

NO. 47772-6-II

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

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STATE OF WASHINGTON, Respondent

v.

STANLEY SNEED WILSON, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-02134-8

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BRIEF OF RESPONDENT

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## RESPONSE TO ASSIGNMENTS OF ERROR

- I. Wilson's Constitutional Right to Confront the Witnesses Against Him was Not Violated by the Admission of the DNA Evidence.**
- II. The trial court properly admitted evidence of Wilson's prior act of showing K.N.C. a pornographic movie cover.**
- III. The trial court properly admitted K.N.C.'s statements as excited utterances under ER 803(a)(2).**
- IV. Wilson was not denied effective assistance of counsel because his counsel preserved his objection to the admission of K.N.C.'s hearsay statements and even if he had not, Wilson cannot show prejudice.**
- V. The prosecutor did not commit misconduct.**
- VI. Wilson was not denied effective assistance of counsel.**
- VII. Cumulative error did not affect the outcome of Wilson's trial.**

## STATEMENT OF THE CASE

Stanley Wilson (hereafter 'Wilson') was charged by Information with Rape of a Child in the Third Degree and Child Molestation in the Third Degree based on allegations of an incident that occurred on August 25, 2013 involving victim, K.N.C. CP 1-4. The case proceeded to trial starting on May 26, 2015 in Clark County Superior Court. The State presented 6 witnesses at trial: K.N.C., Joshua Cox (K.N.C.'s father), police officers Clesson Werner and Jamie Haske, Chaleen Destephano (sexual assault nurse examiner), and Brad Dixon (crime lab analyst).

Wilson was represented by counsel; he testified in his defense. A jury convicted Wilson of both Rape of a Child in the Third Degree and Child Molestation in the Third Degree.

At trial, the evidence showed the following: K.N.C. was born on March 7, 1998. RP 86. K.N.C.'s parents were divorced and during the time period leading up to August 25, 2013, K.N.C. bounced between staying at her mother's house and her father's house, with no set schedule of when or for how long she would stay with either parent. RP 89-90. Joshua Cox, K.N.C.'s father, lived at 13400 SE 20<sup>th</sup> Street in Vancouver, Washington. RP 87-88, 169-70. When K.N.C. would stay with her father, she slept on the couch in the living room as she did not have her own bedroom at his house. RP 90. Wilson was Mr. Cox's close friend, who had been living with Mr. Cox for the past year. RP 170. K.N.C. has known Wilson since she was about 9 years old, but did not see him very often. RP 88. Prior to August 25, 2013, she did not really interact with Wilson and did not have any fights or disagreements with him. RP 89.

On the night of August 24, 2013, K.N.C. estimates she fell asleep around 11 p.m., while watching a TV show on Netflix while lying on the couch. RP 91-93. She wore sweatpants and a shirt to sleep in, with a bra underneath, but no underwear. RP 95. She had a blanket over her. RP 95. She fell asleep. RP 98. The next thing K.N.C. was aware of was someone

next to her breathing heavily. RP 98. She felt pressure on her chest and felt hands over her pants, rubbing her vagina. RP 99, 101. Someone kept whispering to her, “is this okay? Tell me this is ok?” RP 99. K.N.C. kept her eyes closed as the man put his hands inside her pants. RP 99. He “finger[ed]” her and rubbed her chest, kissed her cheek and lips. RP 99. K.N.C. began to silently cry as this touching went on for 15 to 25 minutes. RP 99. The man doing this was breathing heavily and smelled like cigarettes. RP 99. He touched her chest, outside of the clothes, on her left breast. RP 100. When K.N.C. says the man “fingered” her she means that he put his finger inside and kept it there, while moving his hand back and forth. RP 101-02. It felt “gross” and painful. RP 102. K.N.C. did not scream or cry out, she just froze. RP 103. After he stopped touching K.N.C., he said, “I can’t believe you didn’t wake up,” and chuckled and shook his head. RP 104. K.N.C. saw the man as he said that and walked out. RP 105. She has no doubt who did this. RP 105.

Within about ten minutes of this ending, K.N.C. used the house phone to call her dad’s cell phone. RP 106. She was hoping her dad would wake up and come out to the living room. RP 107. During the early morning hours of August 25, 2013, Mr. Cox was roused from his sleep, looked at his phone and noticed he had missed a phone call from the home phone number. RP 174. He found this to be strange so went to check on

K.N.C. RP 174. As Mr. Cox walked out to the living room from his bedroom, he passed Wilson's room. RP 174. He saw Wilson had the light on in his room, was fully dressed, laying perpendicularly on his bed at the midway point, on his stomach, and had his hands to his face and was kicking his feet. RP 174-75. Mr. Cox found this to be "kind of strange." RP 174. He went to the living room and found K.N.C. sitting on the couch sobbing. RP 107-08. She was frozen in the moment, shaking and could not talk. RP 174-75. Mr. Cox thought something bad had happened, like the dog had died, because of the look on K.N.C.'s face. RP 174. She appeared to be "severely upset." RP 177. K.N.C. told him that "he touched me." RP 108; 174.

Mr. Cox then confronted Wilson, who denied touching K.N.C. RP 108; 177. As her dad did that, K.N.C. put the blanket over her head because she did not want to see Wilson. RP 108; 187; 192. Mr. Cox then asked K.N.C. if she was sure it wasn't a nightmare and she said she was sure. RP 108. K.N.C. then went into her dad's room and laid in his bed. RP 109. After a little bit her dad decided to call the police. RP 109; 178. K.N.C. was still upset; Mr. Cox had never seen her like this before. RP 179. The police came and questioned K.N.C. and Wilson. RP 109; 180.

Officer Jamie Haske of the Vancouver Police Department responded to the residence on August 25, 2013 to investigate K.N.C.'s

allegation, along with other police officers including Detective Clesson Werner. RP 194-95; 212. Officer Haske noticed K.N.C. was very upset; her eyes were red and swollen from crying. RP 196. K.N.C. did not want to speak, and when she did she spoke very quietly and cried as she spoke. RP 196. K.N.C. told Officer Haske that she was sleeping on the couch and woken up by her father's roommate. RP 197. K.N.C. said she pretended to be sleeping and the roommate kneeled next to the couch and stuck his hand down her pants and stuck his finger in her vagina several times. RP 197. K.N.C. also said that the roommate grabbed and groped her breast and kissed her on the mouth. RP 197-98. K.N.C. was scared and pretended to be asleep, hoping he would go away. RP 197. K.N.C. said the incident lasted 15 minutes. RP 197. The roommate asked her, "are you okay. Are you okay" and also told her to "say something." RP 198. K.N.C. continued to pretend to sleep. RP 198. K.N.C. waited until the roommate went away, but when she eventually opened her eyes he was there and said, "I can't believe you slept through that." RP 198-99. Once K.N.C. knew the roommate was outside smoking, she used the house phone to call her dad's cell phone. RP 199. K.N.C. told Officer Haske about an incident a few weeks prior where the roommate brought out a porn movie and asked her if she wanted to watch it with him. RP 199.

