair response to the argument of the defense. Thorgerson, 172 Wn.2d at 448. Nor is it improper for a prosecutor to express indignation when the circumstances justify it. State v. Borboa, 157 Wn.2d 108, 123, 135 P.3d 469 (2006).

Rene-Gomez cites two remarks to argue the prosecutor improperly disparaged defense counsel during closing argument.

During cross-examination, the defense attorney questioned D.D.-O. about her testimony about "fending [Rene-Gomez] off":

Q: How tall do you think you are?
A: I'm four, eight.

Q: What about Mr. [Rene-]Gomez, based on your recollection, how tall do you think he is?
A: Five something.
Q: And how much do you weigh, if you don't mind me asking.
A: Right now I weight ninety-two.
Q: Is it fair to say that Mr. [Rene-]Gomez is bigger than you?
A: Yes.
Q: Stronger than you?
A: Yes.
Q: You were talking earlier about fending him off?
A: Yes.
Q: How were you able to do that?
A: I would try to kick and move my arms to get him to let go of me.
Q: And that would work?
A: No.
Q: You spoke earlier about times when he tried to touch you and you fought him and you got away.
A: Because he will let go of me.

In closing argument, the prosecutor addressed the cross-examination of D.D.-O. about her testimony that she fended off Rene-Gomez and the defense theory that D.D.-O. was not credible:

> [I]f you remember [defense counsel] asked [D.D.-O.] about her size, she said she was about four feet, I believe, and under a hundred pounds. She agreed that Mr. [Rene-]Gomez was much bigger than her. And [defense counsel]'s questions sounded surprised that this small girl was able to fight off such a larger attacker.
>
> First, it is fairly disgusting, disrespectful, and offensive to say that a sexual assault victim should not be believed because she was able to stop her attacker from further harming her. Remember, many of these incidents, they occurred in the house, and it would be logical for Mr. [Rene-]Gomez not to put up much of a fight when he knows that all it takes is [Y.O.-G.] to round the corner at the wrong time, and then his cover is blown. This would have been a terrifying, horrifying experience for a young girl, and perhaps [D.D.-O.] even acted stronger than she knew possible when she started kicking at and flailing her limbs when Mr. [Rene-]Gomez grabbed her. So, it is possible that she was able to fight him off. And I want you to think about the opposite for a second. If [defense counsel] asked her that question and [D.D.-O.] stated that she did not fight off Mr. [Rene-]Gomez, then the argument would likely be to you, "Well, she's lying because of course a victim would try to fight off her attacker." The fact is is that none of us are in a position to opine how

> [D.D.-O.], a sexual assault victim, should have behaved during that attack. She's the victim. The onerous is not on her to act in any certain way.[7]

Rene-Gomez did not object. Rene-Gomez cites Thorgerson to argue the prosecutor disparaged or impugned the role of his defense counsel by stating it was "fairly disgusting, disrespectful, and offensive" to suggest D.D.-O. should not be believed because she was able to fend off Rene-Gomez. In Thorgerson, the court concluded the prosecutor impugned defense counsel's integrity by referring to his presentation of his case as " 'bogus' " and involving " 'sleight of hand.' " Thorgerson, 172 Wn.2d at 451-52. The court concluded the "sleight of hand" argument was ill-intentioned misconduct. Thorgerson, 172 Wn.2d at 452. However, because "the victim's testimony was consistent throughout the trial and was consistent with what the witnesses testified she had told them before the trial," the court concluded the misconduct "cannot fairly be said to have had a substantial likelihood of altering the jury's determination that relevant evidence showed the defendant committed these crimes." Thorgerson, 172 Wn.2d at 452. The court also concluded a curative instruction would have "alleviated any prejudicial effect of this poorly thought out attack on defense counsel's strategy." Thorgerson, 172 Wn.2d at 452.

Here, the remark that "it is fairly disgusting, disrespectful, and offensive to say that a sexual assault victim should not be believed" is improper. But when viewed in context, after making the remark, the prosecutor focused on the evidence and testimony to argue why D.D.-O.'s testimony that she was able to fend off Rene-Gomez was credible. In context, we conclude the misconduct "cannot fairly be said to have had a

[7] Emphasis added.

substantial likelihood of altering the jury's determination." Thorgerson, 172 Wn.2d at 452. We also note that a curative instruction would have obviated any prejudicial effect.

