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Division III
State of Washington

NO. 32825-2-III

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

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY WAYNE BLAUERT, APPELLANT

Appeal from the Superior Court of Grant County
The Honorable Evan E. Sperline
and The Honorable John D. Knodell

No. 14-1-00092-1

Brief of Respondent

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

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B. STATEMENT OF THE CASE.

1. Procedure

On February 10, 2014, the Grant County Prosecuting Attorney's Office ("State") charged Anthony Wayne Blauert ("defendant") with one count of rape of a child in the first degree, RCW 9A.44.073. CP 1-2. From

the outset of the case, the State alleged the crime occurred “[b]etween the 1st day of July, 2013 through the 23rd day of October, 2013, both days inclusive.” CP 1. Before trial, the State amended the information to allege one count of child molestation in the first degree, RCW 9A.44.083, in the alternative to the charge of rape. CP 13–15. Similar to the original information, the amended information alleged defendant committed the crime “[b]etween the 1st day of July, 2013 through the 23rd day of October, 2013, both days inclusive.” CP 13.

On July 23, 2013, pursuant to RCW 9A.44.120, the parties appeared before the Honorable Evan E. Sperline for a *Ryan*¹ hearing to litigate the admissibility of the child-victim’s statements at trial. The State sought to admit statements that A.S.,² the four-year-old victim in this case, made to three people: K.S., the victim’s mother; Rickiesha Bagwell, a longtime acquaintance of K.S.; and Karen Winston, a forensic child interviewer and program manager at the Partners With Families & Children advocacy center.

First, Ms. Bagwell testified she had temporarily taken K.S. and A.S. into her home. RP 7–9. Occasionally, K.S. would hire Stephanie Blauert, defendant’s wife, to babysit A.S., and Ms. Bagwell would

¹ *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

² The State will refer to the minor victim (“A.S.”) and her mother (“K.S.”) by their initials out of consideration for the privacy of the victim.

transport A.S. to the Blauerts for care. RP 9. In mid-October 2013, sometime after returning A.S. from the Blauerts, Ms. Bagwell saw K.S. rush out of the bathroom crying. RP 14. Ms. Bagwell asked A.S. what had occurred in the bathroom, and A.S. stated that “Andy had touched her no-no.” RP 14. A.S. referred to defendant as “Andy.” RP 16–17.

Second, K.S. testified she had entered the bathroom to assist A.S. in toileting when A.S. disclosed to her, “Andy touched me,” “[h]e touched my no-no”—referring to her vagina. RP 30–31.

Third, during a recorded forensic interview, A.S. repeatedly told Ms. Winston that defendant had pulled her pants down and touched her vagina. Ex. 3.

After hearing the testimony, the court weighed the factors outlined in RCW 9A.44.120 and found A.S.’ statements admissible if A.S. testified at trial. RP 66–70; CP 36–37. The court also made a preliminary finding of A.S.’ competency for purposes of the *Ryan* hearing. RP 66.

On August 13, 2014, defendant’s jury trial began before the Honorable John D. Knodell. RP 119. Before testimony, defense counsel suggested he might challenge the competency of A.S., but then waived any challenge until he could observe her testify. RP 146. The court instructed defense counsel to raise an objection if it became an issue, and defense counsel agreed. RP 146. No challenge was ever made until after

A.S. had left the stand. RP 161–63. Without any objection until that point, the court considered the objection waived because A.S. had testified and had been subjected to cross-examination. RP 163.

The jury acquitted defendant of rape of a child in the first degree and found him guilty of child molestation in the first degree. CP 34–35.

On October 7, 2014, the court sentenced defendant to 60 months in custody.³ CP 50 (Felony Judgment and Sentence, paragraph 4.1).

Defendant timely filed a notice of appeal at sentencing. RP 68.

2. Facts

In late August of 2013, K.S. and her four-year-old daughter, A.S., moved in with K.S.'s longtime acquaintance, Rickiesha Bagwell. RP 165. Working as a single mother, K.S. would occasionally call upon the services of Stephanie Blauert—defendant's wife—to babysit A.S. RP 155, 167. Mrs. Blauert testified the babysitting began in late August and continued until September 6, and said she helped again on one more occasion on October 15. RP 235–36.

A day or two after returning from the Blauerts in October, A.S. went to the bathroom and called K.S. to assist in wiping herself. RP 168. A.S. winced immediately when K.S. tried to wipe her, a reaction she had never made previously. RP 168. Concerned, K.S. looked for a rash or

³ Defendant had an offender score of 0 with a standard range of 51-68 months. CP 49 (Felony Judgment and Sentence, paragraph 2.3).

injury but found none. RP 168. A.S. responded that her “no-no” hurt, referring to her vagina. RP 169, 170–71, 179.

K.S. inquired why A.S. was experiencing the pain, and A.S. responded, “Well, Andy touched me.” “Andy” is a term of endearment used by A.S. to refer to defendant. RP 156, 171.

K.S. knew defendant had previously assisted Mrs. Blauert with babysitting, so she asked A.S. whether defendant had perhaps accidentally wiped too hard on a particular occasion. RP 169. However, A.S. quickly rejected that explanation, stating, “[N]o, mom, we weren’t wiping. . . . [W]e were playing.” RP 169. A.S. described how defendant had removed her pants and pinched her vagina using his fingernails. RP 158–59.

Unable to control her emotions, K.S. stormed out of the bathroom so that her daughter would not be able to see her break down. RP 172, 178. Ms. Bagwell, who was standing outside of the bathroom, saw K.S. quickly depart while crying, so she approached A.S. and asked her what she had told her mother. RP 178. A.S. told Ms. Bagwell that Andy had touched her “no-no” with his finger. RP 180.

K.S. reported the crime to local law enforcement officers, and Grant County Sheriff’s Office Detective Ryan Green investigated the crime. RP 189. As part of the investigation, K.S. took A.S. to the hospital for a sexual assault examination and later a forensic interview. RP 174.

A.S. told Tamera Nolen, the examining nurse practitioner, that her “no no hurts.” “it feels like my heart is coming down,” and said that defendant (“Andy”) had touched her inside. RP 203.

During her forensic interview, A.S. told Karen Winston, a forensic child interviewer and program manager for the Partners with Families & Children advocacy center, that defendant had touched her with his hand—while pointing at her “pee pee” to demonstrate the molestation. Ex. 3 (11:31:45). She indicated defendant had pulled her pants down to her ankles and digitally penetrated her. Ex. 3 (11:32:25–11:34:45). She also explained that nobody else had ever touched her like that, the touching occurred at defendant’s house, and Mrs. Blauert was not present to see it. Ex. 3 (11:35:00, 11:37:05).

Defendant did not testify on his own behalf, but called his wife and friend, Dustin Cruz, in his defense. Mrs. Blauert testified she babysat A.S. at the end of August, through early September, and once in October 2013. RP 235. She presented the heart of defendant’s partial alibi defense by telling the jury defendant was completing a military registration in Portland on the October babysitting date. RP 244–45. She explained that in October she watched A.S. for only part of the time before making arrangements for Mr. Cruz to finish babysitting. RP 243–44. Mr. Cruz verified he watched A.S. until Ms. Bagwell picked her up. RP 248.

C. ARGUMENT.

1. CONSIDERING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE THAT DEFENDANT COMMITTED CHILD MOLESTATION IN THE FIRST DEGREE.

