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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of: ABDULLAHI NOOR, Petitioner.	No. 80891-5-I DIVISION ONE UNPUBLISHED OPINION

MANN, C.J. — In this personal restraint petition (PRP), Abdullahi Noor asserts multiple claims in an attempt to reverse his two felony and six non-felony convictions. Because Noor does not establish grounds for relief, we deny his PRP.

FACTS

In 2016, a jury convicted Noor of rape of S.K. in the second degree, witness intimidation, assault of S.K. in the fourth degree, harassment of S.K. and Ifrah Noor,[1] and three counts of domestic violence misdemeanor violation of a no-contact order. He is serving an indeterminate life sentence. We affirmed his convictions and sentences in 2018.[2] State v. Noor, No. 75654-1-I, (Wash. Ct. App. June 11, 2018) (unpublished), www.courts.wa.gov/opinions/pdf/756541%20ORDER%20and%20Opinion.pdf. On December 28, 2018, we issued the mandate terminating review and Noor filed this PRP less than a year later.

[1] Ifrah Noor is not related to the petitioner.

[2] The facts underlying Noor's conviction are adequately set forth in our opinion on direct review. Noor, slip op. at 1-6. Accordingly, we will not recount them except as needed to analyze the PRP claims.

ANALYSIS

To prevail on a PRP, Noor bears the burden of proving by a preponderance of evidence that "he was actually and substantially prejudiced either by a violation of his constitutional rights or by a fundamental error of law." In re Pers. Restraint of Benn, 134 Wn.2d 868, 884, 952 P.2d 116 (1998); In re Pers. Restraint of Lord, 152 Wn.2d 182, 188, 94 P.3d 952 (2004). "Actual prejudice must be determined in light of the totality of circumstances." In re Pers. Restraint of Music, 104 Wn.2d 189, 191, 704 P.2d 144 (1985). In determining whether actual prejudice exists, we look to see if the error "so infected petitioner's entire trial that the resulting conviction violates due process." Music, 104 Wn.2d at 191. An error warrants relief when the reviewing court has a "grave doubt as to the harmlessness of an error." In re Pers. Restraint of Sims, 118 Wn. App. 471, 477, 73 P.3d 398 (2003) (internal quotations and citation omitted).

These threshold requirements are "necessary to preserve the societal interest in finality, economy, and integrity of the trial process. It also recognizes that the petitioner has had an opportunity to obtain judicial review by appeal." In re Pers. Restraint of Woods, 154 Wn.2d 400, 409, 114 P.3d 607 (2005) abrogated on other grounds by Carey v. Musladin, 594 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

A. Use of Initials

Noor seeks reversal by arguing that the trial court's use of S.K.'s initials in the "to-convict" jury instructions was a comment on the evidence and a violation of his right to a public trial. But we recently rejected this argument in State v. Mansour, 14 Wn. App. 2d 323, 470 P.3d 543 (2020), review denied, 196 Wn.2d 1040, 479 P.3d 708 (2021).

In Mansour, we held a trial court's use of initials to identify a victim of child molestation in the to-convict instructions "was not a judicial comment on the evidence," reasoning that, identifying a victim either by full name or initials, "did not impermissibly instruct the jury that a matter of fact had been established as a matter of law." Mansour, 14 Wn. App. 2d at 330. We also held the use of "initials in the to-convict instruction did not deprive Mansour of due process or his right to a fair and impartial jury," explaining that the jury "was specifically instructed that Mansour was presumed innocent and that the State must prove all elements of child molestation beyond a reasonable doubt." Mansour, 14 Wn. App. 2d at 331. Finally, we held no court closure occurred where the instructions used the victim's initials but the victim "testified using her full name in open court and was consistently referred to by her full name throughout the proceeding" and her "name was fully accessible to spectators and open to any member of the public who appeared in court or read a transcript of the court proceedings." Mansour, 14 Wn. App. 2d at 333.

Here, like in Mansour, S.K. testified using her full name at trial and was consistently referred to by her full name throughout the proceedings. Her name was fully accessible to spectators who appeared in court or read a transcript. The court and parties intentionally used S.K.'s initials solely for identification purposes, with the understanding that S.K.'s identity was not an element of any of the charged offenses. Additionally, the court instructed the jury that "a defendant is presumed innocent" and the State "has the burden of proving each element of each crime beyond a reasonable doubt."