The second remark Rene-Gomez contends disparaged defense counsel is the argument that the "sole purpose" of some of the information presented at trial is to "muddy the waters or to distract."

> So, what exactly is the State's burden? During the course of any trial, you're going to receive a lot of information, a lot of facts, and much of that information will be useful in order to decide whether the defendant is guilty. But some of that information, its sole purpose is to muddy the waters or to distract, and I want to give you a visual example because some people are more visual, of what I am required to prove and what I am not require[d] to prove. Now, I want to be clear, hold me to my burden, hold the State to its burden. It's one the State fully embraces. But I anticipate later you will hear about many facts of which I am not required to prove or disprove. So, there's a world of what I'm required to prove, a world of what I'm not required to prove, and there's a level of proof required for each of those categories. The things I am required to prove I must prove beyond a reasonable doubt. It still leaves some room, but it's beyond a reasonable doubt, not an unreasonable doubt. It doesn't mean disproving every theory. Things that I'm not required to prove, I have no burden whatsoever. So, I must prove that there was sexual contact between the defendant and [D.D.-O.], and I must prove that he communicated with her for immoral purposes of a sexual nature. What am I not required to prove? I'm not required to prove that there was or was not DNA.[8] I'm not required to prove that there was a sexual assault kit, that there was any injury to [D.D.-O.], that there were additional eyewitnesses, her story does not need to be corroborated, that there was a confession, that Mr. [Rene-]Gomez even had a motive. That's not something the State's required to prove, but in a sexual assault case, it's pretty clear why. He had a sexual desire for her. I don't have to prove or disprove that she was or was not an angry child, that she was a typical victim, or that these messages were deleted or were not deleted.[9]

Rene-Gomez did not object to the remark. The statement that the "sole purpose" of some of the information presented at trial is to "muddy the waters or to distract" was

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[8] Deoxyribonucleic acid.

[9] Emphasis added.

made in the context of addressing the State's burden of proof and did not improperly disparage defense counsel.

In the alternative, Rene-Gomez contends his attorney provided ineffective assistance of counsel by not objecting to the two remarks during closing argument. We review a claim of ineffective assistance of counsel de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To establish a claim of ineffective assistance of counsel, Rene-Gomez must show both deficient performance and prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011); Emery, 174 Wn.2d at 754-55.

Rene-Gomez cannot show defense counsel's representation "fell below an objective standard of reasonableness" based on consideration of "all the circumstances" and that defense counsel's deficient performance prejudiced him. Strickland, 466 U.S. at 687-88. There is a strong presumption that the representation was effective. Strickland, 466 U.S. at 689; In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002). The lack of objection from defense counsel " 'strongly suggests to a court that the argument or event in question did not appear critically prejudicial' " in context. State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006)[10] (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)).

In addition to overcoming the strong presumption of competence, Rene-Gomez must affirmatively show prejudice. Strickland, 466 U.S. at 693. Rene-Gomez must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. "The likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86,

[10] Emphasis added.

112, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). Rene-Gomez cannot show that but for defense counsel's failure to object to the two remarks, the result of the trial would have been different.

Cumulative Error

Rene-Gomez contends cumulative error denied him a fair trial. The cumulative error doctrine applies if there are "several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); In re Pers. Restraint of Cross, 180 Wn.2d 664, 690, 327 P.3d 660 (2014), abrogated on other grounds by State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018). Where, as here, any error had little or no effect on the outcome of the trial, reversal is not required. Cross, 180 Wn.2d at 690-91; State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

Community Custody Conditions

In his opening brief, Rene-Gomez challenges the following community custody conditions the court imposed at sentencing, arguing the conditions are not crime related or vague and overbroad:

> 5. Inform the supervising CCO[11] and sexual deviancy treatment provider of any dating relationship. Disclose sex offender status prior to any sexual contact. Sexual contact in a relationship is prohibited until the treatment provider approves of such.
> 9. Do not enter sex-related businesses, including: x-rated movies, adult bookstores, strip clubs, and any location where the primary source of business is related to sexually explicit material.
> 10. Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider.
> 11. Do not use or consume alcohol.