When a defendant challenges the sufficiency of the evidence, the court must view the evidence in the light most favorable to the State to determine whether any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The court must consider all of the evidence admitted at trial, evidence offered both by the State and the defense. *State v. Jackson*, 82 Wn. App. 594, 608, 918 P.2d 945 (1996).

Challenging the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences from it. *State v. Gerber*, 28 Wn. App. 214, 217, 622 P.2d 888 (1981). "[A]ll reasonable inferences *must* be drawn in favor of the State *and interpreted most strongly against the defendant.*" *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (emphasis added).

Circumstantial and direct evidence are considered equally reliable on review. *Thomas*, 150 Wn.2d at 874. Determinations regarding conflicting evidence or credibility are up to the trier of fact and not subject to review. *Id.*

At trial, the State had to prove the following elements beyond a reasonable doubt to convict defendant of child molestation in the first degree:

- (1) That between July 1, 2013 and October 23, 2013, both days inclusive, the defendant had sexual contact with [A.S.];
- (2) That [A.S.] was less than twelve years old at the time of the sexual contact and was not married to the defendant;
- (3) That [A.S.] was at least thirty-six months younger than defendant; and
- (4) That this act occurred in the State of Washington.

CP 30 (Instruction No. 12).⁴ The court defined “sexual contact” as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party or a third party.” CP (Instruction No. 13).⁵

Defendant does not challenge the second, third, or fourth elements. Rather, defendant contends under the first element that the State did not sufficiently prove when the crime occurred or whether defendant had “sexual contact,” or contact done with the purpose of gratifying sexual desires. Appellant’s Opening Brief at 15–19.

- a. The evidence demonstrated defendant committed the crime in the charging period between July 1 and October 23, 2013.

In this case, when considering the evidence presented by both the State and defendant, sufficient evidence supported a finding that the crime

⁴ See RCW 9A.44.083.

⁵ See RCW 9A.44.010.

had occurred between July 1 and October 23, 2013. A.S. told Ms. Winston during her forensic interview that defendant had touched her at his house when she was four years old. Ex. 3 (11:36:18–11:36:24). A.S. described the molestation having occurred in defendant’s living room. RP 159. And K.S. testified A.S. was born on July 16, 2009—her fourth birthday falling after the beginning of the challenged timeframe. RP 165. Thus, the crime occurred at some time after July 16, 2013, but also at a time when A.S. would have been at the Blauert’s residence, or more specifically, the Blauert’s living room.

During her direct examination, Mrs. Blauert specified when A.S. would have been at defendant’s residence—a time within the charging period: she repeatedly testified she started babysitting A.S. in their home during August, through early September, and only once in October 2013:

[Defense counsel]. Okay. During 2013 did you watch [A.S.] or babysit for [A.S.] in your home?

[Mrs. Blauert]. Yes, I did.

Q. Do you remember what — when you started watching her?

A. It would have to be — I remember it started August 20th or around that time frame. I had her until September 6th. And then there was about a month and a half where I didn’t have her until October 15th.

Q. Okay. And when — I guess you said basically from August 20th to about September 6th.

A. Yes.

Q. About how often would you watch her during that time?

A. Tuesdays, Thursdays, and Fridays.

Q. And then you said — and then apparently you didn't watch her again until October 15th; is that correct?

A. That is correct.

RP 235–36. Mrs. Blauert clarified that A.S. was in defendant's residence only during times included in the to-convict instruction.

Defendant's argument that none of the State's witnesses specified when the molestation occurred fails for two reasons: first, it ignores the standard of review, which requires this court to consider the evidence presented by both the State and defendant. *See Jackson*, 82 Wn. App. at 608. Second, it overlooks reasonable inferences—like the one argued here—that must be drawn in favor of the State. *Salinas*, 119 Wn.2d at 201. Again, defendant molested A.S. when she was four years old in the living room of his house. Mrs. Blauert narrowed that timeframe when she testified A.S. was present in her home in late August, early September, and once in mid-October—all dates that fall within the first element of the crime.

Defendant also mischaracterizes the State's closing argument, claiming the prosecutor conceded this issue, and ignores the context of the

prosecutor's closing argument. Appellant's Opening Brief at 16–17. The prosecutor never conceded the lack of evidence, but instead argued that when K.S. wiped A.S. in the bathroom—the event simply served as a catalyst to A.S. remembering the molestation. RP 265. Immediately after describing how the wiping served as a catalyst, the prosecutor again argued to the jury that the crime could have only occurred while A.S. was at defendant's home in late August or early September. RP 279.

Certainly, like in most child molestation cases, the State could not specify an exact date when the crime occurred. But when considering the evidence in totality, as argued above, defendant molested A.S. in his living room in late August or early September 2013 after A.S. was four years old. This period of time falls well (and only) within the period in the to-convict instruction.

- b. There was sufficient evidence that defendant had sexual contact with A.S.: he removed her pants to her ankles and pinched her vagina.

The jury is permitted to infer a touching is done for the purpose of sexual gratification if it is shown an adult male with no caretaking function touches the intimate parts of a child. *State v. Wilson*, 56 Wn. App. 63, 68, 782 P.2d 224 (1989). If the male has a caretaking function, then the factfinder may consider circumstantial evidence surrounding the touching. *Id.*

In *Wilson*, this court found sufficient circumstantial evidence of sexual contact where the defendant—notwithstanding his caretaking responsibilities—had touched his daughter in an outdoor location where the crime “could not be easily observed,” the defendant was partially clothed, and the girl “was disrobed.” *Id.*

The evidence, even if circumstantial, that defendant had sexual contact with A.S. was compelling: A.S. testified “Andy” touched her “front no-no” (RP 157), he pinched it with his fingernails under her clothes, the touching made her feel bad (RP 158), and that her pants were “all the way down” when it happened (RP 158–59).

A.S. told her mother that “we weren’t wiping” when defendant touched her, but “playing.” RP 169. She explained how defendant had used a finger to make direct contact with her vagina—as opposed to an entire hand to pick her up while playing or some other innocent, mistaken, fleeting swipe. *See* RP 169. She reiterated the same to Ms. Bagwell (RP 178), and again to Ms. Nolen during her medical evaluation (RP 203).

Finally, A.S. rehearsed the same story to Ms. Winston during the forensic interview, physically demonstrating how her pants were removed during the crime. Ex. 3 (11:32:25). A.S. insisted that nobody else had ever touched her like defendant had on that incident. Ex. 3 (11:35:00). Tellingly, A.S. confided to Ms. Winston that defendant committed the

crime in secret when Mrs. Blauert was not present to observe. Ex. 3 (11:37:05).

Defendant offered no alternative explanation for the touching. Like in *Wilson*, defendant disrobed his victim and molested her in a location he would not be seen by others. It was reasonable for the jury to infer the physical contact, as described by A.S. to the jury and through several witnesses, was for purposes of sexual gratification.

Defendant's reliance on *State v. Powell*, 62 Wn. App. 914, 816 P.2d 86 (1991) is misplaced because that case involved incidents of touching that occurred on the outside of the victim's clothing, the touch was fleeting, the victim could not describe how the defendant had touched her, and the defendant testified the touching was an accident. *See* 62 Wn. App. at 917–18. In fact, the defendant in that case took the stand and explained that he was affectionate with his children and it was possible the touching occurred during a hug. *Id.* at 918. The facts of this case are far removed from a blameless hug or an awkward thigh grab.

Unlike *Powell*, there is no innocent explanation for defendant's actions. A.S. was not toileting when defendant pulled her pants to her ankles, and defendant was "playing" with her when he used his finger to rub her vagina.