Thus, based on Mansour and the record before us, we conclude Noor fails to show that the challenged instructions involve any constitutional error or actual prejudice.[3]

B. Trial Court's Statements to Jury

Noor contends the trial court's admonitions to the jury violated his right to a jury free from external influences. He argues the court "repeatedly threatened the jurors with jail sentences, tying the threat to the costs of a mistrial." This argument lacks merit.

Prior to some of the breaks at trial, the trial court reminded the jury of "how important it is for you to keep your minds free of outside information, or influence, not only about the facts in this case, but about anything having to do with the subject matter of this case." The court further explained "the only way the parties in this case get a fair trial is if you are open minded and keep your minds free of outside information until you begin your deliberations." The court gave examples from across the nation in which well-intentioned jurors engaged in such misconduct. Noor even acknowledges that the "motivation of the trial judge in this case was undoubtedly to prevent jurors from obtaining outside information about the case or otherwise violating the court's instructions." We have not found any instances in the record where the trial court threatened the jury.

Again, it is Noor's burden to establish actual prejudice from what he contends were the trial judge's admonitions. Because he has not shown any such prejudice, his claim must be denied.

[3] Noor's attempts to distinguish and undermine Mansour in his reply brief are unpersuasive. Mansour remains good law.

C. Sufficiency of Evidence

Noor claims there is insufficient evidence to convict him for one of the counts of misdemeanor violation of a no-contact order.

"Sufficiency of the evidence is a question of constitutional magnitude because due process requires the State to prove its case beyond a reasonable doubt." In re Pers. Restraint of Tortorelli, 149 Wn.2d 82, 93, 66 P.3d 606 (2003) (citing State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant" and "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "Circumstantial evidence and direct evidence carry equal weight when reviewed by an appellate court." State v. Trey M., 186 Wn.2d 884, 905, 383 P.2d 474 (2016). We defer to the trier of fact on issues of witness credibility. State v. Witherspoon, 180 Wn.2d 875, 883, 329 P.3d 888 (2014).

Noor was convicted on count VIII of misdemeanor violation of a court order, arising from Noor directing Ali Moussa to call and later knock on the door of S.K.'s residence on July 31, 2015. The to-convict instruction set forth four elements of this crime. For the jury to convict, the State was required to prove beyond a reasonable doubt:

> (1) That on or about July 31, 2015, there existed a no-contact order, for the protection of S.K., applicable to the defendant;
> (2) That the defendant knew of the existence of this order;
> (3) That on or about said date, the defendant knowingly violated a provision of this order which was a restraint provision of the order

prohibiting contact with a protected party or a provision of the order excluding the defendant from a residence; and

(4) That the defendant's act occurred in the State of Washington.

Noor does not dispute elements 1, 2, and 4 of the charged crime. A July 2015 no-contact order prohibited Noor from contacting S.K. "directly, indirectly, in person or through others, by phone, mail, or electronic means." Noor argues there was no evidence that he directed Moussa to contact S.K. on July 31, 2015, "only that Moussa was trying to retrieve Noor's son."

S.K. testified about "a time where Mr. Noor sent someone else" to her house. She spoke about receiving a call from a man who informed that Noor "said if you don't give [Noor's child up] in 30 minutes, then . . . what happen[s] to you, it's up to you." Shortly thereafter, a man S.K. did not know knocked on her apartment door and she called the police. A police officer testified to responding to S.K.'s apartment on July 31, 2015 and interviewing S.K. and a man who identified himself as Moussa. Moussa told the officer that he and Noor were acquainted from their mosque and Noor had given him some paperwork authorizing the child to be removed from the apartment.

This evidence was sufficient for the jury to find beyond a reasonable doubt that Noor, through Moussa's actions, indirectly contacted S.K. on July 31 in violation of the no-contact order.

D. Same Criminal Conduct

Noor also argues that his three convictions for no-contact order violation were the "same criminal conduct" for purposes of offender scoring and violated the prohibition on double jeopardy by punishing him more than once for a continuous course of conduct. We disagree.

