

NO. 37828-1

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STATE OF WASHINGTON  
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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LONI VENEGAS, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Frederick W. Fleming

No. 07-1-03860-6

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion in its evidentiary rulings when a) it carefully considered the defense motion to allow expert opinion testimony and ruled after an offer of proof; and b) evidence of defendant's actions was admitted in accordance with the rules of evidence? (Appellant's Assignments of Error 1 and 3)
2. Was defendant denied the right to a fair trial where the statements made by the State in closing did not constitute prosecutorial misconduct as they did not shift the burden to defendant; did not misstate the burden of reasonable doubt, the presumption of innocence or the role of the jury; and contained proper arguments on the evidence? (Appellant's Assignment of Error 5)
3. Has defendant failed to meet her burden of showing deficient performance and resulting prejudice necessary to succeed on her claim of ineffective assistance of counsel? (Appellant's Assignments of Error 2 and 4)
4. Has defendant failed to demonstrate the existence of any prejudicial error in her trial much less an accumulation of it necessary for application of the cumulative error doctrine? (Appellant's Assignment of Error 6)

B. STATEMENT OF THE CASE.

1. Procedure

The State charged defendant, Loni Venegas, on August 23, 2007 with one count of assault of a child in the first degree, and two counts of assault of a child in the second degree. CP 1-2. The victim of the charges was J.V.<sup>1</sup>, the grandson of defendant's husband. CP 3-5. The first count dealt with defendant choking J.V., the second count dealt with a cut on his chin and the third count dealt with a bruise and loss of a tooth. CP 1-2, 3-5. All three counts were charged as crimes of domestic violence. CP 1-2.

The case was called for trial on April 10, 2008 in front of the Honorable Frederick Fleming. RP 4<sup>2</sup>. On April 29, 2008, the State filed an amended information that changed the date range on count I from on or about July 25, 2007 to a range of time of July 24- July 25, 2007. RP 812-3, CP 8-9. The amended information did not change anything about count II, but changed the dates on count III from February 1-February 28, 2007 to March 1- April 1, 2007. RP 812-3, CP 8-9. The State filed a corrected information the same day to correct some language that was inadvertently left out of the amended information. RP 829-830, CP 6-7. The court

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<sup>1</sup> There are many juveniles in this case who will be referred to by their initials.

<sup>2</sup> The State will refer to the verbatim report of proceedings as follows: the three preliminary hearings will be referred to as 2/7/08 RP, 3/5/08 RP, and 3/17/08 RP; the remaining sequentially paginated volumes will be referred to as RP.

accepted the filing of the amended information over defense objection.  
RP 828-29.

On June 6, 2008, the jury found defendant guilty of all three charges. RP 3392-93. CP 69, 72, 73. The jury also found that the assaults in count II and III were separate and distinct from the pattern of assault in count I. RP 3393-94, CP 75.

Sentencing was held on June 13, 2008. RP 3411-3434. Defendant's sentencing range was 129-171 months. CP 109-122. The court sentenced defendant to the high end of 171 months. RP 3428, CP 109-122. Defendant filed this timely appeal. CP 123.

## 2. Facts

J.V. was only six years old when his mom and her significant other were killed in a car accident. RP 781, 1250, 2483. After his mom died, J.V. began living with his grandfather, Remil Venegas and his step-grandmother, the defendant. RP 1251.

J.V. had many chores to do at defendant's house. RP 1254. He also could not eat at the dining room table with the rest of the family because defendant said there weren't enough chairs. RP 1255-56. J.V. had to get up to do chores and didn't have time to eat breakfast on most days. RP 1264. Defendant would kick J.V. in his side and in his stomach if he didn't do his chores right. RP 1266. She would also scald him with hot water in the bath tub. RP 1266-68. When J.V. forgot to feed the dog,

she wouldn't let J.V. eat either. RP 1269. J.V. got in trouble a lot. RP 1270. Defendant would punish him by hitting him all over his body with a stick. RP 1270. These beatings would cause him to have bruises and cuts and sometimes cause him to limp. RP 1272-73. Defendant also hit the tops of his feet with a hammer. RP 1277. Defendant also used a fork to scrape the back of his legs and then poured vinegar on his legs. RP 1278. Defendant choked him, and punched him in the nose, cheeks, and mouth. RP 1279. He would get bruises and fat lips. RP 1279. Defendant knocked one of his teeth loose and he had to pull it. RP 1283. Teachers and friends asked him about the bruises but he was scared to tell what had happened and told them the excuses that defendant had told him to use. RP 1280.

Defendant would also punish J.V. by making him do squats and hitting him with a stick if he didn't bend his knees enough. RP 1284. J.V. had to do wall sits for an hour without a wall. RP 1285. One morning, while J.V. was unloading the dishwasher, defendant wouldn't let him stop to go to the bathroom. RP 1288. J.V. had an accident and defendant forced him to wipe it up with his clothes while he was still wearing them. RP 1289. Defendant then stomped on his head, his chin hit the floor and she stomped on him one more time. RP 1289-1290. He had 12 stitches in his chin. RP 1287. The day J.V. ran away, defendant had had him by his throat against the wall and was choking him. RP 1294, 1408. She

punched him repeatedly. RP 1336, 1409. J.V. couldn't breathe and felt lightheaded. RP 1410.