During the investigation, Det. Werner spoke with Wilson in Wilson's bedroom. RP 213. Det. Werner knocked on Wilson's closed bedroom door and announced he was Vancouver police. RP 213. Wilson was dressed. RP 213. Det. Werner told Wilson why they were there, to investigate the rape of a child, and he informed Wilson of his constitutional rights. RP 214. During his conversation with Wilson, Wilson denied touching K.N.C. and said he was in his room the entire night, except to smoke. RP 215. Wilson said he was sleeping when Mr. Cox asked him if he touched K.N.C. RP 215. Wilson indicated his shoes were not on at this time because he was asleep. RP 217. Wilson denied touching K.N.C., denied kissing her, and said there was no way his DNA would be on her as he never touched her. RP 217. Wilson did not make eye contact with Det. Werner when he spoke; he kept his eyes downcast, looking at the ground. RP 218. Det. Werner spoke to Wilson about going to stay somewhere else and Wilson said he could stay with his mother. RP 218. Later on August 25, 2013, at about 8 p.m., Det. Werner met with Wilson to get a mouth swab for a DNA sample. RP 218. Wilson consented to Det. Werner taking a DNA sample and signed a consent form. RP 219.

The police suggested K.N.C. go to the hospital to get checked out. RP 109; 200. K.N.C. went to the hospital and had an examination; she felt it was embarrassing. RP 112. Chaleen Destephano, a sexual assault nurse

examiner, examined and treated K.N.C. on August 25, 2013 at PeaceHealth Southwest Medical Center in Vancouver, Washington. RP 230. During a sexual assault examination, Ms. Destephano assesses a patient's health and provides necessary treatment. RP 231. She does a head-to-toe physical examination, asks the patient what brought her in that day and gets a history that directs where she collects evidence. RP 232. Ms. Destephano is concerned with a patient's health and well-being throughout the examination, and that is her foremost concern. RP 232. Ms. Destephano examines the vaginal area of a female patient to look for and treat trauma, make sure the patient can heal properly and set the patient up for any needed follow up, and also to collect evidence. RP 230.

Ms. Destephano began her examination of K.N.C. at about 7:30 a.m. on August 25, 2013. RP 235. Ms. Destephano addressed K.N.C.'s physical needs, and made sure she was feeling ok and was not in pain. RP 236. K.N.C. then told Ms. Destephano that she was asleep on the couch when she woke up because Wilson had his hand down her pants. RP 237. He kissed her on the side of her mouth and put his fingers inside of her. RP 237. She pretended to be asleep, and then called her dad on his cell phone after it was over. RP 237. Based on what K.N.C. described, Ms. Destephano took swabs for potential DNA on K.N.C.'s mouth, inside her

vagina, her cervix, and the posterior fourchette. RP 239-40. Ms.

Destephano also collected the sweatpants K.N.C. was wearing. RP 251.

Brad Dixon, a forensic science supervisor in the DNA section of the Washington State Patrol Crime Laboratory located in Vancouver testified at trial. Mr. Dixon testified that DNA is the genetic material that makes each person unique from another. RP 270. A person receives half of his DNA from his mother, and half from his father. RP 270. In autosomal DNA testing, an analyst focuses on the non-sex-determining chromosomes and examines 15 specific areas of DNA to develop a profile. RP 270. No two people have the same DNA profile in autosomal testing. RP 270. There is another kind of DNA testing which tests DNA found only on the Y chromosome; all the males in a particular family line will have the same Y DNA profile because it is passed down from generation to generation. RP 270-71. Y chromosome DNA testing looks at 17 different areas on the Y chromosome to create a DNA profile. RP 274. Even if an analyst is unable to identify results on all 15 or 17 areas of these two types of DNA testing, he may be able to develop a partial DNA profile based on his findings from fewer locations within the DNA. RP 275. Partial profiles are still useful and are used to exclude an individual as the source of a particular sample. RP 275.

The DNA testing process begins with a screening for biological fluids, looking for blood, semen, and/or saliva. RP 271. After an analyst has found a suitable sample for DNA testing, they take a portion of that sample and break open the cell and the nucleus to free the DNA from that sample. RP 271-72. This enables the analyst to isolate and purify the DNA sample. RP 272. Next, the analyst quantifies the sample and then performs a process called “PCR amplification” which makes millions of copies of specific areas of the DNA. RP 272. The copies can then be detected by an instrument which develops the DNA profile from the sample. RP 272. This method is generally accepted in the scientific community. RP 273.

Once a DNA profile is developed from a given sample, the analyst will interpret the profile and compare it to a known sample from a particular person. RP 276. Then the analyst calculates statistics that are relevant for the sample. RP 276. For Y chromosome DNA testing, the analyst compares the profile he/she has developed and compares it to a database to determine if that profile has been observed before. RP 277. From that comparison, they can generate a statistic to mirror how frequently that profile may be encountered in the general population. RP 277. To do this, the analyst uploads the profile he has developed into the database and is given a statistic for the specific database, which means how often this particular profile is observed in all the samples included in

the database. RP 279. This comes from a standard statistical calculation that is used in many different types of statistical calculations. RP 279. This equation calculation method is generally accepted in the scientific community. RP 279. The method for determining the statistic for a Y chromosome DNA profile is different than the method used for determining the statistic for a standard DNA profile because Y chromosome DNA profiles are the same in the entire paternal lineage and this affects the equations scientists use for statistical determination. RP 281.

The database that Mr. Dixon from the Washington State Crime Lab used in this case uses an algorithm to determine a statistical probability of a Y chromosome DNA profile occurring in the general population. RP 294-96. This gives the analyst an estimation of the profile in the general population. RP 300. This method of determining an estimate of the occurrence of a particular Y chromosome DNA profile in the general population is the generally accepted and recommended method of determining such an estimate. RP 302.

Mr. Dixon examined the evidence collected in this case. RP 310-14. He first took portions of the vaginal/endocervical swabs, perineal vulvar swabs and oral swabs to test for semen and amylase. RP 315. Amylase is a constituent of saliva, though present at lower concentrations

in other biological fluids. RP 315-16. These swabs tested negative for semen. RP 315. The vaginal/endocervical and perineal vulvar swabs tested positive for amylase. RP 315. Mr. Dixon also tested the skin swab that came from K.N.C.'s mouth area and it tested positive for amylase. RP 315. Mr. Dixon tested K.N.C.'s sweatpants for amylase and received a positive result. RP 316. The sweatpants tested positive for amylase on the waistband and the crotch area. RP 318. After finding amylase, Mr. Dixon tested the samples for DNA. RP 319.