2. A *PETRICH* INSTRUCTION WAS NOT NECESSARY BECAUSE THERE WERE NOT MULTIPLE ACTS THE JURY COULD HAVE CONSIDERED THAT COULD FORM THE BASIS OF THE CRIME CHARGED.

Criminal defendants have a right to a unanimous jury verdict.

Wash. Const. art. 1, § 21; *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). Jury unanimity issues can arise when there is evidence of multiple acts that could form the basis of one count charged. *State v. Petrich*, 101 Wn.2d 566, 570–72, 683 P.2d 173 (1984). However, in this scenario, “several acts are alleged and any one of them *could* constitute the crime charged.” *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988) (emphasis added). In this situation, the State must tell the jury which act to rely on in its deliberations, or the court must instruct the jury to agree on a specific criminal act. *Petrich*, 101 Wn.2d at 570-572; *Kitchen*, 110 Wn.2d at 411.

Near the end of her forensic interview, A.S. was asked how many times defendant had touched her. Ex. 3 (11:36:04). She responded, “two times,” and clarified that it happened once when she was three and once when she was four. Ex. 3 (11:36:10–11:36:24). Defendant argues evidence of the molestation when A.S. was three constituted an act that could form the basis of the charged crime (the molestation when A.S. was four) and therefore a *Petrich* instruction was necessary.

A.S.' disclosure of a possible molestation when she was three cannot constitute an act that formed the basis of the crime charged because it was a factual impossibility under the to-convict instruction. In order to qualify as a multiple act that "could"⁶ constitute the crime charged, there must be some preliminary showing that the act qualifies under the facts alleged by the State in the information and to-convict instruction, regardless of whether that act could be proved beyond a reasonable doubt. As the first element of the crime, the State had to prove: "(1) That between July 1, 2013 and October 23, 2013, both days inclusive, the defendant had sexual contact with [A.S.]." CP 30 (Instruction No. 12). Evidence that defendant molested A.S. when she was three does not satisfy this element.

As argued *supra*,⁷ the jury considered evidence that defendant molested A.S. while she was being babysat at defendant's house. Ms. Blauert testified that in 2013, the Blauerts babysat A.S. *only* during late August, early September, and once in October—all after A.S. turned four. So even if defendant had molested A.S. when she was three years old, it could not have occurred between July 1 and October 23, 2013 and thus cannot qualify as an act requiring a special instruction.

A *Petrich* instruction would have been proper had the previous molestation occurred within the charging period. For example, consider

⁶ *Kitchen*, 110 Wn.2d at 411.

⁷ Brief of Respondent, Argument 1(a).

the following hypothetical: the State charges a defendant with a single count of child rape that occurred between time periods A and C, both periods inclusive. During trial, the victim testifies that she was actually raped on two occasions, time periods A and B. Based on this evidence there are two acts that “could” constitute the charged crime because both rapes A and B occurred during the charging period A through C.

Without a *Petrich* instruction in the hypothetical above, some jurors might consider A to convict, while others might consider B. Juror unanimity is not a guarantee in this scenario.

However, the hypothetical above is not the situation here. In this case, the State charged a crime that was committed between time periods B and D.⁸ At trial, a five-second clip from a forensic interview revealed evidence that defendant molested the victim at time periods A and C.⁹ The crime that occurred at “A” cannot be an act that could form the basis of the charge because it is factually impossible to have occurred in the period alleged by the State.

Defendant even fleetingly concedes, in a footnote, that any alleged molestation when A.S. was three years old was a factual impossibility to the crime prosecuted at trial:

⁸ Or “between July 1, 2013 and October 23, 2013, both days inclusive.” CP 14, 30.

⁹ A.S. told Ms. Winston she was molested once when she was three and once when she was four. Ex. 3 (11:36:10–11:36:24).

No specific dates were given for either alleged incident. Moreover, the allegation [that she was molested when she was three] is factually impossible since [A.S.]’s mother testified that [A.S.] wasn’t going over to the Blauert’s house when she was 3 years old.

Appellant’s Opening Brief at 21 n.8. An allegation of molestation, which is a factual impossibility under the charging information and the to-convict instruction, cannot constitute a “multiple act” that formed the basis of the crime charged. Therefore, no unanimity instruction was necessary.

Even if the first molestation could be considered an act forming the basis of the crime charged, the State properly elected which act the jury could rely on during its deliberations. First, the charging information and to-convict instructions designated the single molestation that occurred when A.S. was four years old. CP 14, 30. Second, the prosecutor elected the latter molestation by emphasizing the charging period during closing:

Let me get this to where you can all see this. Having occurred between July 1st, 2013 and October 23rd, 2013. Those are the charging dates for the crimes for which defendant is charged with.

....

The state — the state contends that this act by the defendant occurred within this time frame.

RP 264–265.

Defense counsel’s counterarguments during closing argument are also indicative of the State’s election: “The state has alleged that the acts occurred somewhere between [July and October]” (RP 272); “Because we

know that from July 1st to August 20th, it couldn't have happened. There was no — Miss Blauert was not watching [A.S.] at that time” (RP 276). If counsel believed there was evidence of a multiple acts requiring a *Petrich* instruction, he certainly would have argued the point.

Finally, the prosecutor emphasized its election again by reiterating the time period of the charged crime in rebuttal closing argument:

When [A.S.] was interviewed by Miss Winston, [A.S.] indicated — or Miss Winston asked her, was Stephanie there? Yes. Did Stephanie see Andy do this? No. Where was Stephanie? At the store. Miss Blauert testified that [A.S.] was seen at their home between August 20th and September 6th.

RP 279.

The entirety of the record, including arguments by both the State and defendant, suggests the case hindered on the State's proof of the molestation when A.S. was four years old—the act elected by the State in its charging and closing argument.

3. DEFENDANT CANNOT CHALLENGE THE VICTIM'S USE OF COMFORT DOLLS BECAUSE HE DID NOT OBJECT AT TRIAL, FAILING TO PRESERVE THE ISSUE BELOW.¹⁰

A party must object and make a record in trial in order to preserve certain errors for review. ER 103(a). This court may refuse to review any

¹⁰ Defendant's claim of ineffective assistance of counsel for failing to object to the use of comfort dolls (Appellant's Opening Brief, Issue 3(b)) is addressed separately with all other claims of ineffective assistance of counsel raised on appeal. The State has responded to these claims in Argument 5.

claim which was not raised to the trial court unless the defendant demonstrates that it was a manifest error of constitutional magnitude. RAP 2.5(a); *State v. Elmore*, 154 Wn. App. 885, 897, 228 P.2d 760 (2010).

“[P]ermitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders, and courts.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (emphasis in original). It is the defendant’s burden to identify a constitutional error and show how the error actually affected defendant’s rights in the context of the trial. *Id.* “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *Id.*

Defendant failed to object to five-year-old A.S. holding two dolls while she testified to a room of strangers about the sex crime committed against her. The issue, now raised for the first time on appeal, is waived because defendant cannot demonstrate how any alleged error is of constitutional magnitude. Specifically, there is no actual error that demonstrates defendant’s rights were impacted in the context of trial.

Defendant argues (1) the trial court abused its discretion by allowing the victim to hold the dolls, and (2) the use of the dolls was so prejudicial such that it warrants a new trial.

