SUPREME COURT NO. 1031645

NO. 84771-6-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LUIS IBARRA,

Petitioner.

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

The Honorable Catherine Shaffer, Judge

PETITION FOR REVIEW

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A. PETITIONER & COURT OF APPEALS DECISION

Petitioner Luis Ibarra seeks review of the Court of Appeals' May 13, 2024 unpublished decision in State v. Ibarra, appended to this Brief. ("App.").

B. ISSUES PRESENTED FOR REVIEW

1. Under a misguided open-door theory, the trial court erroneously permitted the State to introduce evidence that Ibarra, a registered nurse, was previously "counseled" and "warned" not to engage in sexual misconduct with patients—which informed jurors he had previously engaged in misconduct. Such evidence was irrelevant and highly prejudicial, denying Ibarra a fair trial. Should this Court grant review and reverse Ibarra's conviction?

2. A trial court should grant a mistrial where irregularities are serious, not cumulative, and incurable. The prosecutor elicited evidence from Ibarra's ex-wife that Ibarra had lied regarding an inflammatory collateral matter, guns. The ex-wife also volunteered other inflammatory information. Some testimony was stricken, but the lingering impression was Ibarra

was a bad guy and a liar. Should this Court consider this matter and hold a mistrial was warranted?

C. STATEMENT OF THE CASE

The State charged Ibarra with second degree rape, alleging he engaged in sexual intercourse with patient I.W. during treatment. RCW 9A.44.050(1)(d); CP 179. A defendant so charged may offer the affirmative defense that the patient consented to intercourse knowing it was not for treatment. RCW 9A.44.050(1)(d).

Ibarra worked the night shift at Swedish Hospital in Seattle beginning October 21 and ending October 22, 2020. 5RP 1804-05, 1808. Patient I.W. was recovering from surgery. 5RP 1809.

Ibarra learned from the prior nurse that I.W. was in pain. I.W. was prescribed an opioid and a muscle relaxer. 5RP 1811, 1813. Although traditional pharmacology is the standard treatment, nurses can offer other options such as ice therapy; repositioning; distraction; aromatherapy; and "therapeutic touch." 5RP 1818-19.

Ibarra checked on I.W. throughout the night. 5RP 1818. I.W. said her pain medication wasn't working. 5RP 1819. Because was I.W. maxed out, Ibarra offered I.W. other therapies, which she mostly rejected. 5RP 1823.

At one point, Ibarra heard moans from I.W.'s room; I.W. reported great pain. 5RP 1825-26. Ibarra again offered ice, repositioning, television, music, and aromatherapy. I.W. asked if there was anything else Ibarra could do. Ibarra said there was something that might help—reflexology—although he shouldn't offer it. 5RP 1826. Reflexology targets different body areas through pressure points on hands and feet. 5RP 1826-29. But, per Swedish rules, he was prohibited from patient massage or reflexology without a third party present. 5RP 1832.

Nonetheless, I.W. performed reflexology on I.W.'s right hand, then massaged her left arm, then repeated the process with her right hand and arm. I.W. relaxed. 5RP 1834. Ibarra then offered to perform reflexology on her feet. After completing

reflexology techniques on each foot, he gained I.W.'s permission to massage each leg. 5RP 1836-38.

When Ibarra reached the top of I.W.'s left leg, he accidentally brushed I.W.'s crotch. He commented he didn't think I.W. wanted to be touched there. But I.W. said, "Go for it." 5RP 1839. Ibarra knew nurses were strictly prohibited from such contact. 5RP 1840. Ibarra felt confused and shocked by her reaction yet took what I.W. said as a command. 5RP 1841.

Ibarra initially touched I.W.'s lower abdomen and asked if that was okay. I.W. made a noise of assent. 5RP 1842. Ibarra moved his fingers to where I.W.'s labia met at the top and asked if she wanted to be touched there. I.W. responded by spreading her legs. Ibarra rubbed I.W.'s clitoris until she appeared to orgasm. 5RP 1843-45. He asked, "Did what I think just happen[ed], happen?" 5RP 1854. She confirmed it had. Ibarra told I.W. the experience was weird. She thanked him and said what happened was just between them. 5RP 1845.

Swedish employes eventually interviewed Ibarra about the incident. He feared losing his job and said I.W. had touched herself. 5RP 1847. He also gave that account to a Seattle police detective. 5RP 1848-49. Ibarra lost his job anyway. 5RP 1847. Ibarra acknowledged a sexual encounter violated the rules governing his profession. However, he believed he had obtained I.W.'s consent. 5RP 1849.

After Ibarra's direct testimony, the State argued he had opened the door to prior misconduct. 5RP 1851. Before trial, the State had moved to admit, under ER 404(b), a 2005 incident at St. Joseph's Hospital in Tacoma. 1RP 25. A patient alleged Ibarra improperly touched her when checking her catheter. 1RP 33. The Department of Health investigated, and Ibarra's nursing license was suspended. 1RP 29-30. During the investigation, Ibarra admitted to unprofessional behavior. 1RP 37-38. Related DOH findings listed various Washington Administrative Code (WAC) regulations regarding appropriate nurse-patient interaction, and Ibarra had to complete additional training to

regain his license. 1RP 29-30, 41, 64-65. As for the 2019 allegation, Ibarra was originally charged with indecent liberties (count 2) for pinching a patient's nipple. CP 179, 185.

The court originally said the 2005 incident could be admissible as to the rape charge, count 1, because the related sanctions (alerting Ibarra that sexual behavior was prohibited) rebutted Ibarra's consent defense. 1RP 49-50, 74. As to count 2, the 2005 incident was relevant to common plan and knowledge. 1RP 75.

After count 2 was dismissed, the court revisited its ER 404(b) ruling. 2RP 706-08. The State argued the 2005 incident was still admissible. 2RP 713-14. The defense argued the 2005 incident was dissimilar and too remote from the remaining charge. 2RP 721.