Mr. Dixon performed a Y-STR (Y chromosome) DNA testing on K.N.C.'s sweatpants. RP 321. On the waistband, there was a mixture of at least four male individuals' DNA. RP 321. There was one profile Mr. Dixon identified as the major Y-STR profile; this matched the profile of Wilson. RP 321. Therefore Wilson and his paternal male relatives could not be excluded as the donor of that particular sample. RP 321. Mr. Dixon used a statistical analysis from the U.S. Y-STR Database on this sample and found that the estimated occurrence of this profile in the population is one in 7700 male individuals. RP 322.

On the vaginal/endocervical swabs, Mr. Dixon was only able to obtain a partial Y-STR DNA profile; he found this profile consistent with Wilson's profile. RP 322. The statistical analysis showed this profile is

likely to occur in no more than one in every twenty-six males in the U.S. general population. RP 323.

The trial court heard an offer of proof from the State on a prior incident involving Wilson showing K.N.C. a movie cover with a naked woman on it, prior to allowing its admission. During the offer of proof, K.N.C. testified that she was sitting down at the laptop when Wilson came out and asked her if she wanted to watch a movie and held the movie up to her face. RP 117. She glanced at the movie and saw a picture of a naked girl on the front and believed it was porn. RP 117-18. She told Wilson that she did not want to watch it. RP 118. This occurred about two weeks to two months prior to the night of August 25, 2013. RP 118. In allowing this evidence to be admitted, the trial court discussed the need to find the act by a preponderance of the evidence, and to weigh its probative value versus its prejudicial effect. RP 122-23. The trial court found by a preponderance of the evidence that this incident occurred and that it was relevant to prove an element of the crime, that it showed grooming behavior, and that its probative value outweighed its prejudicial effect. RP 123. Upon this ruling, Wilson requested a limiting instruction be given to the jury. RP 123-26.

Before the jury, K.N.C. testified that on one occasion she was sitting on the couch with her laptop and Wilson walked in behind her, put

a movie by her face and asked her if she wanted to watch it as it was better (than what she was watching currently on the TV). RP 129. K.N.C. looked at the movie Wilson showed her and saw a picture of a “naked lady” on it. RP 129. She looked back at her computer and told him no. RP 129. The trial court immediately gave the following limiting instruction:

Ladies and gentlemen of the jury, I want give [*sic*] you a little instruction here. I’m allowing this evidence, but you may consider the evidence’s answer only for the purpose to evaluate the defendant’s disposition towards [K.N.C.]. You must not consider the evidence or answers for any other purpose.

RP 129. K.N.C. indicated this incident occurred prior to the touching incident on August 25, 2013, but she was not sure how long prior; she estimated it was within a couple months prior. RP 130.

During Officer Haske’s testimony, Wilson’s attorney objected to the admission of K.N.C.’s statements to Officer Haske. RP 196. The trial court later indicated on the record that he overruled that objection and allowed K.N.C.’s statements to be admitted as excited utterances because K.N.C. “continued to be excited by the startling event.” RP 207-08. The trial court indicated this was shown by K.N.C.’s demeanor, her appearance, the way she was behaving and reacting. RP 208. The trial court further noted these statements to Officer Haske were made fairly

close in time to the incident, as Mr. Cox called police fairly quickly and they responded fairly quickly. RP 208.

At trial, Wilson objected to Mr. Dixon's testimony regarding the statistical result he obtained regarding the likelihood of finding the same or similar DNA profile in the general population. RP 64-65; 302. The trial court ruled the determination of the statistical estimate in this case was not a testimonial statement and allowed Mr. Dixon to testify regarding the estimate he relied upon in rendering his opinion on the DNA evidence in this case. RP 304.

Wilson testified in his defense. RP 342-65. Wilson was born on September 9, 1970 and has never been married or in a state-registered domestic partnership with K.N.C. RP 353-54. Wilson testified that during the evening hours of August 24, 2013 he and Mr. Cox got two movies and pizza and watched the movies together. RP 342. Wilson indicated that K.N.C. took the dog for a walk during the second movie. RP 342. After watching the movies, Wilson and Mr. Cox went to bed while K.N.C. remained in the living room. RP 342. Wilson testified that at about 1 a.m. on August 25, 2013, Mr. Cox came into his room, while Wilson was sleeping, and asked him what was wrong with K.N.C., that she was crying and saying Wilson had touched her. RP 342, 347. Wilson testified he came out to the living room and asked K.N.C. what she was trying to say and

she just threw a blanket over her head and cried and would not say anything. RP 343. Wilson testified he went back to bed and the next thing he knew police were there shining a flashlight at him and telling him to open the door. RP 343. Wilson testified he told police he did not touch K.N.C. RP 343. The officer then asked him if he had another place he could go to live, and he called his mother who told him he could come over. RP 344. Later during the evening hours of August 25, 2013, Wilson met with the police officer again and the officer took two swabs from his mouth. RP 344.

Wilson denied ever showing K.N.C. a pornographic movie cover. RP 350-51.

The prosecutor's closing argument encompassed 15 pages of transcript. RP 397-412. His rebuttal argument encompassed 5 pages of transcript. RP 425-30. The portions of his closing argument pertinent to Wilson's claims of error are as follows:

In his eyes she wasn't his best friend's little girl. She was an opportunity for sex. His best friend trusted him to live in his house and be around his daughter. He betrayed that trust for the sake of his own selfish sexual desire. He is the reason she had to lay there smelling the smoke on his clothes, listening to his heavy breathing, crying silently in the dark just hoping and waiting for him to stop violating her body.

He is the reason she had to go to the hospital and take part in an embarrassing medical examination. He is the reason

that a 20-plus year friendship ended in the blink of an eye. [K.N.C.] did not deserve what happened to her that night. And the person that inflicted that on her needs to be held accountable for his actions.

RP 397-98. The portion of the prosecutor's rebuttal argument pertinent to Wilson's claim of error is as follows:

We don't have the ability to go back in time and stop bad things from happening. We don't have the ability to take bad memories out of someone's mind. [K.N.C.]'s been left to deal with what's happened to her. Now the time has come for him to deal with it as well. Thank you.

RP 430.

The jury convicted Wilson of Rape of a Child in the Third Degree and Child Molestation in the Third Degree. CP 46-47. The trial court found the two convictions encompassed the same criminal conduct and sentenced Wilson to a standard range sentence. CP 51-53. He timely appeals. CP 68.

#### **ARGUMENT**

##### **I. Wilson's Constitutional Right to Confront the Witnesses Against Him was Not Violated by the Admission of the DNA Evidence.**

Wilson argues his constitutional right to confront the witnesses against him was violated when the Washington State Crime Lab analyst, Brad Dixon, testified as to a statistical estimate of the likelihood of the occurrence of a DNA profile within the general population. Wilson argues

this evidence violated his right of confrontation because Mr. Dixon did not, himself, perform the equation which gave the statistical result. The computer which performed the equation giving the statistical result is not a witness against Wilson and the ‘statement,’ i.e., the statistic, was a non-testimonial statement. Thus the Confrontation Clause was not triggered and Wilson’s rights were not violated. Wilson’s claim fails.