The first contention is impossible to assess because the facts necessary to adjudicate the claimed error are not in the record, so no actual prejudice can be shown. *See McFarland*, 127 Wn.2d at 333. The standard of review for a trial court refusing/permitting the use of comfort items while testifying is for an abuse of discretion. *State v. Dye*, 178 Wn.2d 541, 553, 309 P.3d 1192 (2013). But in the authorities cited by defendant,¹¹ the defendants objected to the challenged objects (e.g., a dog, dolls, etc.) at trial so the trial court was able to make a record for appeal. In this case, the trial court exercised no discretion because apparently neither party objected to A.S. using dolls to help her testify. Neither does any case authority require a court to *sua sponte* enact precautionary measures regarding the use of dolls—especially where defendant has not suggested even slight concern over the matter.

In a related case, though obviously inapposite as to the facts, the State Supreme Court determined that defense counsel's failure to object to a defendant being shackled during trial proceedings constituted a waiver of the claimed error on appeal. *See In re Davis*, 152 Wn.2d 647, 700, 101

¹¹ *Dye*, 178 Wn.2d 541; *State v. Hakimi*, 124 Wn. App. 15, 98 P.3d 809 (2004).

P.3d 1 (2004). Like the trial court's discretion for comfort items and the balancing mandated under *Dye*, the trial court in *Davis* should have normally weighed certain factors in determining whether the jury should be able see the defendant shackled during trial. *See Davis*, 152 Wn.2d at 700. However, the trial court in this case never considered any of the measures proscribed by *Dye* because defendant never objected or requested a hearing.

Second, defendant cannot demonstrate how the presence of the dolls vitiated the reliability of A.S.' testimony, his cross-examination of the youth, or the remainder of the State's evidence. The dolls were not a focus of the examination or a point of emphasis either. In total, the dolls were the subject of two questions: "Who are your friends up there with you today?" and "Are they twins?" RP 150–51. These questions fell in the middle of other routine, background questions for the five-year-old victim, such as whether she remembered her birthday, whether she could indicate her age with her fingers, what she did for her birthday party, what toys she received, whether she had cake, what her favorite flavor of cake was, where she currently lived, whether she had any pets ("Kermit the Frog and Bear"),¹² whether she attended school, and what tasks she enjoyed at school. *See* RP 150–54. It cannot be argued these short questions alone

¹² RP 153.

interrupted the remainder of the proceedings or the assurance of defendant's right to a fair trial, or were otherwise so prejudicial that the jury convicted solely based on sympathy derived from the use of the comfort dolls.

Defendant did not object to this issue below and cannot demonstrate under RAP 2.5 why this court should now consider the issue without a record to support it.

4. DEFENDANT FAILS HIS BURDEN TO PROVE THE PROSECUTOR'S CONDUCT WAS BOTH IMPROPER AND PREJUDICIAL TO HIS RIGHT TO A FAIR TRIAL.

Defendant alleges the prosecutor committed misconduct during two separate lines of questioning: first, when she asked K.S. about A.S.'s truthfulness as a child; and second, when she asked a nurse practitioner whether A.S. was "forthcoming" during a medical examination.

In the first instance, the State recognizes the questioning was likely improper, but defendant cannot demonstrate how the error was critically prejudicial and could not have been remedied by a curative instruction, especially when the jurors were instructed that they were the sole determiners of credibility. In the second instance, the prosecutor's questioning was neither improper nor prejudicial. "Forthcoming" does not

mean “honest,” but rather “ready” or “willing.” These separate allegations of misconduct are addressed in turn.

In order to establish prosecutorial misconduct, a defendant must (1) prove that the prosecutor’s conduct was improper, and (2) that it prejudiced his right to a fair trial. *See State v. Dhaliwhal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). This court reviews allegedly improper statements in the context of the prosecutor’s entire argument, the issues in the case, and the evidence. *Id.* Misconduct only requires a new trial when there is a substantial likelihood that the misconduct affected the jury’s verdict. *State v. Copeland*, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996).

If a prosecutor’s argument is improper, error is generally waived where defense counsel fails to make an adequate and timely objection. *Id.* at 290 (citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)). Where counsel fails to object, defendant must show that the prosecutor’s conduct was flagrant, ill-intentioned, and the resulting error could not have been neutralized by a curative instruction. *Id.*; *see also State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008).

Absent a request for a curative instruction, it is strongly suggested that the argument in question was not critically prejudicial. *Swan*, 114 Wn.2d at 661.

- a. Defendant does not satisfy his burden to show K.S.' testimony about A.S. character, which he did not object to, was so prejudicial that a curative instruction could not have remedied any error.

During its case in chief, the prosecutor briefly asked K.S.—the victim's mother—about A.S.'s character, specifically her reputation:

[Prosecutor]. What kind of child is [A.S.]?

[K.S.] A very friendly, outgoing, very bubbly.

Q. Is she a truthful child?

A. Yes.

RP 165. The court interjected and requested a sidebar, suggesting to the prosecutor and the defense that it was improper to ask a witness to comment on the truthfulness of another witness. The court withdrew its concern when defense counsel did not object and the prosecutor indicated it had intended to inquire about the victim's reputation:

THE COURT: Isn't it highly improper to ask a witness to express an opinion about the truthfulness of another witness? This invades the province of the jury, doesn't it?

[Prosecutor]: I think that as far as the child, the reputation of the child is the parents' knowledge.

THE COURT: You did not object.

[Defense counsel]: No. I believe she's expressing an opinion based upon her observations of her child.

THE COURT: Okay. Well I guess if there's a problem, I'll have to discuss it later.

RP 165–66. The prosecutor assured the court that she would not return to the subject, and the court agreed that that would be a sufficient response. RP 166.

Notwithstanding the prosecutor's intention to elicit general reputation testimony, the State recognizes it was likely improper to question K.S. about A.S.' truthfulness. Because defendant did not object to the testimony, however, the heightened burden of proof applies and requires defendant to demonstrate the prosecutor's actions were so flagrant and ill-intentioned that a curative instruction could not have remedied the error. *Warren*, 165 Wn.2d at 30. Defendant cannot satisfy this burden here.

The record demonstrates the prosecutor's actions were not flagrant or ill-intentioned. In fact, when pressed by the court why she had questioned K.S. accordingly, the prosecutor indicated she had simply intended to elicit the child's reputation through the mother, which is potentially admissible evidence if it is subject to cross-examination. RP 166; *see* ER 405(a) (“In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation.”). Even defense counsel conceded that he believed the

mother would be able to testify on the matter because it fell within “her observations of her child.” RP 166.

Moreover, despite the trial court’s concern, the court did not make any finding that the prosecutor had purposefully or blatantly disregarded the law.

In addition to the lack of proof that the prosecutor acted flagrantly, the error and any possible prejudice could have been easily remedied with a curative instruction had defense counsel requested one. The court expressly stated it would address the issue if it thought there was a problem, but it never suggested that a curative instruction or mistrial was necessary. RP 166. Additionally, the prosecutor volunteered not to return to the point, which helped ensure the parties did not overly emphasize the point to the jury for lengthy consideration.

Defendant relies primarily on *State v. Jerrels*, 83 Wn. App. 503, 925 P.2d 209 (1996), to argue the prejudice was incurable. Appellant’s Opening Brief at 35. But in that case, the prosecutor asked the victims’ mother, who testified for the defense, at least eight questions regarding her children’s veracity. This lengthy topic of examination is detailed below:

Q. And in fact, you made a decision on whether you believe [the allegations] or not, haven’t you?

A. No, I have not made a decision.

Q. About whether the kids are telling the truth?

A. I believe the kids are telling the truth, yes.

Q. We are talking about you believe that [J.J.] and ["Mary"] and ["William"] are telling the truth when they're talking about being molested by their dad?