After Ibarra's direct examination, however, the State argued the door was open to both incidents. It wished to (1) introduce the specific allegations identified in the 2005 DOH

investigation and (2) cross-examine Ibarra about the 2019 allegation and related training. 5RP 1851-53.

The court said Ibarra's claim that I.W. had consented opened the door to training, admissions, and discipline related to the prior incidents, but not to the precise allegations. 5RP 1853-54, 1864-65. Defense counsel objected—Ibarra had admitted on the stand that his behavior was against the rules and therefore related testimony was irrelevant and overly prejudicial. 5RP 1856. The court then suggested training related to the 2019 incident was admissible to rebut Ibarra's testimony that the 2020 incident, and I.W.'s reaction, were unexpected and unusual. 5RP 1858, 1863. Prior training was also relevant because Ibarra minimized his conduct. 5RP 1868. Defense counsel argued Ibarra had not minimized. 5RP 1868. The court countered that Ibarra's conduct violated not just hospital rules but WACs. Thus, certain admissions in the DOH findings were admissible, as were the related sanctions. 5RP 1869, 1871, 1874-76.

Regarding the 2019 incident, cross-examination proceeded as follows:

> Q [D]uring your time at Swedish hospital, were you counseled on the limits of making patients comfortable[?]
>
> A [T]hat specific conversation never happened[.]
>
> Q Well [in] 2019, you had been told by Swedish hospital that you were not to give massages, is that correct?
>
> A [I] was told that if I was going to give a patient a massage[,] someone else had to be present[.]
>
> Q [Y]our testimony now is that you could give a massage at Swedish hospital, as a nurse.
>
> A That didn't change. I was alone, so I couldn't give a massage to [I.W.]
>
> . . . .
>
> Q By December of 2020, Mr. Ibarra, you were told by Swedish hospital you were not to be alone with patients giving them massage[?]
>
> A Yes.

Q And that was an admonition that you had received during your employment at Swedish[?] You were counseled, you were warned, you were told [by Swedish before meeting I.W.?]

A Yes.

5RP 1895-96

After several questions about the charged incident, the prosecutor turned to the 2005 incident. 5RP 1905.

Q [Y]ou have been counseled [prior] to 2019 about appropriate and inappropriate conduct with patients, is that correct?

A Yes.

Q Okay. And back in, I believe, 2006, you were counseled specifically about boundaries with patients, is that correct?

A I took a boundaries class.

Q Okay. That boundaries class, how extensive was it?

A [B]oundaries [class] was really generalized[.]

Q Okay. Part of that general boundaries class required you to write a paper, isn't that correct?

A I did write a paper.

Q Okay. And so you had to engage in sort of reflecting on what those boundaries would be, is that correct?

A [T]he paper that I wrote had to do with what I would do and what I learned from patients' perceptions . . . that were not necessarily accurate.

Q [B]ack then when you had to write that paper, what did you agree that you were going to do?

A [T]hat I would check with the patient, I would verbally, you know, explain myself, my intentions, my acts, get consent.

Q Were you not told back then even that you cannot have sexual contact with patients, no matter if the patient consents?

A No, I was not told that I could not have sexual contact with my patients in 2006 because there was no sexual contact.

. . . .

Q Mr. Ibarra, I'm going to hand you [Exhibit 12]. Do you recognize this document as something you would have received on August 18th, 2006?

A Yes.

Q Okay. Would you like to follow along with me on page 104?

A Okay.

Q Back then, were you not told that it is a violation of standards of nursing conduct or practice to engage in sexual behavior with the clients?

A This does not say that I was told anything. This is reciting nurse WACS.

. . . .

Q So I'm looking at page 104.

A Okay.

Q And you received this document back in 2006, on August 18th, 2006, did you not?

A Did I receive this? Yes.

Q [O]n the last page, 106, it says, "Notice to respondent." That's you, right?

A Yes.

Q [W]ere you not told on page 104, you cannot engage in sexual misconduct with the client?

Very explicitly in subsection H there, in the middle of the page.

A [This] is citing a nursing WAC[.] I was not told [I] can't have sex with clients [because] here was no sexual contact with any clients.

Q And you were not told of the [WACs] for you back then in 2006?

A Okay. [So,] I know that the WAC[s] prohibit sexual conduct [with patients].

[Court instructs jury that regulations present "separate question from whether . . . the State has proved this case beyond a reasonable doubt."]

Q So you would agree with me that as part of nursing regulations and professions, you have to have continuing education.

A Yes, ma'am.

Q And in addition to continuing education, you had still yet more education back in 2006 because you had to the write a paper, is that correct?

A Yes.

Q And in this document that we're referencing today, it says that you cannot have sex with clients, right?

A Yeah, no nurses can, correct?

Q Okay. And so you acknowledge that that is not an appropriate behavior?

A Correct.

. . . .

Q And in this document, as well, you were told [on page 105] about specific conduct that is prohibited[?]

A Yeah, it says what nurses shouldn't be doing.

. . . .

Q [S]o, you were told even back in 2006, even if a patient consents, that is not something a nurse should be engaging in—

A Correct.

. . . .

Q Okay. And [in] that same proceeding in subsection three, again, you can look at it if you'd like, you're told exactly what a nurse is supposed to do to avoid allegations like these, isn't that right? . . . . You were a nurse back then, right?

A Yes, ma'am.

5RP 1905-12.

Ibarra's ex-wife Laura testified for the State. In its opening statement, the State said the jury would hear that Ibarra told Laura that he "lied to the detective [and] that he did masturbate his patient at Swedish Hospital." 4RP 1318.

Laura initially addressed Ibarra's work history. 4RP 1493. Ibarra had worked at St. Joseph's until 2005. For several years thereafter, he primarily provided childcare for the couple's children, other than intermittent Army Reserves mobilizations. 4RP 1476-78.

The State also asked about more recent events.

> Q [Did Ibarra] contact you at some point in 2020 [about ending] his employment at Swedish.
>
> A He did not.
>
> Q [D]id police contact you?
>
> A They did.
>
> Q Okay. When was that?