The Sixth Amendment to the U.S. Constitution guarantees a defendant the right to confront witnesses against him. U.S. CONST. amend. VI. Washington State’s constitution also provides a criminal defendant with “the right to meet the witnesses against him face to face.” CONST. art. 1, sec. 22. Our State’s protections are coextensive with federal protections. *State v. Lui*, 179 Wn.2d 457, 468-69, 315 P.3d 493, cert. denied, 134 S.Ct. 2842 (2014). The Sixth Amendment confrontation clause “applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’” *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (citation omitted). Thus, in a criminal trial, the State cannot introduce a testimonial statement from a non-testifying witness unless the witness is unavailable and the defendant has a cross-examination opportunity. *Crawford*, 541 U.S. at 68, 124 S.Ct. 1354. A statement is testimonial when its primary purpose is to establish facts relevant to a criminal prosecution. *Davis v. Washington*, 547 U.S. 813,

822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). *Crawford* allows non-testimonial statements. *State v. Benefiel*, 131 Wash.App. 651, 653–54, 128 P.3d 1251 (2006). In essence, to invoke the Confrontation Clause, the person must be a “witness” by making a statement of fact to the court, and this witness must be “against” the defendant, by making a statement that inculcates the defendant. *Lui*, 179 Wn.2d at 462. Wilson cannot show that the machine/software program that Mr. Dixon used is a “witness” or that it was “against” him as required to trigger the Confrontation Clause.

In *Lui*, our Supreme Court held that the right to confront a witness attaches “[i]f the declarant makes a factual statement to the tribunal, ...[and] the witness’s statements help to identify or inculcate the defendant.” *Id.* at 482. The Supreme Court specifically held that their test allows experts “to rely upon technical data prepared by others when reaching their own conclusions, without requiring each laboratory technician to take the witness stand.” *Id.* at 483. In *Lui*, the State presented the testimony of a DNA expert who compared and testified regarding DNA profiles that she had not, herself, created. *Lui*, 179 Wn.2d at 492-93. The Court reasoned that prior to a comparison, the DNA profiles, themselves, are only numbers that have no meaning. *Id.* at 488. The only witness “against” the defendant in a DNA testing situation is the “final analyst who examines the machine-generated data.” *Id.* at 489. Thus the

Court found the “machine-generated data” was admissible through the expert witness who examined it.

Here, as in *Lui*, the analyst who “examin[ed] the machine-generated data” was present and testified at trial. Brad Dixon is the witness who gave meaning to the DNA results, and who was able to and did explain the interpretation and significance of the generated statistic. Wilson was able to fully confront Mr. Dixon and thus his right to confront and meet witnesses against him “face to face” was not violated.

The machine-generated statistic that Mr. Dixon testified to was not a “testimonial statement.” To determine if a statement is testimonial, our courts must determine whether the statement has a “primary purpose of creating an out-of-court substitute for trial testimony.” *Michigan v. Bryant*, 562 U.S. 344, 358, 131 S.Ct. 1143, 1155, 179 L.Ed.2d 93 (2011). If a statement’s primary purpose is not to create a record for trial, then its admissibility does not concern the Confrontation Clause. *Id.* at 359. The machine/software Mr. Dixon used to run Wilson’s DNA profile and determine its frequency within a given population did not generate its statistic with a purpose of creating a substitute for trial testimony. This statement was clearly nontestimonial and therefore its admission did not violate Wilson’s right to confront the witnesses against him.

The machine-generated data was also not “against” Wilson as the word “against” indicates that the facts attested to must be adversarial in nature. *Lui*, 179 Wn.2d at 480. In the truest sense of the word, the generation of a statistic by a machine is in no way “against” any particular person, let alone Wilson. The *Lui* holding specifically “allows expert witnesses to rely upon technical data prepared by others when reaching their own conclusions....” Mr. Dixon reached his own conclusion about the DNA samples he tested, and he adopted the machine’s statistical analysis, as is often done and well-accepted by members of his field of scientific study.

The Washington Supreme Court in *Lui* determined that the Confrontation Clause is not violated when an expert witness at trial presents an independent DNA analysis based on data generated by work of others in the DNA testing process. “[T]he DNA testing process does not become inculpatory and invoke the confrontation clause until the final step, where a human analyst must use his or her expertise to interpret the machine readings and create a profile.” *Id.* at 486. When DNA evidence is presented, the witness against the defendant is the final analyst who examines the machine-generated data, creates a profile, and makes a determination that the defendant's profile matches some other profile. *Id.* at 489. Our Supreme Court’s decision is consistent with the U.S. Supreme

Court's decision in *Williams v. Illinois*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012). In *Williams*, the Supreme Court found that an expert could rely upon and disclose independent DNA results that the expert herself did not determine when testifying about her own conclusions without triggering the Confrontation Clause. *Williams*, 132 S.Ct. at 2240.

As in *Williams, supra* and *Lui, supra*, Brad Dixon testified about a result he did not, himself, determine, but that he relied upon in coming to his own, independent conclusions. Mr. Dixon's testimony did not violate Wilson's confrontation right. Wilson fully and effectively cross-examined Mr. Dixon and showed any weaknesses in the DNA testing methodology and Mr. Dixon's reliance upon certain testing methods. Wilson was fully able to confront the "witnesses against" him. His claim fails.

**II. The trial court properly admitted evidence of Wilson's prior act of showing K.N.C. a pornographic movie cover.**

Wilson argues the trial court committed reversible error by admitting evidence of an incident wherein Wilson showed K.N.C. the cover of a movie that had a naked woman on it and asked her if she wanted to watch it. This evidence was clearly relevant and admissible to show Wilson's prurient interest in K.N.C. and to show a pattern of escalating grooming behavior of a child victim of sexual assault. Wilson's claim of error fails.

Evidence of a defendant's prior act, good or bad, may be admissible under ER 404(b) to prove motive, intent, preparation, or plan. ER 404(b). The purpose of ER 404(b) is to prohibit the admission of evidence that suggests that the defendant is a "criminal type" and thus likely guilty of committing the crime with which he is charged. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). However, evidence may be admissible for other, valid purposes, including showing common scheme or plan, and a defendant's lustful disposition towards the victim of a sex offense. In order to admit evidence of other acts under ER 404(b), the trial court must 1) find by a preponderance of the evidence that the act occurred, 2) identify the purpose for which the evidence is sought to be introduced, 3) determine whether the evidence is relevant to prove an element of the crime charged, and 4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 649, 904 P.2d 245 (1995). A trial court's decision to admit evidence under ER 404(b) is reviewed for an abuse of discretion. *Id.* at 648. A trial court abuses its discretion if no reasonable person would take the view the trial court adopted, or if the court's decision was manifestly unreasonable or based on untenable grounds or reasons. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). On review, an appellate court may consider proper

bases for admission of evidence at trial, even if the trial court's purported reason for admitting the evidence differed. *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995); *State v. Cummings*, 44 Wn.App. 146, 152, 721 P.2d 545, *rev. denied*, 106 Wn.2d 1017 (1986).