A. Yes, I believe they are telling the truth.

....

Q. Okay. So if ["William"] said that, do you believe that?

A. If ["William"] said that? I don't know what I believe from a 6 year old boy. Minds wander so much.

Q. Okay. But you've just testified that what he said happened didn't happen?

A. I don't think he would say that unless he was supposed to say that.

See 83 Wn. App. at 506–07. The later prosecutor returned to the subject:

Q. Mrs. Jerrels, now I'm a little confused. I'd like to be clear about what you believe. When you say you believe the kids, what are you saying? What is it you believe?

A. I believe my kids would tell the truth.

Q. Do you believe your kids did tell the truth?

A. I would think they would, yes.

Q. So if [J.J.] testified that your husband put his penis in her vagina, you would believe her?

A. Yes.

Id. at 507.

In *Jerrels*, the reviewing court determined the lengthy examination above was too prejudicial to have been remedied by a curative instruction, stressing the cumulative effect of the questioning. *Id.* at 507–08.

The improper testimony in this case, however, is far removed from the repetitious, flagrant questioning in *Jerrels*. The prosecutor here asked a single question about the victim’s veracity in general. Unlike the questions in *Jerrel*, which required the witness to opine about the veracity of the victims’ original allegations as well as their in-court testimony, the prosecutor in this case did not ask K.S. to express an opinion about A.S.’ account of the molestation or her live testimony.

Prejudice is also difficult to presume when the trial court instructed the jury that they were the sole judges of credibility for each witness. CP 18 (Instruction No. 1). For these reasons, the error was not so prejudicial that it could not have been remedied by a curative instruction.

- b. The prosecutor did not vouch by asking a witness whether A.S. was “forthcoming.” And defendant cannot demonstrate how the term was prejudicial.

Later during trial, the prosecutor asked Ms. Nolen, the nurse practitioner who examined A.S.:

Q. Did [A.S.] appear to be forthcoming in her statements?

A. Yes.

Q. And her mother — what was her mother's role in this?

A. Encouraging the patient to be honest and to be forthcoming and supporting her.

RP 204. Defense counsel did not object and the court did not request a sidebar. After the witness had finished her cross examination, the court asked the parties if there was anything they needed to discuss, addressed the admissibility of an exhibit, and finally, initiated a discussion on whether the “forthcoming” question was a comment on A.S.’ credibility. RP 210–212.

The prosecutor explained to the court that “forthcoming” did not insinuate credibility, but whether A.S. was unhesitant during her examination: “Your Honor, it was — I don’t take [forthcoming] that way. And if I can explain. *My question meant was she hesitant.* That has nothing to do with credibility.” RP 210 (emphasis added). After hearing this, the court suggested it might be misinterpreting “forthcoming”:

THE COURT: Did she appear to be forthcoming? Did she appear to be forthcoming? Maybe I’m wrong. But counsel, I’m not — obviously there’s been no objection, nothing is before me. I’m just asking counsel to just please keep this in mind, because this sort of thing can be a problem at the Court of Appeals.

. . . . And then we have testimony that the child’s forthcoming. I don’t know what the answer to this is.

RP 210–12.

- i. **Ms. Nolen’s testimony that A.S. was “forthcoming” was not a statement about her credibility, so there was no prosecutorial misconduct.**

The prosecutor’s use of “forthcoming” does not constitute improper vouching because the prosecutor did not intend, nor does the ordinary meaning of “forthcoming” suggest, a comment on one’s credibility. “Forthcoming” is defined as “1 : being about to appear : APPROACHING <the ~ holidays> 2 a : readily available <new funds will be ~ next year> b : SOCIABLE, AFFABLE <a ~, accessible, and courteous man>.” *Webster’s New Collegiate Dictionary* 453 (1977). A similar definition is found in other dictionaries.¹³ The ordinary meaning of “forthcoming” thus supports the prosecutor’s position that A.S. was affable and unhesitant, not the court’s interpretation.

Additionally, when considered in context, even Ms. Nolan differentiated between “forthcoming” and credibility when she said K.S. was present during the examination to encourage A.S. to be “forthcoming” and “honest.” RP 204. There would be no need to differentiate between the two words if forthcoming already included honesty.

¹³ In another dictionary, “forthcoming” is defined as “1. About to appear or happen : APPROACHING <the *forthcoming* election.> 2. a. Available when required or as promised <Funds were no longer *forthcoming*.> b. Affable : outgoing <a considerate, *forthcoming* person.>. An act or instance of coming forth.” *Webster’s II New Riverside University Dictionary*: 500 (1984).

The prosecutor's questioning of Ms. Nolan was not improper because the terms the prosecutor used did not vouch for the victim's credibility.

ii. Defendant did not suffer prejudice when Ms. Nolan told the jury A.S. was unhesitant, and any potential prejudice could have been cured.

Defendant did not object to the question, and the record does not support his argument that the prosecutor's actions were flagrant or ill-intentioned. Just as she explained to the court at trial, the prosecutor used "forthcoming" in a manner supported by its definition in the dictionary, which did elicit a response vouching for the victim.

Defendant greatly overstates the court's response as "express[ing] frustration over the prosecutor's conduct and bewilderment over the defense counsel's inaction." Appellant's Opening Brief at 32. There is no support in the record that the court indicated such baffled angst. In fact, the court did not rebuke or sanction the prosecutor, nor did it suggest the testimony was so grossly erroneous that defense counsel necessarily should have objected. Rather, the court urged the parties to be careful and cautioned them not to comment on witnesses' credibility. If the court was so distressed at the prosecutor's overt misconduct and defense counsel's lame inaction, then certainly it would have taken some action other than

casually speaking about the matter right before recess, dismissing for lunch, and never raising the issue again. *See* RP 209–13.

5. DEFENDANT FAILS HIS BURDEN IN EACH CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL TO SHOW THAT HIS COUNSEL’S PERFORMANCE WAS BOTH DEFICIENT AND PREJUDICIAL TO HIS DEFENSE.

To establish a claim of ineffective assistance of counsel, defendant must show (1) that counsel’s performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987). “Surmounting Strickland’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 l. Ed. 2d 284 (2010).

Counsel’s performance is deficient when it falls below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 687–88. There is a strong presumption that counsel’s performance was not deficient. *McFarland*, 127 Wn.2d at 335. The court reviews counsel’s performance in the context of all of the circumstances. *Id.* at 334–35. Performance is not deficient where counsel’s conduct can be characterized as legitimate trial strategy or tactics. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

A defendant establishes prejudice by showing there is a reasonable probability that the result of the proceeding would have been different but for counsel's unprofessional errors. *McFarland*, 127 Wn.2d at 335. 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*." *Strickland*, 466 U.S. at 695 (emphasis added).

There is a strong presumption that defendant received effective representation. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). 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; *see also Grier*, 171 Wn.2d at 44. 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." *Strickland*, 466 U.S. at 690.

- a. Defense counsel's silence on A.S. holding dolls while she testified does not constitute deficient performance. Neither did it result in prejudice.