Sometimes J.V. had to stay home because of the beatings. RP 1306, 1641. He would have to do chores and read. RP 1307. Defendant took away his birthday and was mad when J.V.'s aunt brought him a cake. RP 1390-10. Defendant took away his gifts. RP 1311-12. Defendant told him to do belly flops in the pool until she told him to stop. RP 1318. When she told him to stop, his nose was bleeding. RP 1318. Defendant was also locked in a storage room, the longest time period was for one and one half days. RP 1319. He was not brought food the first day and was forced to urinate through a window. RP 1319-20. Defendant called him names such as dumbass, dumb fuck, fuck-up, asshole, shithead, and faggot. RP 1331. Defendant told him he was a really bad kid. RP 1330.

J.V. was at Remann Hall but only because a neighbor was trying to keep he and Jasmine away. RP 1648. J.V. did not skip school. RP 1648.

D.V., defendant's son, testified that he saw defendant punch J.V. on the arm. RP 1684. D.V. indicated that his parents took the lock off the storage room door after J.V. ran away. RP 1698. D.V.'s testimony changed somewhat between his interview and court because his mom helped him remember things. RP 1717.<sup>3</sup>

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<sup>3</sup> This help had occurred at a supervised visit over the weekend and during a visit form the defense investigator. RP 1717-8, 1729, 2191.

A.C. is the biological daughter of defendant's husband. RP 165. A.C. stayed with defendant's family during the summer of 2005. RP 171. A.C. testified that J.V. had to do chores while the other kids played. RP 174, 188. Defendant was mad at J.V. almost every day. RP 182. J.V. ate on the back porch and did all the dishes after the meal. RP 183-4. A.C. testified that she observed defendant put J.V.'s nose in cat feces after he vacuumed it up with her new vacuum. RP 185. Defendant told J.V. that he was bad, useless, and slow. RP 186. A.C. also observed defendant discipline J.V. by making him do wall sits. RP 186. J.V. was punished by not getting food for a weekend after he forgot to feed the dog because he didn't deserve to eat either. RP 196. A.C. saw defendant and J.V. go downstairs one day after he didn't finish his chores. RP 202, 206-7. A.C. heard the sound of something swinging and when J.V. came back up, he had red marks on the top of his hands. RP 206-7. A.C. also observed bruises and cuts on J.V.'s face and legs. RP 207.

K.P. is A.C.'s cousin. RP 591. She visited defendant's house in 2005. RP 591. K.P. observed J.V. doing chores while they were playing. RP 594. She also observed that J.V. did not eat at the table any of the three days she was there. RP 595. Defendant was always yelling at J.V. RP 595. K.P. saw defendant take the back of J.V.'s head and slam his face into the pool table. RP 596. J.V. was crying and telling defendant to stop. J.V.'s chin was bloody and he had a fat lip the next day. RP 598, 609, 611.

Robert Deters is defendant's brother-in-law. Deters indicated that J.V. was not going to have one of his birthday's celebrated because he was grounded. RP 853. Deters recalled that at one of J.V.'s previous birthdays there had been no presents or friends for J.V. RP 854. Deters picked up a cake for J.V. and defendant was mad. RP 956. J.V. stayed with them for awhile after he was removed from defendant's house and during that time defendant and Remil came over and interrogated him. RP 859, 860, 870.

Rosa Broadnax Johnson's son M.J. is best friends with J.V. RP 283. Johnson observed J.V. at home working in the yard when he should have been at school. RP 287. Defendant told Johnson that J.V. was a troublemaker and had been in Remann Hall. RP 291. J.V. was in the car during this conversation. RP 291. J.V. came to her house on June 25, 2007. RP 297. J.V. had been hit and had run away. RP 292. J.V. was stuttering and shaky. RP 294. His cheek was red, there was redness and swelling on his face and there were scratch marks on this neck. RP 294, 299. Johnson called CPS and called the police. RP 300.

M.J. testified that J.V. was always getting yelled at by defendant. RP 305. M.J. also testified that J.V. was not happy at his house and defendant wouldn't let them play together. RP 331, 332.

Shannon Roque lived next door to defendant. RP 354. Defendant had told her that J.V. stole, ran away, and skipped school. RP 365. The only nice thing defendant had to say about J.V. was that he was good at

math. RP 366. Roque's observations of J.V. were not consistent with what defendant said about him. RP 366. Defendant thought J.V. was going to be a psychopath though Roque did not see behavior that supported this. RP 371-2, 560. Defendant treated J.V. differently than her biological kids in that she was not affectionate toward him, very strict, and didn't say nice things. RP 366, 367. J.V. was often doing chores while the other kids were playing. RP 373, 374-5.

Carrie Adrian was the principal at Collins Elementary School. RP 646. J.V. was absent a lot. RP 653. The school was also concerned with J.V.'s appearance and the fact that he was withdrawn to be home schooled. RP 654, 656-7. More than one CPS report was filed by his teacher's while he was at Collins. RP 657.

Shelley Hurtado was J.V.'s speech pathologist at Collins. RP 927-28. Hurtado saw bruises and a cut on J.V.'s nose in September of 2004, and bruises on his cheek, the bridge of his nose and swollen lip in December 2005. RP 929-34.

Katherine Trezise was J.V.'s third grade teacher. RP 989-90. Defendant was concerned J.V. did not have enough homework and was doing sloppy work despite Trezise's repeated assurances that J.V. was a stellar student. RP 990, 993, 996, 998. Trezise noticed a bruise on J.V.'s cheek on September 23, 2003. RP 1002. She made a CPS report in January 2004 because J.V. had abrasions on his lips and a bruise on his shoulder. RP 1005-06.

Kimberlie Munson was a teacher at Collins. RP 1116. She saw a bruise on the side of J.V.'s nose and a bruise on his cheek and called CPS on September 9, 2004. RP 1120-21. On September 23, 2004, she called CPS after observing J.V. with bruise on the bridge of his nose and cut on the inside of his lip. RP 111-22. When defendant withdrew J.V. from school on November 4, 2004 to home school him, she called CPS. RP 1123-24.