In *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003), our Supreme Court analyzed whether evidence under ER 404(b) in a child sex abuse case was properly admitted at trial. The trial court admitted evidence that the defendant wore bikini or g-string underwear around the victim, showed the victim naked pictures, and engaged in sexual conduct with the victim. *Id.* at 22-24. On appeal, the Court found the admission of this evidence under ER 404(b) was proper as a “design or plan to add a sense of normalcy to his behavior and to gain the trust of the girls by desensitizing them to his nudity, thereby making it easier to move from nudity to physical ... and sexual behavior.” *Id.* This supports admission of evidence of a defendant's scheme or plan to molest, and of grooming behavior in a child sex abuse case. In *State v. Quigg*, 72 Wn.App. 828, 833, 866 P.2d 655 (1994), the trial court heard testimony that “grooming” is a “process by which child molesters gradually introduce their victims to more and more explicit sexual conduct.” In *State v. Myers*, 82 Wn.App. 435, 918 P.2d 183 (1996), *aff'd on other grounds*, 133 Wn.2d 26, 941 P.2d 1102 (1997), the Court on appeal considered whether evidence the

defendant had videotaped the clothed genital areas of adults and children was admissible under ER 404(b). *Myers*, 82 Wn.App. at 438. In that case, the defendant was charged with sexual exploitation of a minor for persuading his seven-year-old daughter to allow him to video tape her genitals. The Court on Appeal upheld the admission of the other recordings because they showed that his “intent was to alter his daughter’s behavior so that she would exhibit herself for his sexual stimulation, and that the scenes of her vaginal area were a continuation of that prurient purpose.” *Id.* at 439. In *State v. Krause*, 82 Wn.App. 688, 919 P.2d 123 (1996), the trial court properly allowed admission of other uncharged sex abuse of children to show a common scheme or plan under ER 404(b). On appeal, the Court stated that the trial court’s reasoning was sound, that the defendant’s prior acts showed that he “had a systematic scheme for getting himself in a position where he had access” to children to “groom” them. *Krause*, 82 Wn.App. at 694.

Based on the above case law, it is clear that evidence of a defendant’s “plan” or “scheme” to get close to a child, to gain that child’s trust, to desensitize that child to sexual subjects, and to eventually molest that child, is admissible under ER 404(b) to show a grooming pattern. In Wilson’s case, the evidence that Wilson showed K.N.C. a movie cover with a naked woman and asked her if she wanted to watch it was clearly

grooming behavior. Wilson was attempting to introduce a sexual atmosphere into his relationship with K.N.C. He was hoping to normalize sexual behaviors and increase this behavior over time. This evidence was relevant and probative of whether Wilson did rape and molest K.N.C. on August 25, 2013. The trial court did not abuse its discretion in admitting this evidence.

This evidence was also admissible under ER 404(b) to show Wilson's lustful disposition towards K.N.C. Evidence showing a lustful disposition toward an offended female may be admissible under ER 404(b). *See State v. Medcalf*, 58 Wn.App. 817, 823, 795 P.2d 158 (1990) (citing *State v. Ferguson*, 100 Wn.2d 131, 134, 667 P.2d 68 (1983) and *State v. Bernson*, 40 Wn.App. 729, 737-38, 700 P.2d 758 (1985)).

In *State v. Ray*, 116 Wn.2d 531, 806 P.2d 1220 (1991), our Supreme Court stated, "[t]his court has consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant's lustful disposition directed toward the offended female." *Ray*, 116 Wn.2d at 547 (citing to *State v. Camarillo*, 115 Wn.2d 60, 70, 794 P.2d 850 (1990), *State v. Ferguson*, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983), and *State v. Medcalf*, *supra* at 822-23). The Supreme Court discussed its prior holding in *Ferguson* wherein it stated that evidence admitted for the purpose of showing lustful inclination

of the defendant towards the offended female makes it more probable that the defendant committed the charged offense. *Id.* (quoting *Ferguson*, 100 Wn.2d at 134 (quoting *State v. Thorne*, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953))). Further, “[t]he important thing is whether it can be said that it evidences a sexual desire for the particular female.” *Id.*

In *State v. Medcalf*, this Court found that evidence of a defendant’s possession of pornographic videos was inadmissible under ER 404(b) because the videos did not tend to show lustful inclination towards the offended female as they had no connection to the victim. *Medcalf*, 58 Wn.App. at 823. This case shows that the line on admissibility of this type of sexual evidence in a sexual assault case depends upon a connection to the victim and whether the evidence tends to show the defendant had a lustful disposition towards that particular person. Under *Medcalf*, Wilson’s mere possession of a pornographic movie would likely not be admissible under ER 404(b), but his using that pornographic movie to proposition K.N.C., to try to get her to watch that movie, gave his behavior a direct connection to the victim and therefore showed his lustful inclination toward her.

Based on the facts of this case, and the legal authority discussed above, the trial court had two proper bases on which to admit this evidence: to show Wilson’s scheme or plan of grooming K.N.C., and to

show his lustful disposition toward K.N.C. The trial court also properly found that this act occurred by a preponderance of the evidence, that it was relevant, and that its probative value outweighed its prejudicial effect.

Wilson argues the trial court erred in finding this incident occurred by a preponderance of the evidence because Wilson, himself, later denied it occurred. Wilson also argues the trial court erred in admitting the evidence because there was nothing to prove the movie was pornographic in nature. The trial court was within its authority and discretion to find K.N.C. credible and to find the incident occurred by the preponderance of the evidence based on her testimony. Furthermore, the testimony firmly established that this was a movie of a sexual nature that Wilson was showing to a child. This was clearly relevant and admissible under established case law.

Prior act evidence offered under ER 404(b) must be proved to the court by a preponderance of the evidence. *State v. Benn*, 120 Wn.2d 631, 653, 845 P.2d 289 (1993) (citing *State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)). “The preponderance of the evidence standard requires that the evidence establish the proposition at issue is more probably true than not true.” *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005). A trial court’s finding will be upheld if it is supported by substantial evidence. *Id.* (citing *Tharp*, 96 Wn.2d at 594). Substantial evidence is

evidence sufficient to persuade a rational, fair-minded person of the asserted premise. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). The trial court decides issues of fact and makes credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This Court will not disturb a trial court's credibility determination on appeal. *Id.* Further, our Supreme Court has previously stated, “[w]e believe, in the final analysis, that the trial court is in the best position to determine whether it can fairly decide, based upon the offer of proof, that a prior bad act or acts probably occurred.” *State v. Kilgore*, 147 Wn.2d 288, 295, 53 P.3d 974 (2002).