A It was December 21st, 2020. There were three King County Sheriff vehicles that rolled up in our cul-de-sac, and they came to my door looking for him.

Q Okay. And how did that go, I guess?

A [I said] he hasn't lived here in years. [I gave a detective] his mom's address. And [it] was a little surreal because you don't normally see King County and Pierce County [police], you know, in your little quiet neighborhood.

Q Okay.

A And they started asking me some questions, and I immediately was, like, oh my goodness, [this] isn't good[.]

MR. PRESTIA: Objection, again, relevancy.

THE COURT: Sustain.

MS. RAMIC: Okay.

Q [W]ere you able to interact with the deputies that showed up that day?

A Yeah.

MR. PRESTIA: Objection; relevancy.

THE COURT: Overruled.

MS. RAMIC: Okay.

Q And during those interactions, just sort of how you were feeling, what was that feeling?

MR. PRESTIA: Objection; relevancy.

THE COURT: Sustain[.]

. . . .

Q Okay. After this point, did you interact with Mr. Ibarra at all?

A I [texted] him in January after his release[.] It was my third son's birthday and we were getting ready to go to dinner. And I had just been given notice that Luis had made bail [and] I was really worried that he was going to reach out and kind of ruin this son's birthday.

MR. PRESTIA: Objection[;] relevancy and 403.

THE COURT: Sustained. That's stricken.

MS. RAMIC: Okay.

THE COURT: [P]lease zero in[.]

Q So that text exchange, [w]as that just about your son's birthday?

A That was about the children.

MR. PRESTIA: Objection; relevancy.

THE COURT: Yes or no, was it about your son's birthday?

THE WITNESS: Yes.

THE COURT: Thank you.

Q After that point, you mentioned there was a phone call.

A [H]e called me. [I] took the call in my car in the garage so [the children could not hear.]

. . . .

Q So when he calls you, how does the conversation begin[?]

A Well, it was to kind of explain, like, [how] did we get to a space where King County is at my door, and you're in jail, and, you know, like how did you get here? Like what's the story with this?

Q Okay. And—

MR. PRESTIA: I'm going to object to that under 403; move to strike.

THE COURT: It's stricken.

Q And when you . . . said that you just listened, or, I guess, what do you mean by that?

A He did . . . most of the talking, and he was explaining how things were going[.]

[He] was explaining how he went down to the station to meet with the detective. [H]e talked about [being interviewed] and that he got arrested. And then he explained how he did not tell the detective certain things. *He said, I lied to the detective. He said, I didn't tell them about the guns that I have.*

MR. PRESTIA: Objection; 403. Move to strike.

THE COURT: That is stricken.

BY MS. RAMIC:

Q Yeah. [I'm just talking about the Swedish incident.]

. . . .

A [Ibarra wanted to tell the children what happened] so that they weren't thinking a certain worst case scenario. The children know the charges. And—

THE COURT: Okay. So that's not what you were asked.

THE WITNESS: Okay.

THE COURT: The Prosecutor's asking you what, if anything, Mr. Ibarra said [that] pertained to how truthful he was to the police about this incident. Got it?

Q [I] know this is hard, right? [Y]ou said his concerns seem to be about the children. How did that work into the Swedish, I guess, situation?

MR. PRESTIA: Objection; relevancy.

THE COURT: Sustained.

MS. RAMIC: Your Honor, this goes to—

THE COURT: No, [g]et to the point[.]

. . . .

Q What did Mr. Ibarra tell you about what he did to a patient at Swedish?

A He said that he put lotion on the patient, that he essentially masturbated the patient, and that the patient wanted this, and [his] words were, it wasn't ethical, but it was consensual, and she thanked me[.]

4RP 1481-90 (emphasis added).

The court called the prosecutor to a sidebar. 4RP 149. After Laura's testimony was complete, the court put sidebars on the record.

> The second sidebar was me asking the State when, if ever, we were going to hear Mr. Ibarra's alleged admission to his wife that he had lied to the police. [The prosecutor explained] his account to Mrs. Ibarra was different than his account to the police, and that may be true[, but] that's not the same thing as an admission to her that he lied to the police. [I am] not happy that the jury heard [he only admitted to lying to the police about guns[.]

4RP 1494; see also 4RP 1495.

Defense counsel moved for a mistrial:

> Your Honor, we just heard a raft of inadmissible testimony, some of which I managed to object to and some of which I did not. There [were] a couple of references to him posting bail, with being arrested, being in jail. There was the reference to the guns [which] shouldn't have been said. It's totally irrelevant. It's far more prejudicial than it is probative of anything[.]

4RP 1496-97.

In response, the prosecutor claimed she had a good faith basis—despite decades of decisional law[1]—to believe an admission to lying about a collateral matter—guns—was admissible. But, in any event, she had directed Laura to "avoid any talk about guns, or bail, or arrests, or anything like that[.]" 4RP 1497-98.

The court denied the mistrial motion. However, it criticized the prosecutor for arguing Ibarra admitted to lying but not clarifying that the lie was about guns. 4RP 1499-03.

Ibarra appealed, raising, in part, the two issues identified above. The Court of Appeals rejected these arguments in an unpublished opinion. App. at 7-10 (mistrial denial); App. at 1-12 (prior misconduct).

Ibarra now asks that this Court grant review and reverse.

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[1] State v. Oswalt, 62 Wn.2d 118, 120, 381 P.2d 617 (1963) ("[A] witness cannot be impeached upon matters collateral to the principal issues being tried.").

D. REASONS REVIEW SHOULD BE GRANTED

1. **Review is appropriate under RAP 13.4(b)(1) and (2) because the Court of Appeals' decision conflicts with decisional law as to the open door doctrine and the prejudice resulting from reference to prior convictions.**

This Court should grant review. Contrary to the Court of Appeals' decision, Ibarra did not open the door to such damaging evidence.