Neither of the authorities relied upon by defendant require defense counsel to object to the use of comfort dolls for child victims. *See, e.g., Dye*, 178 Wn.2d 541; *Hakimi*, 124, Wn. App. 15. Regardless, the court in *Hakimi* ultimately decided that counsel's failure to repeatedly object to the

use of comfort dolls did not constitute ineffective assistance of counsel because he could not demonstrate—from the record—how the victim’s use of the dolls prejudiced him “in any way.” 124 Wn. App. at 24.

The defendant in *Davis*, discussed *supra*,¹⁴ alleged ineffective assistance of counsel for failing to object to the defendant’s shackling in front of the jury. *Davis*, 152 Wn.2d at 700. That court determined:

Assuming the failure to object was deficient performance, Petitioner still bears the burden of proof that his counsel’s failure to object resulted in actual and substantial prejudice. In the *guilt phase* of the trial, the question to be answered is ‘whether there is a reasonable probability that, absent the error[], the factfinder would have had a reasonable doubt respecting guilt.’

Id. at 700 (emphasis and omitted citations in original).

Defense counsel’s failure to object did not result in any prejudice. As in *Davis*, the record does not indicate his counsel’s performance in this regard actually prejudiced the jury’s determination of his guilt.

- b. Defense counsel’s failure to object to the alleged vouching did not result in a reasonable probability the jury would have had a reasonable doubt respecting his guilt. Nor was it improper not to object to “forthcoming.”

“The object of an ineffectiveness claim is not to grade counsel’s performance.” *Strickland*, 466 U.S. at 698. “If it is easier to dispose of an

¹⁴ Brief of Respondent, Argument 3.

ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” *Id.*

First, counsel’s failure to object to the single question whether A.S. was, in general, a truthful child does not call into question the remainder of the State’s evidence. RP 165. Unlike the irreparable prejudice in *Jerrels*, where the prosecutor and witness repeatedly vouched for the victims’ in-court testimony and specific allegations, the testimony in this case pertained to A.S.’ character in general. When considered in context, the testimony was limited in both scope and effect.

Moreover, the jury heard A.S. testify at trial, so they saw her demeanor during direct and cross examination, and they were able to weigh her credibility. The jury also watched a twenty minute video of a forensic interview where A.S. gave a detailed description of the crime, giving the jury further insight into her character, demeanor, and (in)ability to fabricate the allegation. All of this occurred wholly independent of the alleged vouching.

While perhaps counsel should have objected to the testimony as improper character/reputation evidence, neither he nor the trial court believed the testimony was so prejudicial as to warrant a mistrial. The State requests this court to deny defendant’s claim that the error could not have been remedied.

Next, defense counsel was not deficient in his performance when he did not object to the prosecutor's use of "forthcoming." *See* RP 204, 210. As argued above, "forthcoming"—by its own definition—does not suggest a comment on one's credibility. Rather, "forthcoming," as the prosecutor explained to the trial court, pertained to A.S.'s willingness to speak about the incident, not whether she was telling the truth.

c. Detective Green's testimony was relevant and proper, and it did not require a *Frve* hearing.

Evidence Rule 702 permits a witness to testify as an expert if they have "scientific, technical, or other specialized knowledge" that will assist the trier of fact to understand the evidence. ER 702.

The Washington State Supreme Court previously determined that an expert may testify about general behavioral profiles of crime victims, such as delaying in reporting crimes committed against them. *See State v. Ciskie*, 110 Wn.2d 263, 279, 751 P.2d 1165 (1988). In *Ciskie*, an expert testified that battered women often delay reporting crime and demonstrate certain "stressors" that indicate unusual, stressful events in the victim's life. *Id.* On review, the Court authorized such testimony because it was helpful to the trier of fact:

In [the professor's] expert opinion, the failure of the woman . . . to report the sexual assaults until 2 days after the last incident and 9 months after the first, was characteristic of a person suffering from the battered

woman syndrome. The testimony was helpful to the jury's understanding of a matter outside the competence of an ordinary lay person. . . .

Id. The Court warned, however, that the expert cannot infer that the victim was actually battered or opine that the defendant committed the crime simply based on the victim's behaviors. *Id.* at 279–80.

Similarly, in *State v. Cleveland*, 58 Wn. App. 634, 794 P.2d 546 (1990), the Court of Appeals upheld the admissibility of a family therapist's testimony, who explained particular "characteristics and typical responses of child victims of sexual abuse." 58 Wn. App. at 637. The family therapist relied on her interactions with at least 80 child victims of sexual abuse to explain that victims were reluctant to speak about the crimes and often added or subtracted details with each retelling. *Id.* at 644.

In upholding the admissibility of such testimony, the court held:

The case sub judice more closely resembles *Ciskie* Huffman's testimony did not espouse a theory proving guilt. In fact, her testimony was really not an explanatory theory or opinion requiring acceptance by the scientific community by ER 702. . . . Huffman did not at any time offer an opinion that K. was a victim of sexual abuse.

Id. at 646.

However, in *State v. Jones*, 71 Wn. App. 798, 863 P.2d 85 (1993), the State violated the Courts' admonition above when it called a social worker who opined the defendant had committed molestation based solely

on her observations of the child victim's behaviors. She insisted that "I felt that [the victim] had been sexually molested by [defendant] at that point" because the child's behavior corresponded with those of other sexually abused children. *Id.* at 804.

The reviewing court found the social worker's testimony improper without a *Frye*¹⁵ hearing and held: "In sum, the use of generalize profile testimony, whether from clinical experience or reliance on studies in the field, to prove the existence of abuse is insufficient under *Frye*." 71 Wn. App. at 820. In its opinion, the court noted it did not overturn *Cleveland*, specifically stating, "[w]e do not find [our holding] precluded by *Cleveland* The testimony in *Cleveland* was offered to explain the victim's reluctance to report abuse and assist the jury in weighing her testimony." *Id.* at 820 n.11.

Considering the framework between the State Supreme Court's holding in *Ciskie*, and the Courts of Appeals' opinions in *Cleveland* and *Jones*, it appears an expert may testify without a *Frye* hearing about their personal observations of the victims as well as general behaviors of victims of sex crimes. However, the expert is prohibited from opining about whether the victim indeed suffered actual, sexual trauma or whether

¹⁵ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

the defendant actually committed the crime. *See, e.g., Ciskie*, 110 Wn.2d at 279–80.

The testimony in this case more closely resembles the testimony in *Ciskie* and *Cleveland* than the social worker’s improper statement on defendant’s guilt in *Jones*, so defense counsel was not obligated to object. Here, Detective Green testified that he investigated Grant County’s sex crimes and had investigated “probably close to a hundred, if not more” child-molestation cases. RP 189. When asked whether it was unusual for child victims to delay reporting, he responded, “No. It’s very common, and most of the time children have a hard time understanding what has happened to them, so they do delay in reporting.” RP 189.

Detective Green never suggested A.S. was raped or molested, he did not tell the jury that A.S. delayed reporting the crime because she had been traumatized, and he never opined defendant had committed the crime based on A.S.’ behavior. Moreover, one of defendant’s primary defenses was that A.S. reported the crime shortly after returning from the Blauert residence in October when it was impossible for him to be there, suggesting the molestation, if any, did not occur at his hands. Detective Green’s testimony thus rebutted an inference that A.S.’ behavior was unusual—testimony entirely permitted under *Ciskie*, *Cleveland*, and *Jones*. *See, e.g., Jones*, 71 Wn. App. at 820 (“[S]uch testimony may be used to

rebut an inference that certain behaviors of the victim, such as sexual acting out, are inconsistent with abuse.”).

Because the testimony was admissible, there was no reason for defense counsel to object. Defense counsel adequately represented defendant on this point.