Here, K.N.C. testified that on an occasion between 2 weeks and 2 months prior to the August 25, 2013 incident, Wilson showed her the cover of a movie that depicted a naked woman and asked her if she wanted to watch it. The trial court was in the best position to determine K.N.C.'s credibility as the court observed her manner and demeanor while testifying. Her testimony, if believed, constitutes substantial evidence that this interaction occurred. The trial court clearly believed K.N.C., found her to be credible, and found that this incident occurred by a preponderance of the evidence standard. The trial court's determination and implicit finding of K.N.C.'s credibility should not be disturbed on

appeal. There was substantial evidence to support the court's finding that this occurred.

Further, Wilson's argument that there was insufficient evidence to establish the sexual nature of this evidence is without merit and belies common sense. K.N.C. was a child and Wilson took an opportunity when he found himself alone with her, to show her a movie cover that depicted a naked woman. This clearly had a sexual component and is suggestive of Wilson's lustful disposition towards K.N.C. Admission of evidence under ER 404(b) to prove lustful disposition is not limited solely to evidence of physical contact. *See, e.g., State v. Bernson*, 40 wn.App. 729, 737-38, 700 P.2d 758 (1985) (holding that defendant's statement that 'I'd really like to get her,' was properly admitted under ER 404(b) to show lustful disposition). The kind of conduct that is admissible to show a lustful disposition is conduct that would "naturally be interpretable as the expression of sexual desire." *State v. Thorne*, 43 Wn.2d 47, 60-61, 260 P.2d 33 (1953) (quoting 2 John Henry Wigmore on Evidence (3d ed.) 367, sec 399).

Furthermore, the fact that this ER 404(b) evidence does not involve prior sexual contact lessens the potential for prejudice. The purpose in offering the evidence that Wilson showed a sexual movie cover to K.N.C. was to show that Wilson had a sexual interest in K.N.C. Asking

someone to watch a movie that shows as its cover a naked woman, rationally can be interpreted to express sexual interest in that person. This evidence makes it more likely that Wilson did touch K.N.C. as she alleged and did so for a sexual purpose. This is clearly the type of evidence properly admissible under ER 404(b).

The trial court properly identified the purpose for the admission of this evidence, that he found it occurred by a preponderance of the evidence, that it was relevant, and that it was more probative than prejudicial. RP 123. The trial court correctly identified the legal standard, applied that legal standard to his own findings of fact and credibility determinations, and properly found the evidence admissible. The trial court then gave a limiting instruction at defense's request, and informed the jury to only consider this evidence to evaluate Wilson's disposition towards K.N.C. RP 129. The trial court's decision was reasonable and rationally based; the trial court did not abuse its discretion. Wilson's claim of error fails.

Furthermore, any potential error was harmless. Evidentiary errors under ER 404(b) are not of constitutional magnitude, and any potential error is harmless unless the outcome of the trial would have differed had the error not occurred. *State v. Wade*, 98 Wn.App. 328, 333, 989 P.2d 576 (1999). The outcome of Wilson's trial would not have differed had this

evidence not been admitted. Wilson's DNA was found on a swab taken of K.N.C.'s cervix, inside her vagina, only hours after this incident occurred. This was a child who immediately reported the touching, who was observed crying and upset by multiple people, and who underwent an embarrassing and invasive examination at a hospital which resulted in finding the defendant's DNA on her cervix and her sweatpants. DNA evidence which Wilson had no explanation for and denied any possibility of any other reason why his DNA would be found on her pants or cervix. The evidence in this case was overwhelming without K.N.C.'s testimony about an incident a few weeks or months prior where she believed Wilson was trying to get her to watch a porn video with him. This evidence simply did not affect the outcome of the trial. If this Court finds the admission of the evidence under ER 404(b) was improper, it was certainly harmless. Wilson's claim of error fails.

**III. The trial court properly admitted K.N.C.'s statements as excited utterances under ER 803(a)(2).**

Wilson argues the trial court erred in admitting the testimony of Officer Haske that K.N.C. had told her that Wilson had previously shown her a movie cover with a naked woman on it and asked her if she wanted to watch it. This evidence was properly admitted as an excited utterance under ER 803(a)(2) as it reasonably related to the rape. But even if this

Court finds the trial court erroneously admitted this testimony, such admission was harmless error. Wilson's claim should be denied.

This Court reviews a trial court's decision to admit a hearsay statement as an excited utterance for an abuse of discretion. *State v. Woods*, 143 Wn.2d 561, 597, 23 P.3d 1046 (2001). A trial court abuses its discretion if no reasonable person would take the view the trial court adopted, or if the court's decision was manifestly unreasonable or based on untenable grounds or reasons. *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A hearsay statement is admissible as an excited utterance if the statement was made "while the declarant was under the stress of excitement caused by the event or condition." ER 803(a)(2); *State v. Thomas*, 46 Wn.App. 280, 283, 730 P.2d 117 (1986). To be admissible as an excited utterance, the trial court must first find that there was a startling event or condition, that the declarant was under the stress of this startling event or condition, and the statement is related to the startling event or condition. *State v. Ohlson*, 162 Wn.2d 1, 8, 168 P.3d 1273 (2007). The trial court should consider many things in coming to its decision, including passage of time, the declarant's emotional state, and whether the declarant had an opportunity to reflect on the event and fabricate a story. *State v. Williamson*, 100 Wn.App. 248, 258, 996 P.2d 1097 (2000) (citing *State v.*

*Briscoeray*, 95 Wn.App. 167, 173, 974 P.2d 912, *rev. denied*, 139 Wn.2d 1011, 994 P.2d 848 (1999) and *State v. Strauss*, 119 Wn.2d 401, 416-17, 832 P.2d 78 (1992)).

Wilson specifically argues the trial court erred because K.N.C.'s statements regarding the movie cover do not "relate to" the exciting or startling event. Under ER 803(a)(2), a statement may "relate to" a startling event even if the statement "does not explain, elucidate, or in any way characterize the event." *State v. Chapin*, 118 Wn.2d 681, 688, 826 P.2d 194 (1992). "Any utterance that may reasonably be viewed as having been about, connected with, or elicited by the startling event meets this requirement." *Id.* The startling event of being raped and molested by Wilson caused K.N.C. great distress as evidenced by her demeanor immediately following the incident. The trial court found she was still under the stress of excitement caused by this event when K.N.C. spoke to Officer Haske. The statements about the movie cover "relate to" the rape and molestation under the standard applied by this Court. Any utterance that reasonably can be viewed as "connected with" or "elicited by the startling event" qualify as "relat[ing] to" a startling event. *Id.* As discussed previously, Wilson's prior contact with K.N.C. involving the pornographic movie was a grooming technique Wilson employed to attempt to gain K.N.C.'s trust, and also to normalize sexual behavior between the two of

them. This behavior clearly is “connected with” the rape and molestation. The trial court’s finding that the requirements of ER 803(a)(2) have been met will only be disturbed if this Court finds the trial court abused its discretion. The trial court’s finding is clearly based on tenable grounds, as a significant period of time had not passed since the event, K.N.C. was under the stress of the event, and her statements reasonably related to, and were connected with, the event. The trial court’s admission of these statements should be upheld.