This Court reviews evidentiary rulings for an abuse of discretion. State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009). A court's decision is manifestly unreasonable—an abuse of discretion—if it is outside the range of acceptable choices, considering the facts and the applicable legal standard. Ryan v. State, 112 Wn. App. 896, 900, 51 P.3d 175 (2002).

A party may open the door to otherwise inadmissible evidence by introducing evidence that must be rebutted to preserve fairness. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). The trial court may admit evidence under the open door doctrine "so long as the party who otherwise stands to

benefit from exclusion has increased the subject's relevance through actions at trial." State v. Rushworth, 12 Wn. App. 2d 466, 475, 458 P.3d 1192 (2020). "The fact that an ordinarily forbidden topic has gained increased relevance does not result in automatic admission of evidence. [Rather, evidence] is still subject to possible exclusion based on constitutional requirements, pertinent statutes, and the rules of evidence [including ER 402]." Id. at 473.

Indeed, even where evidence arguably becomes relevant, the court should exclude unduly prejudicial evidence. ER 403 "Where admission of evidence of prior bad acts is unduly prejudicial, the minute peg of relevance is said to be obscured by the dirty linen hung upon it." State v. Turner, 29 Wn. App. 282, 289, 627 P.2d 1324 (1981).

An evidentiary error is not harmless "if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). In contrast, improper admission

of evidence constitutes harmless error if the evidence is of minor significance to the evidence as a whole. Id.

Here, the trial court determined Ibarra had opened the door to admissions, sanctions, and training following the 2005 and 2019 incidents by asserting the 2020 activity was consensual and, specifically, by (1) purportedly minimizing the extent to which sexual contact with a patient was prohibited and (2) claiming I.W.'s sexualized reaction was unexpected. 5RP 1858, 1863, 1868, 1874-76. The court ruled that underlying allegations were not admissible, but certain admissions appearing in the DOH findings were admissible, as well as the sanctions. The court also allowed discussion relating to the 2019 Swedish incident. 5RP 1873-76.

The trial court said evidence of Ibarra's training related to the prior incidents was relevant to rebut Ibarra's minimization of the professional wrongfulness of his contact. But Ibarra did not minimize. He freely acknowledged on direct examination that even the initial massage was not permitted by Swedish rules and

later acknowledged "that the rules that governed [him] as a nurse at the time" prohibited sexual contact. 5RP 1832, 1849. The defense did not discuss WACs in great detail on direct examination. But that is not surprising, considering that a violation of the WACs is not tantamount to a criminal violation. CP 9. Purported minimization begs the question of the relevance of professional regulations in the first instance.

As for the relevance of minimization: The issue at trial was I.W.'s consent. Despite the trial court's repeated insistence to the contrary, it is unclear how the existence of regulations I.W. did not know about was relevant to whether she consented. Cf. State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (defendant's prior sexual misconduct was irrelevant to defendant's state of mind—"motive or intent"—because defendant admitted intercourse occurred, and disputed issue was therefore complainant's consent).

The court also alluded to Ibarra's consent, although the court never clearly articulated how specific counseling and

training was relevant to his consent. As the court acknowledged, but the Court of Appeals fails to recognize,[2] Ibarra never claimed I.W. *forced* him to do anything or that he felt it would have been improper for him to refuse. 5RP 1875 ("And a good deal of what [Ibarra] said, you know, could have been taken, *had he testified differently*, that this was sort of invited and forced by this victim." (Emphasis added.)); cf. 5RP 1840-41 (Ibarra testified he perceived I.W.'s "[g]o for it statement" as a "command" but never indicated that he felt forced). See Saltarelli, 98 Wn.2d at 363 (issue was complainant consent, not defendant's state of mind).

The court's other theory of consent-related admissibility was that prior training was relevant to rebut Ibarra's claim the incident was unexpected. E.g., 5RP 1858. But Ibarra never claimed the overall incident—the offer of reflexology—was unexpected. Rather, he testified that I.W.'s sexualized reaction

[2] App. at 11-12.

was unexpected. 5RP 1840-41; see also 5RP 1886 (cross-examination). As to each prior incident, Ibarra disputed sexual contact occurred at all and never claimed either patient had reacted in a sexualized manner. E.g., 5RP 1856 (portion of police interview, regarding 2019 incident, read into record). Contrary to the Court of Appeals' decision, App. at 11, neither the prior incidents nor any related training rebutted Ibarra's testimony that I.W.'s reaction was unexpected.

The door was not open because Ibarra's testimony did not make the area of inquiry—admonishment and training related to prior incidents—relevant. See Rushworth, 12 Wn. App. 2d at 475.

The next question is prejudice. The potential prejudice of prior acts is at its highest in sex cases. Saltarelli, 98 Wn.2d at 363; accord State v. Gower, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). "'Once the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty,

he could not help but be otherwise.'" Saltarelli, 98 Wn.2d at 363 (quoting Slough and Knightly, Other Vices, Other Crimes, 41 IOWA L. REV. 325, 333-34 (1956)).

The State must meet a substantial burden when attempting to introduce evidence of prior misconduct under one of the exceptions to general prohibition. The prior acts must be (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving an ER 404(b) exception, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial. State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). But evidence that is not admissible under an exception simply invites the jury to draw the "forbidden inference" underlying ER 404(b), that an accused had a propensity to commit the charged crime. State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999).

The prosecutor's cross-examination regarding prior admonishment and training was highly prejudicial. 5RP 1894-1905 (2019 incident); 5RP 1905-13 (2005 incident). It strongly

suggested Ibarra had committed, in the course of nursing, some prohibited sexual act in 2005-2006 and again in 2019. Cf. State v. Miles, 139 Wn. App. 879, 886-87, 162 P.3d 1169 (2007) (prosecutors' questions may effectively convey information to jurors that is not otherwise admissible). Further, Laura's testimony that Ibarra stopped working as a nurse in 2005 made the fact of prior misconduct even more obvious. 4RP 1476-78.