1. Offender Score

Noor contends the trial court miscalculated his offender score because the convictions constituted the same criminal conduct. When calculating an offender's score, courts count all current and prior offenses separately unless it is determined that multiple offenses encompass the "same criminal conduct." RCW 9.94A.589(1)(a). To constitute the same criminal conduct, two or more criminal offenses must (1) have the same objective intent, (2) occur at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a). "If any one element is missing, multiple offenses cannot be said to encompass the same criminal conduct, and they must be counted separately in calculating the offender score." State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

Noor, however, waived this challenge because he failed to challenge the calculation of his offender score at sentencing. In re Pers. Restraint of Shale, 160 Wn.2d 489, 496, 158 P.3d 588 (2007) (plurality opinion) (offender waived right to argue same criminal conduct on collateral attack when he did not raise the issue at sentencing), overruled on other grounds by State v. Knight, 162 Wn.2d 806, 174 P.3d 1167 (2008). But, even if Noor had properly preserved this challenge, it is without merit. This is so because the charging document alleged, and the evidence established, that Noor violated the no-contact order: (1) on June 4, 2015, when he twice entered S.K.'s apartment building; (2) on June 8, 2015, when he entered S.K.'s apartment building; and (3) on July 31, 2015, when Moussa, at his direction, called and approached S.K. at

her home. Because the offenses did not occur at the same time, they are not the same criminal conduct.[4]

2. Double Jeopardy

Noor also argues that, based on the manner in which the jury was instructed, the three convictions violated his right to be free from double jeopardy.

The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution protect a defendant from multiple punishments for the same offense. State v. Hall, 168 Wn.2d 726, 729-30, 230 P.3d 1048 (2010). "If a defendant is charged with violating the same statutory provision more than once, multiple convictions can withstand a double jeopardy challenge only if each is a separate 'unit of prosecution.'" State v. Allen, 150 Wn. App. 300, 313, 207 P.3d 483 (2009) (quoting State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226 (2000)). We have previously made clear that:

> RCW 26.50.110(1) punishes "a violation" of a no-contact order. Use of the word "a" supports the State's reading that the unit of prosecution is each single violation of a no-contact order. The Supreme Court "has consistently interpreted the legislature's use of the word 'a' in a criminal statute as authorizing punishment for each individual instance of criminal conduct, even if multiple instances of such conduct occurred simultaneously."

State v. Brown, 159 Wn. App. 1, 10-11, 248 P.3d 518 (2010) (quoting State v. Ose, 156 Wn.2d 140, 147, 124 P.3d 635 (2005)); Allen, 150 Wn. App. at 313-14 (each act of sending an e-mail constituted a statutory violation).

[4] Noor also alleges his trial counsel was ineffective for not arguing these convictions were the same criminal conduct and his appellate counsel was ineffective for not raising this issue on direct review. Because Noor's same criminal conduct argument lacks merit, for obvious reasons, his claims of ineffective assistance of counsel on this issue also fail.

Each day Noor contacted S.K., whether by entering her apartment building himself, or by having Moussa do so, he committed a separate violation. Consequently, Noor's three convictions of violation of a no-contact order did not violate double jeopardy protections.[5]

We also reject Noor's argument that he engaged in a single, "continuous course of contact [of S.K.] in June, July and August 2015." He relies on State v. Spencer, 128 Wn. App. 132, 114 P.3d 1222 (2005), for the proposition that violation of a no-contact order is a continuing crime. But his reliance on Spencer is misplaced. In Brown, we clarified that, "[t]he Spencer court simply determined the scope of one particular contact that lasted several minutes. It did not hold that repeated contacts were continuing." Brown, 159 Wn. App. at 13.

E. Brady Violation

Noor argues that the State suppressed material exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The State denies a Brady violation occurred.

1. Background

In August 2015, a Child Protective Services (CPS) caseworker interviewed Noor's child M.N. (age six at the time). During this interview, the child reported not witnessing any violence in the home, answered "Hadio" when asked "what's your mom's name," and said Hadio said she was 25-years-old. This caseworker also interviewed Hadio who had disclosed her true identity as 16-year-old S.K. At that point, the CPS caseworker, Prosecutor's Office, Seattle Police Department, and Seattle City Attorney's

[5] Given our disposition of this claim, we reject Noor's claim that his counsel provided ineffective assistance for not raising the issue at trial or on appeal.

Office began to coordinate a joint interview of S.K. for purposes of a pending dependency action and Noor's prosecution.

Later that same month, in a series of e-mail exchanges, trial defense counsel requested the prosecutor's help in coordinating an interview with Noor's child M.N. To the defense's initial request, the prosecutor responded, "I'm not sure where [the child] has been placed for foster care, or that I'd call him as a witness." Counsel then shared that the child was present during some of the alleged offenses and, "[o]nce I locate [the child] I will let you know." The prosecutor responded, saying "I'm not sure what CPS's position will be on" Noor's young child voluntarily participating in an interview. Defense counsel closed discussion on this topic by stating: "In terms of [the child], I am sure we can work something out. My client has asked me to speak to him as he (the child) will have a very different understanding of events and will be able to corroborate my client's side of the story."