Even if this Court finds the trial court should not have admitted the statements K.N.C. made to Officer Haske regarding the pornographic movie cover, any error was harmless. Improper admission of evidence may be harmless error. *State v. Bashaw*, 169 Wn.2d 133, 143, 234 P.3d 195 (2010). The “admission of testimony that is otherwise excludable is not prejudicial error where similar testimony was admitted earlier without objection.” *State v. Ramirez-Estevez*, 164 Wn.App. 284, 293, 263 P.3d 1257 (2011) (quoting *Ashley v. Hall*, 138 Wn.2d 151, 159, 978 P.2d 1055 (1999) and citing *State v. Dixon*, 37 Wn.App. 867, 874-75, 684 P.2d 725 (1984) (finding erroneous admission of written statement as excited utterance was harmless error where court had heard same details in victim’s testimony)). In *Ramirez-Estevez*, the Court found the admission below of a victim’s hearsay statements about a rape to her mother and

school counselor was error. *Ramirez-Estevez*, 164 Wn.App. at 292. In analyzing whether the error was harmless, this Court stated, “[b]eing subject to such cross-examination itself diminished, if not extinguished, the type of prejudice that sometimes results from admission of hearsay where the declarant is not subject to cross-examination at trial.” *Id.* at 293. The Court found the admission of the victim’s statements harmless for reasons that are also present in Wilson’s case.

K.N.C. testified about the incident involving the pornographic movie cover. RP 129. Wilson had the opportunity to cross-examine K.N.C. about this testimony. RP 132-45, 154-55. As in *Ramirez-Estevez*, the jury was able to watch and listen to K.N.C. and judge her credibility, and her “live testimony in front of the jury eclipsed her earlier consistent recounting of the events” to the police officer. *Ramirez-Estevez*, 164 Wn.App. at 293. As in *Ramirez-Estevez*, the jury also got to hear Wilson and his version of the events and observe his demeanor and credibility. This Court does “not second guess the jury,” and this jury obviously believed K.N.C. and not Wilson. *Id.* at 294. Wilson has not shown that “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” *Bashaw*, 169 Wn.2d at 143 (internal quotation marks omitted) (quoting *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)). This Court should find any error in the

admission of out-of-court statements made by K.N.C. to Officer Haske about the pornographic movie was harmless.

**IV. Wilson was not denied effective assistance of counsel because his counsel preserved his objection to the admission of K.N.C.'s hearsay statements and even if he had not, Wilson cannot show prejudice.**

Wilson argues he was denied effective assistance of counsel if this Court finds his trial counsel did not preserve his argument that K.N.C.'s statements to Officer Haske regarding the movie cover was inadmissible hearsay. The State agrees trial counsel preserved Wilson's claim by timely objecting to the admission of this evidence, and therefore this argument is moot.

However, even if this Court considers Wilson's ineffective assistance of counsel claim, Wilson cannot show that he has been prejudiced by his counsel's '[failure to specifically object that K.N.C.'s statements to Officer Haske regarding the pornographic movie did not relate to the startling event. As discussed above, K.N.C.'s statements to Officer Haske were properly admitted as they did relate to the startling event. To prevail on a claim of ineffective assistance of counsel, an appellant must establish, within reasonable probability, that "but for counsel's deficient performance, the outcome of the proceedings would have been different." *Kyllo*, 166 Wn.2d at 862. "A reasonable probability

is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. The trial court properly admitted K.N.C.’s statements to Officer Haske as excited utterances under ER 803(a)(2) as discussed above. As the trial court properly admitted these statements, Wilson cannot show that had his attorney objected with greater specificity that the outcome of his trial would have been different. Not only were these statements properly admitted, but they also were not the linchpin of the jury’s verdict. The admission of these statements did not, on their own, secure Wilson’s conviction. As discussed above, the admission of these statements, if error, was harmless. Their admission did not prejudice Wilson, and he cannot show he was deprived the effective assistance of counsel.

**V. Prosecutorial misconduct did not deny Wilson a fair trial.**

Wilson argues the prosecutor committed misconduct by presenting arguments during closing that were calculated to inflame the passions or prejudices of the jury. The prosecutor’s arguments were proper. Further, Wilson did not object to the arguments he now complains of and raises this claim for the first time on appeal.

A defendant has a significant burden when arguing that prosecutorial misconduct requires reversal of his convictions. *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011). To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's complained of conduct was "both improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (quoting *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997))). To prove prejudice, the defendant must show that there was a substantial likelihood that the misconduct affected the verdict. *Magers*, 164 Wn.2d 191 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). A defendant must object at the time of the alleged improper remarks or conduct. A defendant who fails to object waives the error unless the remark is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Meaning, the reviewing court will not even review the claim unless the defendant demonstrates that the misconduct was so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174

(1988). The reviewing court should focus more on whether the allegedly improper remark could have been neutralized by a curative instruction and less on whether it was flagrant and ill-intentioned. *State v. Emery*, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

In the context of closing arguments, a prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d, 759, 860, 147 P.3d 1201 (2006)). The purported improper comments should be reviewed in the context of the entire argument. *Id.* The court should review a prosecutor’s comments during closing in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998).

Improper argument does not require reversal unless the error was prejudicial to the defendant. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). The court in *Davenport* stated:

Only those errors [that] may have affected the outcome of the trial are prejudicial. Errors that deny a defendant a fair trial are per se prejudicial. To determine whether the trial was fair, the court should look to the trial irregularity and determine whether it may have influenced the jury. In

doing so, the court should consider whether the irregularity could be cured by instructing the jury to disregard the remark. Therefore, in examining the entire record, the question to be resolved is whether there is a substantial likelihood that the prosecutor's misconduct affected the jury verdict, thereby denying the defendant a fair trial.

*Davenport*, 100 Wn.2d at 762-63.

“In determining whether the misconduct warrants reversal, we consider its prejudicial nature and its cumulative effect.” *State v. Suarez-Bravo*, 72 Wn.App. 359, 367, 864 P.2d 426 (1994). “[T]he absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Edvalds*, 157 Wn.App. 517, 525-26, 237 P.3d 368 (2010), citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Wilson does not argue with sufficient specificity which statements, words or phrases by the prosecutor constitute flagrant and ill-intentioned misconduct, but cites to full paragraphs of argument. It is Wilson's obligation to point to the specific parts of the record he claims constitute error. RAP 10.3(a)(6). “Without adequate, cogent argument and briefing, [we will] not consider an issue on appeal.” *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 160, 795 P.2d 1143 (1990). As Wilson cites to full paragraphs of the transcript, alleging prosecutorial misconduct, without

further specifying which words or phrases specifically are improper, the State is burdened with having to speculate as to which portions specifically Wilson deems improper.