The jury was not explicitly told the details of the prior incidents. But any attentive juror would have perceived the specter of prior sexual misconduct with patients and thus "abnormal bent." In summary, the door was not open, and there is a reasonable likelihood that introduction of such damaging propensity evidence affected the outcome of trial. This Court should grant review and reverse.

2. **This Court should also grant review and address the improper denial of mistrial.**

This Court should also grant review and address the improper mistrial denial. Specifically, the Court of Appeals

decision elides the prosecutor's contribution to the worst of Laura's testimony, where the prosecutor even acknowledged that she always understood Ibarra's admission to lying to police—which she highlighted—to be about guns. E.g., 4RP 1494, 1497.

This Court reviews a trial court's denial of mistrial motion for abuse of discretion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). A trial court should grant a mistrial when the asserted irregularities have so prejudiced the accused that nothing short of a new trial can preserve fairness. State v. Rodriguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002). This Court evaluates prejudice based on the evidence as a whole. State v. Taylor, 18 Wn. App. 2d 568, 579, 490 P.3d 263 (2021) (citing State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987)).

This Court uses a three-part test to determine whether the petitioner was so prejudiced as to require a new trial. Taylor, 18 Wn. App. 2d at 579 (citing State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)). It considers: (1) the seriousness of the irregularity; (2) whether the information placed before the

jury pursuant to such irregularity was cumulative of other properly admitted evidence; and (3) whether the irregularity was curable by instruction to disregard it, which juries are generally presumed to follow. Weber, 99 Wn.2d at 165-66.

Meanwhile, an important underlying legal rule is that the prosecution may not impeach a witness, or contradict prior testimony, on collateral matters. State v. Oswalt, 62 Wn.2d 118, 120, 381 P.2d 617 (1963); ER 402 ("Evidence which is not relevant is not admissible.").

Here, Ibarra moved for a mistrial immediately after Laura's testimony based on the host of irrelevant and prejudicial information she had revealed to the jury. 4RP 1496-97. Laura testified that two law enforcement jurisdictions had mounted a substantial response to search for Ibarra; that he was ultimately jailed; that, upon his release, he wanted to reveal potentially inappropriate information to children regarding "charges;" and, to top it off, there was a risk he would ruin his son's birthday. 4RP 1482-85. The prosecutor reportedly admonished Laura to

avoid many of those matters. 4RP 1497. Nonetheless, Laura's testimony presented her ex-husband in an extremely negative light.

However, far worse was Laura testimony that Ibarra admitted to lying to the police about guns. There are two inadmissible, prejudicial components to this assertion. Laura alerted the jury that Ibarra (1) kept dangerous weapons and (2) was willing to lie to police about them—in effect, that he was a liar on subjects that did not even touch on his profession and his livelihood.[3] In other words, he was a generalized liar.

Properly applied, the three-part Weber test reveals the court abused its discretion in denying Ibarra's mistrial motion. Considered in light of the trial as a whole, see Taylor, 18 Wn. App. 2d at 584, Laura's testimony overburdened the defense such that nothing short of a new trial could fix the situation. This

[3] Ibarra did change his story between his initial statements and trial; however, Ibarra explained that he was trying to keep his job. 5RP 1847-48.

Court should grant review on this ground, as well. Further, as Ibarra argued below, the two errors constituted cumulative error, denying him a fair trial. See Walker v. Engle, 703 F.2d 959, 963 (6th Cir. 1983) (trial errors may cumulatively produce a trial setting that is fundamentally unfair).

E. CONCLUSION

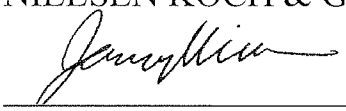
For the reasons stated, this Court should grant review and reverse.

I certify this document is prepared in 14-point font and contains 4,996 words excluding RAP 18.17 exemptions.

DATED this 12th day of June, 2024.

Respectfully submitted,

NIELSEN KOCH & GRANNIS



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APPENDIX

FILED
5/13/2024
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LUIS RUBEN IBARRA, Appellant.	No. 84771-6-I DIVISION ONE UNPUBLISHED OPINION

SMITH, C.J. — Luis Ibarra, a registered nurse, was charged with and convicted of rape in the second degree after he assaulted a patient while she was nearly immobile and recovering from spinal surgery. He was sentenced to 102 months to life. On appeal, Ibarra asserts that the trial court erred in denying his motion for mistrial based on irrelevant and prejudicial testimony by his ex-wife and in determining that he opened the door to evidence that he had been previously counseled or warned about sexual contact with patients. He also alleges cumulative error and asks for the court to remand to strike a victim penalty assessment, DNA[1] collection fees, and the community custody condition requiring urinalysis and/or breathanalysis upon request.

In a statement of additional grounds, Ibarra argues that the trial court erred in improperly refusing to dismiss a juror and by placing improper time restraints on the trial. Ibarra asserts ineffective assistance of counsel and a lack

[1] Deoxyribonucleic acid.

of sufficient evidence to support his conviction. Finding the majority of his arguments unpersuasive we affirm the conviction, however, we remand for the court to strike the victim penalty assessment, DNA collection fee, and the community custody condition requiring urinalysis and/or breathanalysis upon request.

FACTS

Background

In October 2020, Luis Ibarra was a registered nurse working in the neuroscience-epilepsy unit of Swedish Hospital (Swedish) in Seattle, Washington. The unit mostly houses patients receiving pre- or postoperative care. I.W. was one such patient, recovering from spinal surgery. The surgery was intensive, resulting in titanium screws in her spine and 17 staples in her back to keep the incisions closed. I.W. needed assistance for even slight adjustments in position. She was also in a significant amount of pain. Ibarra was I.W.'s night nurse for the second night of her hospital stay.