Brian Peterson was J.V.'s 5<sup>th</sup> grade teacher. RP 238. Mr. Peterson reported no behavioral problems with J.V. RP 238. Peterson did see bruises on J.V, and documented his observations to CPS on September 26, 2005 and March 1, 2006. RP 239, 240-45.

David Larkey was J.V.'s teacher at Ford Middle School. RP 663. In March 2007, he noticed bruises on J.V.'s face. RP 667. Larkey noticed that the bruising was unusual and didn't seem to fit the story J.V. told him. RP 670-1, 673. J.V. had missed school on March 23<sup>rd</sup> and then came back to school with bruises on the 26<sup>th</sup>. RP 685. Larkey indicated that the bruise looked like someone had used their knuckles on J.V. RP 687. A couple of weeks prior to the bruising, Larkey had noticed that J.V. had a cut on his chin with stitches. RP 688-9. J.V. eventually disclosed to him that he was injured by a parent: the defendant. RP 694, 707.

Nicole Redl was one of J.V.'s teacher's at Ford Middle School during 2006/2007. RP 953. Redl had a parent teacher conference with J.V. and defendant. RP 955-7. Defendant called J.V. a liar, a bad kid, and

a thief and also said he wanted to be a gang member. RP 956. The more positive things Redl said about J.V., the more negative defendant became. RP 957. Redl observed bruising on J.V. after they returned from Christmas break. RP 962. She also saw J.V. limping around in March. RP 962-3.

Beth Weinrich teaches 6<sup>th</sup> grade at Ford Middle School. RP 1165. Weinrich had told defendant how great a kid J.V. was and defendant got more and more upset as she tried to tell her good things about J.V. RP 1169-72. Weinrich noticed bruises on J.V.'s cheeks in February 2007. TP 1178. She also observed stitches in J.V.'s chin in March 2007. RP 1179. J.V. also had bruising on his check and was missing a molar. RP 1180-1. J.V. came to school limping in the spring. RP 1182. She also called CPS. RP 1183.

CPS had several reports about J.V. RP 731-34. Reports were received from J.V.'s school on September 23, 2004, November 4, 2004, September 26, 2005, December 12, 2005, March 28, 2007, and June 24, 2007. RP 731-34. A foster parent called in on June 26, 2007. RP 734. J.V. was removed from defendant's house on June 25, 2007. RP 739. Heather Hasse from CPS indicated that J.V. said his grandfather had punched him and defendant had grabbed him, choked him and thrown him into a wall. RP 782-83.

Detective Lynelle Anderson placed J.V. in protective custody on June 29, 2007. RP 1809. She noticed small marks on his neck. RP 1813.

Ms. Roque attended the CPS family meeting. RP 356. Roque helped with the safety plan that was set up where J.V. lived in a trailer in the backyard and could only return to the house when defendant was not there. RP 359-60, 746. During this time, J.V. was called home to perform chores. RP 392. J.V. was also left in the trailer with no adult supervision. RP 395. Defendant wanted to make sure the J.V. was doing chores while at the Roque house and was mad that Roque had taken J.V. to the movies. RP 414, 4125-6. J.V. confided in her during this time period and it was so shocking and disturbing that Roque made a CPS report. RP 363, 398, 539. J.V. sobbed for hours. RP 407. Roque observed marks on J.V.'s hands and arm as well as his neck. RP 409, 410.

Clarence Mason, a forensic investigator with the Pierce County Sheriff's department, took pictures of J.V. on July 19, 2007. RP 133, 136. J.V. had discoloration on his skin on the left side of his neck and on the front of his Adam's apple. RP 136. J.V. also had marks on the back of his hands and under his chin. RP 136.

Defendant presented family and friends to testify on her behalf. C.C. testified that J.V. was weird. RP 1898. Several said the J.V. was not treated any differently. RP 2051, 2114, 2246. Ja.V. testified that J.V. picked his chores and picked his punishment of squats. RP 2251, 2256. Ja.V. claimed J.V. got in trouble in 5<sup>th</sup> grade, started picking fights and letting his grades slip. RP 2259, 2261. Ja.V. claimed J.V. was small for

his age and always getting hurt and getting beat up. RP 2263, 2265-66.  
J.V. also supposedly hurt himself by accidentally falling. RP 2291.

Defendant alleged that J.V. had played a sexy game with two of her boys. RP 771. She told Ms. Roque that J.V. had made the younger boys put their penis in his mouth. RP 496, 568. Defendant claimed that she did not leave J.V. alone with her kids without supervision although Roque saw them alone. RP 569, 570. On July 9, 2007, defendant called CPS to report the 2001 sexy game. RP 771. Defendant also reported at that time, that J.V. stuck his finger into her younger son's butt in 2004. RP 772. Defendant had called Dr. Friedman about the sexy game and claimed that he helped her develop a safety plan. RP 1487, 2564, 2896. While defendant had called, no such safety plan existed. RP 1487-91.

Defendant claimed she was J.V.'s mother in every sense of the word. RP 2849. J.V. was always part of the family and she loved him. RP 2567, 2796. She said she was happy to hear J.V. was doing well in school. RP 2855. Defendant claimed that J.V. got in fights. RP 2941-42. 2652. Defendant also claimed that J.V. was a klutzy, clumsy kid. RP 2958. Defendant denied punching and kicking J.V. RP 954.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS RULINGS AS TO THE ADMISSIBILITY OF EVIDENCE.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651, *review denied*, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. *Rehak*, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. *State v. Thetford*, 109 Wn.2d 392, 397, 745 P.2d 496 (1987).