Wilson claims the prosecutor appealed to the passion and prejudice of the jury when he made these remarks, to which no objection was made:

In his eyes she wasn't his best friend's little girl. She was an opportunity for sex. His best friend trusted him to live in his house and be around his daughter. He betrayed that trust for the sake of his own selfish sexual desire. He is the reason she had to lay there smelling the smoke on his clothes, listening to heavy breathing, crying silently in the dark just hoping and waiting for him to stop violating her body.

He is the reason she had to go to the hospital and take part in an embarrassing medical examination. He is the reason that a 20-plus year friendship ended in the blink of an eye. [K.N.C.] did not deserve what happened to her that night. And the person that inflicted that on her needs to be held accountable for his actions.

RP 397-98. Wilson also claims the prosecutor appealed the passion and prejudice of the jury by stating:

We don't have the ability to go back in time and stop bad things from happening. We don't have the ability to take bad memories out of someone's mind. [K.N.C.]'s been left to deal with what's happened to her. Now the time has come for him to deal with it as well. Thank you.

RP 430.

The prosecutor's remarks did not cause the jury to render a verdict based on passion or prejudice. The remarks were of minor moment in the

overall trial and they conjured no more outrage than would naturally flow from the allegations that K.N.C. lodged against Wilson. Further, these arguments were not objected to. “A prosecutor is not barred from referring to the heinous nature of a crime but nevertheless retains the duty to ensure a verdict ‘free of prejudice and based on reason.’” *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158, 1169 *review denied*, 175 Wn. 2d 1025, 291 P.3d 253 (2012).

The prosecutor here did not invent an entire murder scenario out of whole cloth as the prosecutor did in *Pierce, supra*. He did not appeal to racial bias, as the prosecutors did in *State v. Perez-Mejia*, 134 Wn.App. 907, 143 P.3d 838 (2006) and *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011). He did not craft a closing argument on the notion of a war on a particular crime, as the prosecutor did in *State v. Echevarria*, 71 Wn.App. 595, 860 P.2d 420 (1993). The prosecutor appropriately touched on the heinous nature of the crime, as is permissible in closing arguments. Some of the remarks were arguably irrelevant, but not so flagrant and ill-intentioned that they could not have been obviated by a curative instruction.

The fact that these remarks were not objected to, by an attorney who was clearly not shy on objecting during trial, suggests that the remarks did not appear particularly impactful or prejudicial at trial. Wilson

certainly has not shown that they were so flagrant and ill-intentioned that they could not have been cured by an instruction to disregard, or that there is a substantial likelihood that they contributed to the verdict. The evidence in this case was very strong: markedly stronger than is typical in child sex abuse cases. K.N.C. reported immediately after the incident occurred, and Wilson's DNA was found on swabs from K.N.C.'s cervix and on the sweatpants she was wearing. The prosecutor's remarks did not affect the jury's verdict and engendered no more prejudice than would naturally be engendered by the disgusting acts testified to throughout the trial.

Wilson has not shown that these brief remarks of the prosecutor, when viewed in the context of the entire trial, were so prejudicial that they could not have been neutralized with a timely curative instruction, nor can he show a substantial likelihood that they affected the verdict. Wilson's argument fails.

**VI. Wilson was not denied effective assistance of counsel.**

Wilson argues his trial counsel was ineffective for failing to object to the prosecutor's closing argument. As discussed above, the prosecutor's arguments were not objectionable; further, any decision not to object was tactical and Wilson has not shown prejudice. Wilson's claim of ineffective assistance of counsel fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable."

*Thomas*, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); see also *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*,

466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome “a strong presumption that counsel's performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney’s performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kylo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel's choices were strategic, but whether they were

reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Also, in making a determination on whether defense counsel was ineffective, the reviewing court must attempt to eliminate the “distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from the counsel’s perspective at the time.” *Id.* at 689. The reviewing courts should be highly deferential to trial counsel’s decisions. *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). A strategic or tactical decision is not a

basis for finding error in counsel's performance *Strickland*, 466 U.S. at 689-91.

“The decision of when or whether to object is a classic example of trial tactics.” *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662, *rev. denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989). This Court presumes that the failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). Further, “[t]he absence of an objection by defense counsel strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Edvalds*, 157 Wn.App. 517, 525-26, 237 P.3d 368 (2010) (citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)). “Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for a new trial or an appeal.” *Swan*, 114 Wn.2d at 661 (quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960)). Further, when a defendant's ineffective assistance of counsel claim is based on counsel's failure to object, the defendant must show that the objection would have succeeded. *State v. Gerdtz*, 136 Wn.2d 720, 727, 150 P.3d 627 (2007).

In *In re Davis*, 152 Wn.2d 647, 101 P.3d 1 (2004), our Supreme Court noted that “[l]awyers do not commonly object during closing argument ‘absent egregious misstatements.’” *Davis*, 152 Wn.2d at 717 (quoting *U.S. v. Necochea*, 986 F.2d 1273, 1281 (9th Cir. 1993)). A decision to not object during a prosecutor’s closing argument is “within the wide range of permissible professional legal conduct.” *Id.* (citing *Strickland*, 466 U.S. at 689). Here, Wilson’s trial attorney made a permissible and appropriate tactical decision not to object to the prosecutor’s closing remarks. This decision was an acceptable and legitimate strategy commonly employed by attorneys in defending criminal cases. Wilson cannot show it was deficient performance for his attorney to fail to object to the prosecutor’s argument. This argument was not out-of-bounds and did not warrant possibly alienating and offending the jury during closing argument. Wilson also cannot show that the prosecutor’s remarks were inappropriate or that any objection to these remarks would have been sustained. Wilson has failed to establish any prejudice from his counsel’s performance.

Wilson had the benefit of effective assistance of trial counsel. Wilson has failed to meet either prong of the *Strickland* test and this Court should deny his claim.

**VII. Cumulative error did not affect the outcome of Wilson's trial.**

Wilson argues cumulative error materially affected the outcome of his trial. As discussed in each of the preceding sections, Wilson has not shown any error below, let alone cumulative error that together affected the outcome of his trial.

The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Where no prejudicial error is shown to have occurred, cumulative error cannot be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990). The cumulative error doctrine does not provide relief where the errors are few and had little to no effect on the outcome of the trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). As discussed above, Wilson has failed to show error, or how each alleged error affected the outcome of his trial. Further, Wilson has not shown how the combined error affected the outcome of his trial. Accordingly, Wilson's cumulative error claim fails.

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**CONCLUSION**

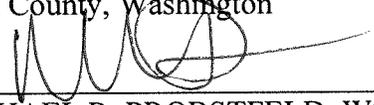
For the foregoing reasons, Wilson's convictions for Rape of a Child and Child Molestation should be affirmed.

DATED this 15<sup>th</sup> day of April, 2016.

Respectfully submitted:

ANTHONY F. GOLIK  
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By:

  
\_\_\_\_\_  
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# CLARK COUNTY PROSECUTOR

**April 15, 2016 - 4:34 PM**

## Transmittal Letter

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