Over the course of the night, I.W.'s pain remained intense, despite having received as much pain medication as was allowed. She informed Ibarra that the medication was not working and Ibarra offered ice packs. I.W. declined. In the early hours of the morning, she asked about additional medication but Ibarra offered alternative methods instead. He began with aromatherapy, pinning cotton balls soaked in orange oil to I.W.'s hospital gown, which smelled nice but did not alleviate any pain. Ibarra then offered reflexology, which is a form of massage that targets pressure points in the hands and feet. Ibarra was aware

that, per Swedish's rules, he was prohibited from performing reflexology on a patient without a third-party present. He nevertheless offered the massage and I.W. agreed. Ibarra massaged each hand which again failed to reduce I.W.'s pain. Ibarra next offered a foot massage and I.W. agreed. Ibarra began by putting lotion on I.W.'s left foot, before moving his hands all the way up her leg. When Ibarra reached the top of I.W.'s left thigh, his hand bumped her groin. He then moved to I.W.'s right foot, worked his way up her right leg, and when Ibarra reached the top of I.W.'s right thigh, moved his hand between her legs, inserted his fingers into her vagina, and began to rub her clitoris. He was not wearing gloves. Eventually, Ibarra asked I.W. if she had an orgasm and she replied that she had. I.W. later testified that she lied so he would stop touching her. Ibarra then left the room.

I.W. left the hospital a few days later and immediately began taking care of her husband, three dogs, and a friend, despite remaining in acute pain. In early November, as she started to more fully recover, I.W. started having "flashbacks" of the experience. She took notes on these memories and, about three weeks after the incident, called both the police and Swedish's hospital security. Swedish fired Ibarra in November 2020.

Arrest and Pre-Trial Motions

In December 2020, the Seattle Police Department interviewed I.W. and opened a case, assigning Detective Matt Atkinson as an investigator. Detective Atkinson reached out to Ibarra, who went to the police station to be interviewed. In contrast to I.W.'s account, Ibarra stated that he had not touched I.W.'s

genitals. He recounted that he had performed reflexology only on I.W.'s hands and feet, never moving up her legs. Ibarra then described that, while he was touching her, I.W. masturbated herself to orgasm. He acknowledged that he did not discourage the behavior, framing it as pain relief. Detective Atkinson repeatedly asked Ibarra if he was telling the truth, noting the differences between his description and I.W.'s account. Ibarra confirmed that he was telling the truth. At the close of the interview, Detective Atkinson placed Ibarra under arrest for rape in the second degree and indecent liberties.[2]

Before trial, the State moved to admit another patient's similar experience with Ibarra under ER 404(b) as evidence of a common scheme or plan. This first incident took place in 2005 at a different hospital and involved a patient alleging that Ibarra inappropriately touched her genitals while checking a catheter placement. Ibarra admitted to unprofessional behavior and his nursing license was suspended but the patient did not press charges.

The court initially ruled that the 2005 incident was admissible for the rape charge because related sanctions tended to rebut Ibarra's consent defense. The court ruled that it was admissible for the indecent liberties charge as well to show common scheme or plan and evidence of knowledge. The State later moved to

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[2] The indecent liberties charge arose out of a 2019 incident that had not been investigated until after the 2020 allegation. This incident involved a patient alleging that Ibarra had pinched her nipple during a massage while she was recovering from surgery at Swedish.

dismiss the indecent liberties charge[3] and the court reevaluated whether to admit the 2005 incident. On this second pass, the court ruled that the evidence was not admissible to show a common scheme or plan but that the defense might open the door to related evidence by presenting their own evidence of consent.

Trial

The case proceeded to trial in October 2022. While testifying in his own defense, Ibarra gave a vastly different account of the incident than he did while talking to the police. Ibarra stated that he offered reflexology as a "last resort," despite knowing that it violated hospital rules. He asserted that when he reached I.W.'s groin, she told him to "go for it," which he understood as a command to touch her genitals. He then recounted touching I.W. as she had described, but denied any penetration. He testified that after I.W. orgasmed, she thanked him and promised it would stay "just between [them]." He also admitted that he had lied to the police, stating that he did so to avoid being fired.

Because Ibarra testified that he was aware he was not allowed to perform reflexology without a third-party present, the State argued that he opened the door to questions about any warnings or counseling he received following his prior misconduct. Defense counsel objected, asserting that the evidence was not relevant and was more prejudicial than probative. The court determined that Ibarra had opened the door, but only as to warnings and counseling from the

[3] The State moved to dismiss the indecent liberties charge because the patient from the 2019 incident was medically unavailable for the foreseeable future and the State could not proceed without their testimony.

hospitals, not patient allegations. The State proceeded to use evidence of prior warnings to rebut Ibarra's assertion of consent.

Ibarra's ex-wife Laura Ibarra testified.[4] The State intended to use Laura's testimony to establish that Ibarra had lied to the police about his interaction with I.W. However, Laura's responses to the questions presented by the State involved seemingly irrelevant concerns about Ibarra's relationship with his sons, the large response law enforcement had mounted to find Ibarra, the fact that Ibarra had been jailed, and that Ibarra had lied to the police about owning guns. Defense counsel immediately objected to the statements and the court sustained the objections. In a side-bar away from the jury, the court reprimanded the State for eliciting the testimony. The State made clear that they had warned Laura away from those statements and did not intend to produce the information. Defense counsel moved for a mistrial, asserting that Ibarra was so prejudiced by Laura's statements that he required a new trial. The court denied the motion, noting that the State did not intentionally elicit the evidence[5] and that as the court had immediately sustained any objections, the jury knew to disregard what they heard.

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[4] As the appellant and his ex-wife share the same last name, we will address Laura by her first name. We intend no disrespect.

[5] At oral argument, the State argued briefly that it believed Laura's testimony that Ibarra had lied about guns would be admissible. But the State repeatedly asserted that it did not intend to elicit that evidence and had warned Laura away from mentioning it. Given all of the State's assertions, the former does not constitute a concession that the State purposefully elicited the testimony.

The jury found Ibarra guilty. The court sentenced Ibarra to 102 months to life in prison. The court also waived most mandatory fees but imposed the then-mandatory DNA collection fee and victim penalty assessment. It further required Ibarra to submit to urine and breath analysis testing upon the request of his corrections officer.