- d. Defense counsel did not need to challenge A.S.’ competency because she testified coherently and defense counsel cross-examined her.

A defendant cannot succeed on a claim of ineffective assistance of counsel for failure to request a competency hearing unless he can show the trial court would have likely found the witness incompetent. *State v. Johnston*, 143 Wn. App. 1, 18, 177 P.3d 1127 (2007). The witness must understand the nature of the oath to tell the truth and be capable of giving a “somewhat coherent account” of his observations. *Id.* at 18–19. All witnesses, even children, are presumed competent. *See State v. Brousseau*, 172 Wn.2d 331, 341, 259 P.3d 209 (2010). Ultimately, “[t]he threshold for witness competency is very low.” *Johnston*, 143 Wn. App. at 18.

Statute and court rule articulate who is incompetent to testify: “(1) Those who are of unsound mind. . . . and (2) children who do not have the capacity of receiving just impressions of the facts about which they are examined or who do not have the capacity of relating them truly.” CrR 6.12; *see also* RCW 5.60.050. “Unsound mind” refers “only to those with

no comprehension at all, not to those with merely limited comprehension.”

State v. Watkins, 71 Wn. App. 164, 169, 857 P.2d 300 (1993).

Defendant cannot satisfy his burden to show the trial court would have found A.S. incompetent to testify. First, defendant incorrectly suggests that the court presiding over the *Ryan* hearing did not consider competency. *See* Appellant’s Opening Brief at 42. Actually, the court suggested A.S. was competent:

And so first, I want to indicate that there’s certainly suggestion that [A.S.] could be competent at the time of trial. That relates to her ability to observe events, record them in an appropriate context, and relate them here in court. She’s not required to do that perfectly. She is required in order to be competent to have a basic ability to do that, and I believe she demonstrated that.

RP 66. Notwithstanding some hesitation on the four-year-old victim’s willingness to identify her perpetrator during the hearing, the majority of her testimony from the hearing indicates she understood the questions by the parties and competently responded. *See* RP 42–57.

The trial record also demonstrates A.S. was competent to testify, to understand her oath, and relate her observations to the jury. She was able to effectively answer questions relating to her background (RP 149–54), to understand the difference between a truth and a lie (RP 154–55), to identify defendant as the man who molested her (RP 156–58), and candidly describe the sexual contact (RP 158–59).

Defense counsel cross-examined A.S., and succeeded in demonstrating A.S. believed she did not tell anybody but her parents about the molestation (which would discredit her story). RP 160. A.S. appeared to understand counsel's questions and respond accordingly. *See* RP 160. A.S. competently testified and there is no indication the trial court would have found the witness incompetent. Moreover, she is presumed competent under the law. *See Brousseau*, 172 Wn.2d at 341. Counsel's actions thus met reasonable professional norms.

- e. Defense counsel strategically did not object to A.S.' statements to Ms. Nolan. Further, the statements were admissible under ER 803(a)(4) because they pertained to A.S.' treatment.

A.S. told Ms. Nolen during a medical examination that defendant had touched her and that "it wasn't Dustin." RP 203.

Defense counsel's decision not to object to these statements is properly characterized as a legitimate trial strategy. Defendant's strategy centered on denial, suggesting in part that A.S. had been coached to insist defendant was the perpetrator. By not objecting to these statements, defense counsel was able to cross-examine Ms. Nolen about the oddity of A.S. bringing up two men's names during her medical examination: "Miss Nolan, when you said that [A.S.] stated that Andy had touched her, not

Dustin, how — I guess how did that statement. not Dustin, come about?”

RP 205. Defense counsel emphasized this during closing argument:

Another thing I found interesting, that Miss Nolan, when she was testifying, that she asked [A.S.] what had happened, [A.S.] said, Dustin didn't touch me, just Andy did. Why would a child come out with, Dustin didn't touch me spontaneously on her own? You have to ask yourself these questions. Was the child being told what to say by somebody else?

RP 274. Defense counsel thus strategically permitted the jury to infer defendant was not at fault—but perhaps some other—by not objecting to Ms. Nolen's testimony at trial.

Defendant also fails the second inquiry because the testimony did not prejudice him at trial. The testimony was admissible as an exception to the hearsay rule, which permits statements made to medical professionals for purposes of diagnosis or treatment. ER 803(a)(4). Ms. Nolen was investigating a possible rape and had no indication about who could have caused the trauma, the identity of the involved parties, and what danger A.S. would have been exposed to without knowing who touched her. *See State v. Ashcraft*, 71 Wn. App. 444, 456, 859 P.2d 60 (1993).

6. THE TRIAL COURT PROPERLY ADMITTED
CHILD HEARSAY STATEMENTS UNDER
RCW 9A.44.120.

This court reviews a trial court's admission of child hearsay statements for an abuse of discretion. *State v. Beadle*, 173 Wn.2d 97, 112,

265 P.3d 863 (2011). A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable reasons or grounds. *Id.* “The trial court is necessarily vested with considerable discretion in evaluating the indicia of reliability.” *Swan*, 114 Wn.2d at 648.

The trial court must consider the following nine factors in determining whether the child’s out-of-court statements are reliable: (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) the statement contains no express assertions about past fact; (7) cross examination could not show the declarant’s lack of knowledge; (8) the possibility of the declarant’s faulty recollection is remote; and (9) the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented the defendant’s involvement. *Ryan*, 103 Wn.2d at 175–76.

The court in this case properly admitted the child hearsay statements only after carefully considering each of the *Ryan* factors. *See* RP 65–70; *see also* CP 36–38. The court considered these issues at length and determined that if A.S. testified at trial, her statements would be admissible. RP 70; CP 38.

Without any legal authority to support his position, defendant first argues the hearsay statements to Ms. Bagwell were inadmissible because A.S. could not recall telling Ms. Bagwell about the molestation. Appellant's Opening Brief at 54. Defendant confuses A.S.' ability to recall the molestation—which is required under *Ryan*—with her ability to recall, independently, every person she told about the molestation. None of the *Ryan* factors require A.S. to testify accordingly. Besides, common sense suggests A.S. would be unable to recall telling Ms. Bagwell about the molestation because she was under the tremendous stress of disclosing the events to her mother immediately prior.¹⁶

The trial court properly considered the disclosures made to three different people, two of whom testified during the hearing, and each of whom gave a consistent account of what A.S. had disclosed to them. Accordingly, the court found a sufficient indicia of reliability to admit the statement made to Ms. Bagwell. CP 37–38 (Finding of Fact 7; Conclusion of Law 2). The court did not abuse its discretion in this regard.

¹⁶ K.S. stormed out of the bathroom after A.S. disclosed the touching. RP 14, 32. Ms. Bagwell testified that when she entered the bathroom, A.S. seemed to be blaming herself and that she was in trouble. RP 14–16. A year later, it would be difficult for a child as young as A.S. to recall, at that precise moment, telling Ms. Bagwell what had occurred.

Defendant next challenges four of the findings of fact made by the court: findings of fact 1, 2, 6, and 5, in that order.¹⁷ First, the court properly determined A.S. was presumably competent for purposes of the *Ryan* hearing. RP 69; CP 37 (Finding of Fact 6). Specifically, the court found A.S. was able to observe events, record them in an appropriate context, and relate them in court. RP 66. The record supports the court's finding: A.S. was able to recall, in detail, defendant touching her vagina. RP 51–56. She related these events in a similar description to the court, as well as her mother (RP 30–32), to Ms. Bagwell (RP 14), and Ms. Winston (Ex. 3).