Defendant alleges that the trial court abused its discretion when it limited the testimony of Dr. Attig. Defendant also alleges that the trial court abused its discretion in admitting evidence relating to defendant's actions and attitudes toward the victim. The trial court did not error.

- a. The trial court did not error in limiting the expert opinion testimony of Dr. Attig after an offer of proof.

A defendant has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. *Rehak*, 67 Wn. App. at 162; *In re Twining*, 77 Wn. App. 882, 893, 894 P.2d 1331, *review denied*, 127 Wn.2d 1018 (1995). The right to present evidence is not absolute, however, and must yield to a state's legitimate interest in excluding inherently unreliable testimony. *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Baird*, 83 Wn. App. 477, 482, 922 P.2d 157 (1996), *review denied*, 131 Wn.2d 1012 (1997).

Limitations on the right to introduce evidence are not unconstitutional unless they affect fundamental principles of justice. *Montana v. Engelhoff*, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L. Ed. 2d 361 (1996) (stating that the "accused does not have an unfettered right to

offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence” (quoting *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988)). Similarly, the Washington Supreme Court has stated that the defendant’s right to present relevant evidence may be limited by compelling government purposes. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983) (discussing Washington’s rape shield law).

Under ER 103(a)(2), error may not be asserted based upon a ruling that excludes evidence unless a substantial right of the party is affected, and the substance of the evidence was made know to the court by offer or was apparent from the context of the record. “An offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review.” *State v. Ray*, 116 Wn.2d 531, 538, 806 P.2d 1220 (1991). The party offering the evidence has the duty to make clear to the trial court: 1) what it is that he offers in proof; and, 2) the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. *Ray*, 116 Wn.2d at 539, citing *Mad River Orchard Co. v. Krack Corp.*, 89 Wn.2d 535, 537, 573 P.2d 796 (1978).

In the instant case, defendant alleges that Dr. Attig’s expert opinion as to the causation of J.V.’s injury would have “cast grave doubt

on J.V.'s allegation" and that it was crucial for the jury to hear. Brief of Appellant, page 24. Defense counsel called Dr. Attig as a witness. RP 2020. The State had endorsed Dr. Attig on their witness list as well but had not called him in their case in chief. RP 35. Dr. Attig was the treating physician for J.V.'s chin injury that occurred on February 28, 2007. RP 2034. However, defense proposed to go beyond Dr. Attig's treatment and observations of J.V. and ask him to actually render an expert opinion about the causation of J.V.'s injury. RP 2020. The State objected to the expert opinion part of Dr. Attig's testimony. RP 2020.

The trial court gave defense counsel the opportunity to make an offer of proof outside the presence of the jury. RP 2026. Dr. Attig testified that he was a family physician. RP 2026. Dr. Attig treated J.V. for a chin laceration on February 28, 2007. RP 2028. The doctor was told on that day that J.V. had slipped on the kitchen floor and struck his chin on the kitchen floor. RP 2028. The doctor did not observe any other injuries to the face and said that the injury was consistent with the story J.V. told him that day. RP 2029. Dr. Attig then testified that the injury could have been caused by J.V. being stomped on the head but was unlikely without collateral injuries. RP 2030-31. Dr. Attig also said in his opinion, he "didn't think" he was stomped on the head. RP 2031. Dr. Attig testified this was a very common injury and could be caused by many things. RP 2031. The trial court heard the offer of proof and then

sustained the State's objection to the doctor's opinion as to the causation of J.V.'s injury. RP 2032.

The trial court did not error in excluding the doctor's opinion. First, the doctor was not endorsed as an expert witness until right before he was supposed to testify. Under CrR 4.7, the defense has an obligation to disclose to the prosecuting attorney, no later than the omnibus hearing, the names of the witnesses they intend to call as well as the substance of any oral statements. Defense counsel told the court that after she interviewed Dr. Attig she would make the substance of his testimony known to the State. RP 9. Defense counsel was on notice that she needed to provide this information and she waited until the last second to do so. The court did not exclude the witness but did not allow him to testify as to an expert opinion as to the causation of J.V.'s injury. RP 2032. This was a reasonable response and there was no abuse of discretion.

Second, the offer of proof showed that there was an insufficient basis for the doctor's opinion. An expert has to have certain qualifications. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issues, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702. The doctor testified that J.V.'s injury could have been caused by being stomped on though he thought it was an unlikely. RP 2030-31. Further, he testified he didn't think that being stomped

caused the injury. RP 2031. His testimony was devoid of the basis for this opinion of causation and lacked certainty. The doctor's "expert opinion" amounted to conjecture and speculation. In fact, the doctor testified that this was a common injury and any number of things could have caused it. RP 2031. The court did not abuse its discretion in excluding the unsupported opinion.

Finally, defendant was not deprived of Dr. Attig's testimony. Dr. Attig did testify in front of the jury. The doctor was able to testify to the jury that the injury he saw was consistent with J.V. slipping on the floor and hitting his chin. RP 2035. Dr. Attig also testified that J.V. had no injuries to his face and he didn't see any old bruises on J.V.'s face. RP 2035, 2043. Dr. Attig also testified that despite this being over a year ago, he remembered the details of this injury because injuries are not frequent in his practice. RP 2045-46. Defendant received the benefit of Dr. Attig's testimony that J.V.'s injury was consistent with slipping and falling on the kitchen floor. Defendant was able to present a complete defense. The trial court did not error in limiting Dr. Attig's testimony.