Neither party called the child to testify at trial. The prosecutor neither had nor requested a "copy of the CPS files relating to this case" and Noor was not aware of the CPS interview of his child until after close of trial.

2. Application of Brady

Brady "articulated the government's disclosure obligations in a criminal prosecution: 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" State v. Mullen, 171 Wn.2d 881, 894, 259 P.3d 158 (2011) (quoting Brady, U.S. at 87)). The duty to disclose favorable evidence encompasses impeachment evidence as well as

exculpatory evidence, United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), and includes evidence contained in the prosecutor's file, as well as evidence in the possession of the police and others working on behalf of the State. Mullen, 171 Wn.2d at 895. But, the State "'is under no obligation to turn over materials not under its control.'" Mullen, 171 Wn.2d at 895 (quoting United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991)). Rather, the State only has "the duty to learn of evidence favorable to the defendant that is known to others acting on behalf of the government in a particular case." In re Pers. Restraint of Brennan, 117 Wn. App. 797, 804, 72 P.3d 182 (2003) (citing Kyles v. Whitley, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)).

To establish a Brady violation, a petitioner "must demonstrate the existence of each of three necessary elements: '[(1)] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [(2)] that evidence must have been suppressed by the State, either willfully or inadvertently; and [(3)] prejudice must have ensued.'" Mullen, 171 Wn.2d at 895 (quoting Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)).

Even if we assume, without deciding, the prosecutor had knowledge of the CPS interview of Noor's child, this claim fails on the suppression prong. "If the nondisclosed information was available through the defense's own due diligence, there is no suppression under Brady." Mullen, 171 Wn.2d at 903; Aichele, 941 F.2d at 764 (when "a defendant has enough information to be able to ascertain the supposed Brady material on his own, there is no suppression by the government."); Benn, 134 Wn.2d at 916-17 ("'a Brady violation does not arise if the defendant, using reasonable diligence,

could have obtained the information' at issue") (quoting Williams v. Scott, 35 F.3d 159, 163 (5th Cir. 1994)).

Here, the record shows that, as of August 2015, defense was on notice Noor's child was in CPS's custody, confident it could "work something out" with CPS, and aware the child would "have a very different understanding of events and [would] be able to corroborate [Noor's] side of the story." Trial began in June 2016, so the defense had ample time to interview and discover what the child might say at trial. Because Noor cannot show that the State suppressed potentially exculpatory evidence, his Brady challenge fails.

F. Ineffective Assistance of Counsel

Noor raises several claims of ineffective assistance of counsel, arguing that such instances warrant granting his PRP. None of the claims have merit.

To prevail on an ineffective assistance claim, Noor must show that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." State v. Kyllo, 166 Wn.2d 856, 86, 215 P.3d 177 (2009). To show prejudice, Noor "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. If Noor meets his burden to show ineffective assistance under Strickland, then he has necessarily met his burden to show the actual and substantial prejudice the PRP standard requires. In re Pers. Restraint of

Crace, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012). However, if he fails to satisfy either prong of the test, we need not inquire further. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

We approach ineffective assistance of counsel arguments with a strong presumption that counsel provided effective and competent representation. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). A petitioner "can 'rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy'" and the "'reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances.'" In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1 (2004) (quoting Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)).

1. Use of Initials

Noor argues that his trial counsel was ineffective for not objecting to the court's use of S.K.'s initials in the jury instructions. But, since we have already determined there was no instructional error, Noor's claim that his counsel was ineffective for failing to challenge those instructions also fails because he has not shown that counsel's performance was deficient or resulted in actual prejudice. Hendrickson, 129 Wn.2d at 78.

2. Sentencing

Next, Noor claims his counsel was ineffective at sentencing for not presenting evidence that Noor experienced civil war as a child growing up in Somalia. Defense

counsel's obligation to provide effective assistance applies at sentencing. State v. Phuong, 174 Wn. App. 494, 547, 299 P.3d 37 (2013).

At sentencing, the State argued that Noor "stole [S.K.'s] childhood from her" and requested a sentence at the higher end of the standard range, even though Noor had no criminal history. Noor's counsel responded by requesting the shortest sentence within the standard range be imposed. Counsel highlighted Noor's love for his young child and his support from members in the local Somali community. One such member appeared and spoke positively on Noor's behalf. Counsel also submitted many more letters from the community as mitigation evidence.[6]

During allocution, Noor declared: "I never did any of this," "I never used her as a wife," and "I'm her uncle[,] I never used her." He then continued attacking the trial proceedings, denied committing the offenses for which he was convicted, and disparaged his attorney's trial tactics and strategies. Noor squandered the opportunity to share his civil war experiences and how they impacted his life.