Ibarra appeals.

ANALYSIS

Motion for Mistrial

Ibarra contends that the trial court erred in failing to grant a mistrial based on several prejudicial and inadmissible statements during his ex-wife's testimony. He objected to the testimony at trial. The court did not err in denying the mistrial because any irregularities were not serious and the statements were both cumulative and able to be cured.

We review a trial court's denial of a motion for a mistrial for an abuse of discretion. State v. Emery, 174 Wn.2d 741, 765, 278 P.3d 653 (2012). A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. Lord, 161 Wn.2d 276, 283-84, 165 P.3d 1251 (2007). A mistrial is appropriate " 'only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.' " State v. Rodriguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002) (quoting State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986)). The trial court is

in the best position to judge prejudice. State v. Garcia, 177 Wn. App. 769, 777, 313 P.3d 422 (2013).

We use a three-part test to determine whether the defendant was so prejudiced as to require a new trial. State v. Taylor, 18 Wn. App. 2d 568, 579, 490 P.3d 263 (2021). "We consider (1) the seriousness of the irregularity, (2) whether the statement at issue was cumulative of other properly admitted evidence, and (3) whether the irregularity was able to be cured by an instruction to disregard the improper testimony, which the jury is presumed to follow." Taylor, 18 Wn. App. 2d at 579.

1. Seriousness of Irregularity

When reviewing an irregularity at trial, we consider who was responsible for the errant testimony. Taylor, 18 Wn. App. 2d at 581. "When trial irregularities are brought about by one of the attorneys, as opposed to a noncompliant witness, the seriousness increases." Taylor, 18 Wn. App. 2d at 581.

Here, the trial irregularities were the result of a noncompliant witness. The State informed the court, in a side-bar away from the jury, that it had no intention of eliciting Laura's testimony about law enforcement's search for Ibarra, that he was ultimately jailed, that he might ruin his son's birthday, or that he lied to the police about owning guns. As evidenced by the State's opening argument, the State only intended to elicit the fact that Ibarra had lied to the police about sexual conduct with I.W., a fact that Ibarra himself conceded. And Ibarra acknowledges that lack of intent, noting in his opening brief that the prosecutor admonished

Laura to avoid those matters. Because the improper statements are the result of a noncompliant witness, the seriousness of the irregularities decreases. Ibarra asserts that the irregularities were serious because Laura's volunteered comments told the jury that Ibarra, whose defense depended on the jury believing him, was a liar. But Ibarra testified that he lied to the police. His own testimony, admitting that he lied to the police about the topic of the case at hand, is much more likely to have an impact on Ibarra's credibility than his ex-wife's stricken testimony suggesting he lied about irrelevant information.

In addition, while Laura's description of the law enforcement response and the fact that Ibarra was ultimately jailed may have painted Ibarra in a negative light, neither statement was beyond the jury's realm of assumption. Given the subject matter of this case, it is not unlikely that jurors would assume that law enforcement had been involved and that Ibarra had been jailed at some point in the process. It does not follow that the jury would assume guilt as a result.

And finally, Laura's statements about their children, while clearly irrelevant, are not likely to sway the outcome of the case. None of the trial irregularities are serious enough to warrant a mistrial.

2. Cumulative Statement

Ibarra's primary concern surrounding Laura's testimony is that she makes him out to be a liar. Laura did testify as such twice, stating that Ibarra lied to the police when he told them he had not touched I.W. and that he had lied about owning guns. But Ibarra explicitly testified that he lied to the police. In fact, he testified that he lied to the police specifically about whether he touched I.W. So

Laura's first statement was clearly cumulative of his own testimony. And while Laura's irrelevant testimony that Ibarra had lied about owning guns provided the jury with more information that he had been dishonest, any impact it had on his credibility was similarly cumulative.

3. Able to be Cured

" 'Courts generally presume jurors follow instructions to disregard improper evidence.' " State v. Christian, 18 Wn. App. 2d 185, 199, 489 P.3d 657 (2021) (quoting State v. Russell, 125 Wn.2d 24, 84, 882 P.2d 747 (1994)). Defense counsel immediately objected and moved to strike the testimony. The court sustained the objection and struck the testimony from the record. The court then provided the jury with a clear instruction, stating "[w]hen I sustain an objection, whether or not I tell you to disregard, you don't consider whatever it was I sustained the objection to." And the court reiterated that instruction twice before deliberations. With the extent of the court's instruction to disregard the improper statements and the presumption that juries follow those instructions, any irregularity was able to be cured.

The court did not err in denying Ibarra's motion for mistrial.

Evidentiary Ruling

Ibarra asserts that the trial court erred in determining that he opened the door to having been previously counseled or warned about sexual contact with patients. Ibarra opened the door by testifying that I.W. consented to the contact. We review a trial court's ruling on admissibility for abuse of discretion. State v. Jennings, 199 Wn.2d 53, 59-60, 502 P.3d 1255 (2022). A trial court abuses its

discretion if " 'no reasonable person would take the view adopted by the trial court.' " Jennings, 199 Wn.2d at 59 (quoting State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001)). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. And the open-door doctrine is a theory of expanded relevance. State v. Rushworth, 12 Wn. App. 2d 466, 474, 458 P.3d 1192 (2020).

"The open door doctrine permits trial courts to admit evidence on a subject normally barred on policy or prejudice grounds, so long as the party who otherwise stands to benefit from the exclusion has increased the subject's relevance through actions at trial." Rushworth, 12 Wn. App. 2d at 475. A party may waive protection from a usually "forbidden" topic by addressing the subject themselves. Rushworth, 12 Wn. App. 2d at 473. At that point, the opposing party is "entitled to respond." Rushworth, 12 Wn. App. 2d at 473.