- b. The trial court did not error in admitting evidence of defendant's actions for the purposes of motive and intent and to rebut the defense theory of the case.

Defendant was charged with assault of child in the first degree under RCW 9A.36.120(1)(b). "RCW 9A.36.120(1)(b) requires proof of a

principal intentional assault which causes substantial bodily harm, *and* a previous pattern or practice of causing pain. The crime thus is defined not by a single act, but by a course of conduct.” *State v. Kiser*, 87 Wn. App. 126, 130, 940 P.2d 308 (1997). The State is required to prove that defendant engaged in a course of conduct toward J.V. As the State has to prove intent and a history of abuse, evidence of previous hostility by defendant toward J.V. becomes relevant.

ER 404(b) provides that evidence of “other crimes, wrongs, or acts” is inadmissible to prove “action in conformity therewith” on a particular occasion. However, that rule also provides a non-exhaustive list of purposes for which such evidence can be admissible: “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b).

In addition to the non-exhaustive list of exceptions identified in ER 404(b), Washington courts recognize a *res gestae* or “same transaction” exception to the rule. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). Same transaction evidence of prior misconduct is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime. *State v. Lillard*, 122 Wn. App.422, 93 P.3d 969, 974 (2004) (citing *State v. Tharp*, 27 Wn. App. 198, 205, 93 P.3d 969 (1981)). “A defendant cannot insulate himself by committing a string of connected offenses and then argue that the evidence of the other uncharged crimes is inadmissible because it shows

the defendant's bad character, thus forcing the State to present a fragmented version of the events." *Lillard*, 122 Wn. App. at 431.

However, if the story is complete without the proffered testimony, the exception is not applicable. *State v. Mutchler*, 53 Wn. App. 898, 902, 771 P.2d 1168 (1989).

As the State not only had to prove the defendant intentionally assaulted J.V. but also prove a pattern or practice of assault, more than one event had to be shown to the jury. A "pattern" is "a regular, mainly unvarying way of acting or doing," and a "practice" is "a frequent or usual action; habit; usage." *State v. Madarash*, 116 Wn. App. 500, 514, 66 P.3d 682 (2003) (quoting *State v. Russell*, 69 Wn. App. 237, 247, 848 P.2d 743 (1993)) (quoting Webster's New World Dictionary 1042, 1117 (1976)). In order to show that pattern, the State showed defendant's regular way of acting toward J.V. and showed how he was regularly treated by defendant.

The State's presented evidence that defendant did not support anything positive about J.V. and treated him differently than her five biological children. The pattern and practice of assault is a course of conduct and defendant's actions in denying J.V. an opportunity to be in the honors math program, despite his teacher's recommendation, fits into the pattern. Defense counsel objected to the testimony that defendant did not want J.V. in the honors math program. RP 915-17. The court weighed both sides of the argument and found the testimony admissible to show

pattern although it was noted that defense counsel could properly test this theory in cross-examination and could rebut with any witnesses they wished. RP 919-921. As the court listened to both sides and weighed the probative value versus the prejudicial effect, the court did not abuse its discretion.

Similarly, defense counsel objected to the testimony that defendant did not want to pay for J.V.'s foster care. RP 755. The defense theory was that this whole case was a product of J.V.'s imagination and that defendant was really very concerned for J.V.'s well being. Again, the fact that defendant did not want to pay for his foster care showed that she had no regard for J.V. and it showed the pattern of behavior engaged in by defendant. RP 756-57. The court listened to both sides, weighed the probative value versus the prejudicial effect and overruled the defense objection. RP 757. Because the court listened to both sides and engaged in analysis, the court did not abuse its discretion.

In addition, defense counsel objected to testimony that a teacher observed J.V. eat three bowls of cereal at school on the morning of the WASL. RP 1159. This evidence went directly to the pattern of abuse in that there was evidence that J.V. was not given meals as a form of punishment. The court did not abuse its discretion in admitting this evidence. RP 1160.

Defendant also claims it was error to admit evidence that J.V. had to completely rewrite a poem that he wrote for school about his mother's

death. Defense counsel initially objected to the teacher testifying that J.V. told her defendant made him rewrite the poem. RP 1138-39. The State indicated they would not be eliciting the hearsay statement. RP 1139. Defense counsel then objected to any mention of the poem and again objected to the hearsay statement as to defendant making J.V. change the poem. RP 1162. The State reiterated that they would not be eliciting the hearsay statement. RP 1162. The State also indicated that the teacher's observations about the poem showed J.V. to be bright and articulate which was in contrast to how the defense was portraying J.V. RP 1162-3. J.V. would also be testifying about it later providing defense the opportunity for cross-examination. RP 1162. The court listened to both sides and denied the defense motion in limine. RP 1162-3. The court did not abuse its discretion in admitting this testimony.

Defendant lists 13 areas where they believe inadmissible evidence was introduced. Brief of Appellant, page 34-39<sup>4</sup>. However, these instances were not objected to. As such, they are not properly preserved for appellate review.

The trial court reviewed the evidence presented and listened to the arguments of both sides. In order to present evidence of a pattern of

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<sup>4</sup> 2 of the 13 have been addressed in this section because defense counsel did object to them.

abuse, the State had to look at a period of time and present evidence of defendant's actions. The fact that the State presented evidence that was prejudicial to defendant does not mean the State engaged in character "assassination." The State was entitled to present evidence of the pattern and of their theory of the case subject to the court's rulings. As the court engaged in the proper analysis, the court did not abuse its discretion.

2. DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

"Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *Stenson*, 132 Wn.2d at 718. Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995) citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719, citing *Gentry*, 125 Wn.2d at 593-594.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994) citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986). “Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be

ineffective.” *Russell*, 125 Wn.2d at 86, citing *State v. Dennison*, 72 Wn. 2d 842, 849, 435 P.2d 526 (1967). The prosecutor is entitled to make a fair response to the arguments of defense counsel. *Russell*, 125 Wn.2d at 87.

Here, defendant asserts that the prosecutor committed misconduct where she allegedly (a) misstated the State’s burden and misstated the presumption of innocence and (b) shifted the burden to defendant, and misstated the role of the jury. The State’s arguments were proper arguments based on the court’s instructions and the evidence adduced at trial.

- a. The State’s remarks were proper argument and did not misstate the State’s burden of proof or misstate the presumption of innocence.

A jury is presumed to follow the court’s instructions regarding the proper burden of proof. *State v. Gregory*, 158 Wn.2d 759, 861-2, 147 P.3d 1201 (2006). A jury is presumed to follow the trial court’s instructions. *State v. Lough*, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

In that instant case, the court instructed the jury on the law including the reasonable doubt standard and the presumption of innocence.

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The

defendant has no burden of proving that a reasonable doubt exists as to these elements.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 42-68, Instruction 2, *see also* Washington Pattern Jury Instructions

Criminal, WPIC 4.01. Further, the court instructed the jury:

The lawyer's remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions

CP 42-68, Instruction 1, *see also* Washington Pattern Jury Instructions

Criminal, WPIC 1.02.

Defendant alleges that the prosecutor misstated the State's burden and misstated the presumption of innocence by arguing:

State: Counsel says the defendant is presumed innocent and that the State bears the burden of proof and she's absolutely right. The defendant is presumed innocent and the State does bear the burden. We bear that burden gladly, but that presumption of innocence, ladies and gentlemen, that presumption erodes each and every time you hear evidence that the defendant is guilty.

Defense: I object. That's a misstatement of the law.

Court: It's argument, I'll allow it,

State: Every single time that evidence is presented that the defendant is guilty as charged, then that presumption erodes little by little, bit by bit, and at the conclusion of all of the evidence, including the defendant's witnesses and the defendant, herself, and that presumption no longer exists, then that's when the State has proven the case beyond a reasonable doubt. And in this case, the State absolutely has proven beyond a reasonable doubt.

RP 3354-55. The State then proceeds to go through the evidence it believes shows that the State proved its case beyond a reasonable doubt.

The State's argument is not improper. The State acknowledged its burden, told the jury it met its burden, and then proceeded to show how it met its burden. The State clarified the presumption is gone when the State has presented evidence that has proven their case beyond a reasonable doubt. This analysis is consistent with the jury instruction that says the presumption of innocence had been overcome when the jury finds there is evidence beyond a reasonable doubt. This is not an improper statement of the law.

- b. The State did not shift the burden to defendant and did not misstate the role of the jury.

In closing argument, a prosecutor is permitted to argue the facts in evidence and reasonable inferences therefrom. *State v. Dhaliwal*, 150

Wn.2d 559, 577, 79 P.3d 432 (2003); *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). The prosecutor does not shift the burden of proof when it points out the evidentiary deficiencies of defendant's arguments. See *Russell*, 125 Wn.2d at 85-86.

A prosecutor does not shift the burden of proof when they argue that a defendant's version of events is not corroborated by the evidence. *Gregory*, 158 Wn.2d at 860. "The State is entitled to comment upon quality and quantity of evidence presented by the defense. An argument about the amount or quality of evidence presented by defense does not necessarily suggest that the burden of proof rests with the defense." *Id.*

The State is entitled to respond to the arguments made by defense counsel. Defendant points to the following argument as error in terms of misstating the role of the jury and shifting the burden.

State: The bottom line is this. To believe that she did nothing, to believe her testimony in its entirety, this is what you have to believe. You have to disbelieve Ms. Trezise, Ms, Redl, Ms. Weinrich, when they all said how angry she got when they told her —

Defense: Objection, misstates the law, not an accurate statement of the burden of proof.

Court: It's argument, overruled.

State: You have to disbelieve Ms. Renner when she testified that, no, the school had never called her home and said that Jamil had to be disciplined after school for four weeks.

Defense: Same objection, misstates the law, shifts the burden of proof, improper argument.

Court: It's argument.

State: Disbelieve Ms. Gilmore when she testified, "No. Jamil never said he was aspiring to be a gang member," disbelieve Kady Paxton, Alyson Clairmont, Marvin Clairmont who said, "Hey, a cat. I picked him up."

Defense: Same objection, misstates the burden of proof, shifts the burden of proof, improper argument, misconduct.

Court: Overruled.

State: She said, "I never told CPS. I never told CPS that I was keeping the children in separate rooms." She had to say that because she just testified about how all the boys were kept together, allowed to play together, although, of course, every single day of their lives they slept in the living room, and when you're pondering whether to believe or disbelieve Janelle, think of this, ladies and gentlemen, Jamil, he had told his story to Rosa Broadnax, Shannon, police, defense investigator, and anyone else who asked, including the people in this courtroom and you have to ask yourselves this. Did the defense attorney show to you that he is not credible, not believable?

Defense: Objection, shifts the burden,

State: Untrustworthy?

Defense: Improper argument, misconduct.

Court: Overruled.

State: Ladies and gentlemen, I bear the burden. I have to prove that the defendant is guilty, but you know what? Once they put on their case, once they parade witnesses, then you have to give their evidence the exact same level of scrutiny and examination that you give the State's case, and

one of the things that you have to consider is, was Jamil credible and believable when he testified, and was there anything to show that he was neither of those things? That's what you have to decide as a juror.