Ultimately, the trial court imposed a standard range sentence between the sentences the parties recommended. Noor fails to demonstrate that the actions of his counsel at sentencing fell below objective standards of effective representation. Nor has he shown a reasonable probability that, but for his counsel's performance at the sentencing hearing, the court would have imposed a shorter sentence. This is so because even a "poor quality sentencing argument alone is unlikely to result in demonstrable prejudice because of the near impossibility of showing a nexus between

[6] None of the community letters are part of the record on collateral review.

the argument and the eventual sentence." State v. Goldberg, 123 Wn. App. 848, 853, 99 P.3d 924 (2004). Noor's ineffective assistance at sentencing claim fails.

3. Failure to Discover CPS Interview

Noor contends that his counsel provided ineffective assistance by failing to discover and subpoena the August 2015 CPS interview of his child M.N.

Again, we approach this claim with the strong presumption that counsel's representation was effective and that Noor bears the burden to rebut this strong presumption by "'proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.'" Davis, 152 Wn.2d at 673 (quoting Kimmelman, 477 U.S. at 384)). But, from the record, it appears defense counsel made an informed tactical decision not to interview Noor's child, call the child as a witness, or subpoena the child's CPS records.

Believing that his child would be a good witness and verify that he neither assaulted nor raped S.K., Noor asked his first defense counsel to interview the child. Noor says that attorney tried to arrange an interview with the child but was unsuccessful. When another attorney took over the defense as trial counsel, Noor asked him to interview the child. Noor asked his new defense counsel "to contact my dependency lawyers to gain information about my case that may not have been disclosed by the criminal prosecutors. I do not know why [defense counsel] never contacted the dependency lawyers and why he did not interview" the child.

As discussed above, Noor's defense counsel did reach out to the State to coordinate an interview with Noor's child M.N. The interview never occurred. Defense counsel was also unaware of the CPS interview of M.N. While the record does not

explain why defense counsel decided not to interview or call M.N. as a witness, "the decision to call or not to call a witness is for counsel to make." In re Pers. Restraint of Stenson, 142 Wn.2d 710, 16 P.3d 1 (2001).

In closing argument, defense counsel argued that the State simply failed to meet its burden of proof. Counsel informed the jury that Noor's child was on his "list of missing witnesses" whom the State did not call to testify and cautioned that Noor's "decision to follow my advice to not testify cannot be held against him. . . This is about the State's case, what they chose to present, also quite significantly, what they chose not to present."

On this record, we conclude defense counsel had no intention of making Noor's child a trial witness and, therefore, had no need for any material contained in the child's CPS file. Noor has not shown defense counsel rendered ineffective assistance here.

4. Plea Offer

Finally, Noor argues his counsel was ineffective because he did not understand the consequences of refusing the State's plea offer.

The right to effective assistance of counsel extends to the plea negotiation process. State v. Estes, 188 Wn.2d 450, 463, 395 P.3d 1045 (2017). This right to effective counsel "includes 'assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial.'" Estes, 188 Wn.2d at 464 (quoting State v. A.N.J., 168 Wn.2d 91, 111, 225 P.3d 956 (2010)).

Before trial Noor rejected the State's plea offers, indicating that he "wasn't willing to consider several years in prison." He went to trial, where the jury convicted him of multiple charges including a second degree rape charge that carries an indeterminate

life sentence. Now, Noor claims that he "did not understand the plea bargaining process fully" and "did not knowingly and intelligently give up the opportunity to plead guilty to a lesser charge, that would have meant him serving just a few years in prison."

Noor admits that his defense counsel communicated the State's offers and "attempted to explain to [him] what the sentencing consequences were." Noor does not claim that his counsel failed to advise about the sentencing consequences if convicted on the second degree rape charge. Because he fails to present evidence indicating that his counsel's performance was deficient, Noor's claim fails.

We deny Noor's PRP.[7]

Mann, C.J.

WE CONCUR:

[7] Noor raises cumulative error as another ground for relief. Cumulative error is a doctrine "limited to instances when there have been 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). Given our disposition of his other claims, there is no need to address cumulative error.