[11] Community corrections officer.

> 18. . . . Stay out of areas where children's activities regularly occur or are occurring. This includes parks used for youth activities, schools, daycare facilities, playgrounds, wading pools, swimming pools being used for youth activities, play areas (indoor or outdoor), sports fields being used for youth sports, arcades, and any specific location identified in advance by [the Department of Corrections] or CCO.

After filing the opening brief, the Washington Supreme Court issued its decision in State v. Nguyen, 191 Wn.2d 671, 425 P.3d 847 (2018). In Nguyen, the court considered many of the same conditions Rene-Gomez challenges and held the conditions were crime related and not unconstitutionally vague. Nguyen, 191 Wn.2d at 675. We adhere to the decision in Nguyen and conclude conditions 5, 9, 10, and 18 are crime related and are not unconstitutionally vague.

We review community custody conditions for an abuse of discretion and reverse the conditions only if the conditions are manifestly unreasonable. Nguyen, 191 Wn.2d at 678. A "crime-related prohibition" is defined as "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). A court does not abuse its discretion if there is a "reasonable relationship" between the crime of conviction and community custody condition. Nguyen, 191 Wn.2d at 684 (citing State v. Irwin, 191 Wn. App. 644, 658-59, 364 P.3d 830 (2015)). The record supports imposition of condition 11, do not use or consume alcohol, as a crime-related condition. Below, the defense attorney conceded that alcohol use is a risk factor.

In his reply brief, Rene-Gomez challenges condition 10, arguing it is overbroad. In Nguyen, the court addressed the exact same condition:

> "Do not possess, use, access or view any sexually explicit material as defined by RCW 9.68.130 or erotic materials as defined by RCW 9.68.050 or any material depicting any person engaged in sexually explicit conduct

> as defined by RCW 9.68A.011(4) unless given prior approval by your sexual deviancy provider."

Nguyen, 191 Wn.2d at 679. The court cited the decision in State v. Bahl, 164 Wn.2d 739, 193 P.3d 678 (2008), in concluding the condition was not unconstitutionally vague. Nguyen, 191 Wn.2d at 680-81.

Rene-Gomez concedes the court in Nguyen held that the exact same condition was not unconstitutionally vague but argues the court in Nguyen did not address whether the condition was overbroad. See Nguyen, 191 Wn.2d at 679-81. Rene-Gomez argues the condition that prohibits sexually explicit material is constitutionally overbroad because it includes protected speech. "A trial court's imposition of an unconstitutional condition is manifestly unreasonable." Nguyen, 191 Wn.2d at 678.

Whether the condition is overbroad is a question of law we review de novo. State v. Immelt, 173 Wn.2d 1, 6, 267 P.3d 305 (2011). Under the First Amendment to the United States Constitution, a condition is unconstitutionally overbroad "if it prohibits a substantial amount of protected speech." State v. Gray, 189 Wn.2d 334, 345, 402 P.3d 254 (2017). However, "[a]n offender's usual constitutional rights during community placement are subject to SRA[12]-authorized infringements." State v. Hearn, 131 Wn. App. 601, 607, 128 P.3d 139 (2006). A sentencing court may significantly restrict an offender's constitutional rights during community placement by imposing crime-related conditions. State v. Ross, 129 Wn.2d 279, 286-87, 916 P.2d 405 (1996); State v. Riles, 135 Wn.2d 326, 347, 957 P.2d 655 (1998), abrogated on other grounds by State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). Because condition 10 is an

[12] Sentencing Reform Act of 1981, chapter 9.94A RCW.

SRA crime-related condition, we reject Rene-Gomez's challenge to imposition of the condition as unconstitutionally overbroad.

We affirm the jury conviction of two counts of child molestation in the second degree and communication with a minor for immoral purposes, the judgment and sentence, and imposition of the community custody conditions.

WE CONCUR:

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

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