RP 3368-3370.

It is sometimes improper for a prosecutor to tell the jury that their verdict rests on whether they believe one witness or another. *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991) (“[I]t is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying.”); *State v. Barrow*, 60 Wn. App. 869, 875-76, 809 P.2d 209 (1991) (concluding that it was misconduct for prosecutor to argue that “in order for you to find the defendant not guilty . . . you have to believe his testimony and completely disbelieve the officers’ testimony”). Statements that guilt or innocence depend on a determination that a witness is lying are inappropriate when it is possible that the testimony of the witness could be “unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved.” *Casteneda-Perez*, 61 Wn. App. at 363; accord *Barrow*, 60 Wn. App. at 871, 875-76 (misconduct for prosecutor to say that the defendant was calling the State’s witnesses liars when the defendant presented a mistaken identity theory). However, where “the parties present the jury with conflicting versions of the facts

and the credibility of the witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other.” *State v. Wright*, 76 Wn. App. 811, 825, 888 P.2d 1214 (1995).

In the instant case, the jury was presented with two completely different versions of certain events. The defense theory of the case was that J.V. was a troubled boy who had made up the fact that he was abused. The credibility of J.V. and the credibility of defendant were central issues to the case. Defendant testified at trial and testified that certain things had occurred: that the school had called her on certain occasions about discipline and fights, that J.V.’s life goal was to be a gang member and that the interactions she had had with the teachers were positive experiences. RP 2641, 2648, 2657, 2786, 2855, 2942, 2950. However, the teachers had testified in direct opposition to defendant’s account of the facts. In fact, in the State’s rebuttal case, it was clear that there were no records supporting the defendant’s supposed version of the events that transpired at the school. RP 3000, 3001, 3002-3, 3028, 3035, 3126, 3130.

The State did not tell the jury that in order to acquit defendant that they had to disbelieve the State’s witnesses. The State’s argument completed its survey of the inconsistencies between the stories and versions of events. *See* RP 3363-6. This did not misstate the jury’s role as

they still had to decide the credibility of the witnesses and did not misstate the role of reasonable doubt as the State still went through the evidence it felt had satisfied their burden. The State's argument focused on the inconsistencies between the two versions of events and pointed out the obvious: in order to believe one set of facts relating to those specific events, you couldn't believe the other. Simply put both versions could not both be true. The State's argument was not improper.

Further, defense counsel's closing argument contained repeated remarks about J.V. credibility and whether or not the jury should believe him. For example, defense counsel tells the jury that J.V. is "one disturbed boy", that he was "somehow becoming less truthful." RP 3339, 3344-45. Defense counsel tells the jury, "To believe the boy is literally impossible." RP 3306. In another instance, defense counsel tells the jury, "Family and friends knew that Jamil was becoming strange and noncompliant. They did. They knew there was something going on with the kid and they tried to talk to him about it." RP 3345. These statements are representative of the defense theme during the trial and the closing argument.

The State's comment as to what the defense attorney showed in terms of J.V.'s credibility was not shifting the burden to defendant, but asking the jury to actually look at evidence behind the defense arguments

and the defense witnesses. It was asking the jury to look at what evidence was actually presented to discredit J.V. The State did not tell the jury that the defense had an obligation to put on evidence, but since they did, the State is entitled to discuss the evidence and its deficiencies and to point those out to the jury. It was a proper response to the defense closing argument.

3. DEFENDANT HAS FAILED TO  
DEMONSTRATE THAT SHE RECEIVED  
INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to

find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

*Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme Court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L. Ed. 2d 1 (2003).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and "so admissions of deficient performance by attorneys are not decisive." *Harris v. Dugger*, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. *Cuffle v. Goldsmith*, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Defendant claims that she received ineffective assistance of counsel because her attorney 1) failed to timely endorse an expert witness, 2) failed to object to 13 different instances of character evidence, and 3) failed to request a limiting instruction for ER 404(b).

First, as discussed above, defendant cannot show prejudice from Dr. Attig not being able to testify as an expert. Dr. Attig was still able to testify for the defense and was able to testify that he did not see any bruises or other injuries on J.V.'s face. RP 2035, 2045. Dr. Attig also testified that the injury could have been caused by J.V. slipping on the floor and hitting his chin. RP 2035. As Dr. Attig's "expert opinion" was conjecture, the court did not error in excluding it. Defendant still received the benefit of Dr. Attig's testimony and his observations. Defendant cannot show she was prejudiced by defense counsel's actions.

Second, defendant claims her counsel was ineffective for failing to object to 13 different instance of character evidence. Defendant argues that how she treated J.V. was not relevant and was inadmissible character evidence under 404(b). However, the State did not present generic

evidence that defendant was a bad person. The State specifically presented testimony that showed how defendant treated J.V. The State's evidence focused on how she treated him different than her other children and showed the pattern of how she treated J.V. on a regular basis. Defendant mischaracterizes this testimony as evidence of a bad character in general. This testimony completes the description of the course of conduct, prevents a fragmented series of events from being presented to the jury and goes toward defendant's intent and the pattern or practice of assault.