Second, the record supports the court's finding that the timing of the disclosure strengthened the statements' reliability. During the pretrial hearing, the court found that the statements were "made very short in time

¹⁷ The courts findings of fact are as follows:

1. The Court was able to observe [A.S.]'s testimony and demeanor, and found that she demonstrated the probability of being a competent witness at the time of trial; (the Court indicated that such a determination would be premature at the current hearing).
2. The timing of [A.S.]'s disclosure suggest reliability and belie any assertion that her recollection is faulty;
-
5. [A.S.] demonstrated the mental capacity to receive an accurate impression of the event as it occurred, and demonstrated a sufficient memory and an independent recollection of the alleged occurrence;
6. Testimony showed that [A.S.] had no apparent motive to lie and had a general character for being truthful;

CP 37.

after the events are alleged to have occurred. This is not a five year-old talking about something that happened nine months ago.” RP 68.

Defendant argues the court was misled because the State initially believed the evidence suggested the crime occurred in October and inferred as much during the pretrial hearing. But from the outset of the case, the State alleged the crime occurred sometime between July and October. CP 1–2, 13–14. Moreover, the court’s findings regarding the timing of the disclosure did not hinge on the crime occurring in October. Even if the court was under the impression that the crime had occurred in late autumn, at most, based on the State’s charging period, the disclosure was made less than two months after the molestation occurred.¹⁸ Additionally, defendant never objected to the entry of the court’s findings of fact—which were entered after trial on August 26, 2014. CP 36. Any confusion on this point should be remanded for an evidentiary hearing, not a reversal of defendant’s conviction.

Third, ample evidence supports the court’s sixth finding of fact. Ms. Bagwell testified A.S. generally told the truth aside from normal youthful play. RP 18. K.S. also vouched for her child’s general truthful character. RP 24. And Ms. Bagwell and K.S. could not identify any motive for A.S. to fabricate the allegation. RP 18, 34. After hearing

¹⁸ The molestation occurred when A.S. was at the Blauerts in late August or early September. RP 235. The disclosure occurred in mid-October.

testimony from these witnesses and watching the forensic interview, the court concluded:

[A]re we dealing with a child who has an apparent motive to lie? No apparent motive that I can identify, no evidence that [A.S.] had some past problem with Andy, or that Andy and the people hearing the statements were in some dispute.

RP 69. This court should defer to that finding.

Understandably, the record suggests A.S. was very nervous in her first appearance during the pretrial hearing. This should be expected for any five-year-old victim of sexual abuse. She initially refused to identify defendant and briefly struggled at explaining—in the adult terms given to her—the difference between a truth and a lie. *See* RP 47–50. Quickly thereafter, however, she identified defendant as “Andy,” and related to the court how he had touched her vagina. RP 51–55. Further evidence of her ability to be truthful was her forensic interview—where it was apparent she understood the difference between truths and lies, and responded accurately to the questions posed to her by Ms. Winston. Ex. 3 (11:27:30).

Fourth, the evidence strongly supports A.S.’ ability to receive an accurate impression of the crime and her memory to recollect the event. As the court concluded, A.S. was not required to observe events, record them, and relate them perfectly. RP 66. But she did so with sufficient clarity that the trial court found the statements reliable. RP 66.

Any challenge to A.S.'s recollection of the event is undermined by her report during the forensic interview. When asked about what had happened, A.S. *immediately* demonstrated how defendant pulled her pants down and rubbed her vagina. Ex. 3 (11:32:25–11:34:45). Without hesitation she was able to draw a diagram where defendant had touched her. One cannot watch the interview and conclude that A.S. fabricated these events. Considering her testimony at the pretrial hearing, and the similar accounts by Ms. Bagwell and K.S., it was not an abuse of discretion by the court to conclude the minor had the ability to recall the events with sufficient clarity.¹⁹

The trial court listened and observed A.S. describe the molestation. The court listened to her responses and determined her statements, based on the totality of the testimony before it, should be admitted at trial. This court should defer to the trial court's findings.

7. DEFENDANT FAILS TO DEMONSTRATE THAT HE IS ENTITLED TO A NEW TRIAL FOR CUMULATIVE ERROR BECAUSE HE DOES NOT SHOW WHICH PREJUDICIAL ERRORS OCCURRED BELOW.

To succeed on a claim of cumulative error, defendant must demonstrate "severe trial errors" that do not warrant a reversal alone, but

¹⁹ Defendant argues A.S.'s trial testimony slightly differed from the account she gave during the pretrial hearing. But that testimony was not before the court during the pretrial hearing and should not be considered when determining whether the court abused its discretion.

deny the defendant a fair trial when combined. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). When determining whether the errors denied defendant a fair trial, the court only considers prejudicial errors. *See State v. Stevens*, 58 Wn. App. 478, 498, 794 P.2d 38 (1990).

Defendant rehearses each of his assignments of error as proposed prejudicial errors requiring reversal when combined. *See* Appellant's Opening Brief at 60. This argument is misleading. It floods the court with several alleged errors (e.g., sufficiency of the evidence) that should not be considered in a cumulative-error analysis because those alleged errors, alone, require reversal. For example, either sufficient evidence supports defendant's conviction or it does not. If sufficient evidence exists, which the State has demonstrated it does, then there is no error at all. Simply rehearsing an assignment of error does not qualify each assignment for consideration in this legal analysis.

Defendant has not articulated which errors do not require reversal alone but would if combined. None of the alleged errors constitute severe trial errors that warrant the exceptional remedy of reversal.

D. CONCLUSION.

Sufficient evidence supported the elements of child molestation in the first degree. The crime could have only occurred during the period alleged by the State, and the jury readily could have determined defendant made sexual contact when he removed A.S.' pants and touched her vagina. Also, a *Petrich* instruction was not necessary because only one of the molestations that A.S. disclosed occurred during the charging period and the other was a factual impossibility.

For the first time on appeal, defendant challenges the victim's use of comfort dolls while she testified. But he waives this issue because he did not object at trial, and there is no evidence that it prejudiced his right to a fair trial.

In each claim of prosecutorial misconduct and ineffective assistance of counsel, defendant fails to satisfy both inquiries: first, whether the conduct was improper or deficient; and second, whether the conduct prejudiced his right to a fair trial. None of the allegations resulted in prejudice that warrants a new trial.

Finally, the court properly admitted A.S.' hearsay statements because she testified at trial, and the court considered the *Ryan* factors at length and determined the hearsay statements had a sufficient indicia of reliability.

For the reasons stated above, the State respectfully requests this court to affirm defendant's conviction of child molestation in the first degree.

DATED: August 26, 2015.

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Grant County
Prosecuting Attorney



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Deputy Prosecuting Attorney
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

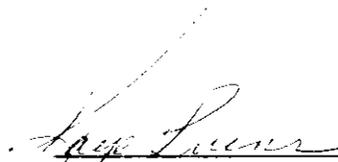
STATE OF WASHINGTON,)	
)	
Respondent.)	No. 32825-2-III
)	
v.)	
)	
ANTHONY WAYNE BLAUERT,)	DECLARATION OF SERVICE
)	
Appellant)	
_____)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Mark Larranaga, Attorney for Appellant, containing a copy of the Brief of Respondent in the above-entitled matter. A copy of said documents was also e-mailed to Mr. Larranaga.

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Dated: August 27, 2015.



Kaye Burns