In addition, there may have been a strategic reason for not objecting to the evidence of what J.V.'s home life was like. Defense counsel offered a copious amount of photos during the trial showing the happy family life that defendant had created for J.V. *See* 890, 893, 1451, 1455, 1458, 1587, 1590, 1596, 1603, 1604, 1654, 1868, 1870, 1875, 1877, 1878, 2116, 2238, 2271, 2274, 2453, 2455, 2476, 2609, 2610, 2623, 2630, 2632, 2815, 2837, 2972, 2976. Defendant also showed a substantial amount of home videos depicting life at the Venegas household and showing J.V. participating. *See* 2527, 2744, 2745. By not objecting to the testimony about such things as toys given to J.V. and J.V. not being allowed to play, counsel was able to question multiple witnesses about J.V. involvement with the family, have them identify him in pictures and discuss trips to Wild Waves and parties. *See generally* 208-229, 333-353,

1350-1424, 1425-1460, 1586-1638, 1862-1899, 2125, 2229-2318-2426-2462. This went to the issue of J.V.'s credibility which was a central issue in this case. As much of the testimony defendant claims should have been objected to was addressed by defense counsel in terms of the defense theory, a strategic reason exists for not objecting.

Further, there is no evidence that an objection to the testimony would have been sustained. The evidence completes the story and shows the pattern of behavior engaged in by defendant. The court could have engaged in the same balancing test it employed in earlier evidentiary considerations. There were also so many people that testified to seeing evidence of abuse on J.V. and testified to how J.V. was treated that it is hard to see how the admission of this evidence would have changed the result. Defendant cannot show deficient performance or prejudice.

Third, defendant alleges that counsel was ineffective for failing to request a limiting instruction for 404(b) evidence. Defendant argues that there could be no tactical reason for failing to ask for such a limiting instruction. However, defendant used the testimony about J.V. not receiving toys, not be allowed to play and not having his birthday celebrated to cast doubt on J.V.'s credibility. By showing pictures and videos to counteract J.V.'s story, defendant sought to create doubt in the jury's mind and show that J.V. couldn't be telling the truth because he had

a very happy life with a loving step-grandparent: defendant. Since defense counsel was using this information to her advantage, there would be no reason for her to request a limiting instruction. Requesting a limiting instruction that this evidence only went to motive or pattern would not allow defense counsel to use the same evidence for credibility. Defendant cannot show deficient performance.

A review of the entire record indicates that counsel was an advocate for her client. Counsel made numerous motions in limine, made many objections during trial, presented evidence in the forms of pictures, videos, books and testimony on behalf of defendant, and rigorously cross-examined witnesses. Counsel objected several times during the State's closing on behalf of her client. Counsel cannot be said to be ineffective for failing to object if there was a strategic reason for not objecting. Counsel can also not be said to be ineffective because the court denied some of her motions or some of her objections.

Further, counsel was able to argue against the State's arguments in her closing and was able to address the issues she thought important in light of the context of this particular trial. Defendant cannot prove that counsel's performance was deficient or that she was prejudiced by it. Defendant's claim cannot prevail.

4. DEFENDANT HAS FAILED TO ESTABLISH THAT THERE WAS AN ACCUMULATION OF PREJUDICIAL ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that “an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. *Id.* “Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.” *Neder v. United States*, 119 S. Ct. 1827, 1838, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Brown v. United States*, 411 U.S. 223, 232, 93 S. Ct 1565, 36 L. Ed. 2d 208 (1973) (internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. *Rose*, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. *Id.* at 578; *see also State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (“The harmless error

rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.”).

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); *State v. Coe*, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); *see also State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) (“although none of the errors discussed above alone mandate reversal....”). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995). There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. *See Id.* Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. *Id.* Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. *See, e.g. Johnson*, 90 Wn. App. at 74. Conversely, errors that individually are not

prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. *See, e.g., State v. Stevens*, 58 Wn. App. 478, 498, 795 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 38 (1990) (“Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.”).

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970)(holding that three errors amounted to cumulative error and required reversal), with *State v. Wall*, 52 Wn. App. 665, 679, 763 P.2d 462 (1988)(holding that three errors did not amount to cumulative error), and *State v. Kinard*, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979)(holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, *see e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963)(holding that failure to instruct the jury (1) not to use codefendant’s confession against Badda, (2) to disregard the prosecutor’s statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State’s sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, *see*

*e.g.*, *State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984)(holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1992)(holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, *see e.g.*, *State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. *See Stevens*, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant has failed to establish that her trial was so flawed with prejudicial error as to warrant relief. Defendant has failed to show that there was any prejudicial error much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

J.V. testified as to the abuse he received at the hands of defendant. Some of this abuse was corroborated by the observations of K.P. and A.C. In addition, physical evidence of at least some of the abuse was noted by numerous teachers. These observations were documented by numerous

phone calls to CPS. Despite defendant's assertion that J.V. was a clumsy kid, and that that explained away the bruises and injuries, the evidence showed otherwise. The evidence showed that J.V. was the subject of regular abuse at the hands of defendant. The evidence showed that defendant intentionally assaulted J.V. and had engaged in a pattern or practice of assault for a long period of time.

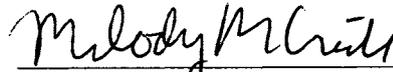
In addition, the court did not abuse its discretion when it admitted evidence as noted above. The prosecutor's arguments were proper in response to the arguments of defense counsel and in light of law and facts. Further, had any of the statements been improper, the jury would be presumed to follow the court's instructions and apply the appropriate standards and law. Finally, defendant cannot show that her counsel's performance was deficient or that she was prejudiced by her counsel's actions. Any error in this case was harmless. Defendant cannot prevail under the doctrine of cumulative error.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the convictions and sentence below.

DATED: June 2, 2009

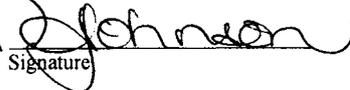
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/2/09   
Date Signature

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