Ibarra placed any prior admonishment informing him not to engage in any sexual contact with patients before the jury as a matter of impeaching his credibility, when he testified about being surprised by the sexual encounter with I.W. He testified that the encounter was unusual and unexpected, stating "[y]eah, I told her that that was kind of, you know, weird for me. . . . you know, unusual, unpredicted." That is belied by the fact that he had been trained about such an encounter twice before.

Ibarra also called his credibility into question when he testified that he interpreted I.W.'s statement of "go for it," which she denies saying, as a

"command" he had to obey. His prior training is relevant to establish that that belief is unreasonable. Having been informed not to engage in any sexual conduct with a patient, Ibarra knew not only that he could disobey that "command," but that he was required to refuse.

Additionally, the court had specifically cautioned Ibarra that any education or counseling he received following prior misconduct could become admissible as rebuttal evidence if he introduced evidence of consent. Ibarra's statement that I.W. had told him to "go for it," suggests that she not only consented to the encounter, but that she initiated it.

Because Ibarra addressed the subject of I.W.'s consent as well as the concept that this was an isolated incident he could not have anticipated, the court did not abuse its discretion in determining that he opened the door to the State's cross-examination on prior education.

Cumulative Error

Ibarra argues that, even if either asserted error alone is not enough to warrant reversal, the combined effects of both denied him a fair trial under the cumulative error doctrine. There is no error to warrant reversal.

The cumulative error doctrine applies when "several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). "The test to determine whether cumulative errors require reversal of a defendant's conviction is whether the totality of the circumstances substantially prejudiced the defendant and denied him a fair trial." In re Pers. Restraint of

Cross, 180 Wn.2d 664, 690, 327 P.3d 660 (2014) (abrogated on other grounds by State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018)). The defendant bears the burden of proving cumulative error. In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994).

Here, Ibarra failed to establish any trial errors. The court did not err in denying Ibarra's motion for mistrial or in determining that Ibarra opened the door to evidence of prior warnings and education around sexual contact with patients. Although some of Laura's testimony was improper, the court struck that testimony from the record and Ibarra cannot establish that the statements she made resulted in any prejudice.

Because reversal under the cumulative error doctrine requires circumstances that substantially prejudiced the defendant and Ibarra has failed to show error or prejudice, reversal is not warranted.

Community Custody Conditions

Ibarra asserts that the community custody requirement that he be available for drug and alcohol testing at the request of his community corrections officer (CCO) or treatment provider unconstitutionally invades his right to privacy. We remand to strike that community custody condition.

Constitutional challenges to community custody may be raised for the first time on appeal. State v. Reedy, 26 Wn. App. 2d 379, 395, 527 P.3d 156, review denied, 1 Wn.3d 1029 (2023). Generally, sentencing courts may impose and enforce crime-related prohibitions and affirmative conduction as a condition of community custody. State v. Martinez Platero, 17 Wn. App. 2d 716, 725-26, 487

P.3d 910 (2021). That said, there must be "a reasonable relationship between the condition and the defendant's behavior." Martinez Platero, 17 Wn. App. 2d at 726.

The State recognizes that alcohol and drug use did not contribute to Ibarra's offense. The State asserts, however, that the legislature has expressed an intent that the rehabilitation of felony offenders may include alcohol and drug prohibitions even if their use did not contribute to the crime. Pointing to a singular statute and a handful of unpublished cases, the State asks this court to carefully consider those cases "anew," and hold that the requirement to submit to urinalysis and breath testing is sufficiently narrowly tailored regardless of whether alcohol or drugs were involved in Ibarra's crime. We decline to do so. Current binding caselaw provides that there must be a reasonable relationship between community custody conditions requiring urinalysis and/or breathanalysis and the defendant's behavior and the State cannot establish such a relationship. We remand for the court to strike the community custody condition requiring urinalysis and/or breathanalysis upon request.

Victim Penalty Assessment and DNA Collection Fee

Ibarra contends that the victim penalty assessment (VPA) should be stricken because he is indigent. He also asserts that the DNA collection fee should be stricken. The State does not object. We remand for the court to strike the VPA and DNA collection fees from the judgment and sentence.

In July 2023, the legislature amended RCW 7.68.035 to prohibit the imposition of a VPA if the court finds a defendant indigent at the time of

sentencing. The legislature also eliminated DNA collection fees. Recently amended RCW 43.43.7541 provides that the court shall waive any DNA collection fee previously imposed upon a motion by the defendant. These amendments apply retroactively in this case because Ibarra's appeal was pending when the amendments took effect. State v. Ellis, 27 Wn. App. 2d 1, 17, 530 P.3d 1048 (2023).

Here, neither party disputes that Ibarra was indigent at sentencing, and that the VPA should be stricken. Likewise, neither party disputes that the DNA collection fee should be stricken. On remand, we instruct the court to strike both fees.

Statement of Additional Grounds

In a statement of additional grounds, Ibarra asserts that the trial court improperly refused to excuse a juror based on their ethnicity, that the court put improper time constraints on the length of the trial, that his counsel was ineffective, and that there was insufficient evidence to support his conviction. We disagree.

A defendant may submit a pro se statement of additional grounds under RAP 10.10. We only consider issues raised in that statement of additional grounds if they adequately inform us of the "nature and occurrence of the alleged errors." State v. Calvin, 176 Wn. App. 1, 26, 316 P.3d 496 (2013). We do not consider arguments repeated from the briefing. RAP 10.10(a).

1. Improper Refusal to Excuse Juror

Ibarra argues that the court denied dismissal of a juror based solely on her desire for ethnic diversity and in violation of Ibarra's right to challenge jurors for cause during voir dire. We disagree.

We review a trial court's decision to remove, or decline to remove, a juror for abuse of discretion. State v. Hopkins, 156 Wn. App. 468, 474, 232 P.3d 597 (2010). A trial court abuses its discretion if its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. Lord, 161 Wn.2d at 283-84.

RCW 2.36.110 states, "it shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service."

Defense counsel challenged the juror at issue on the basis that she was a physician and may have been in a position to second-guess testimony about healthcare standards and the varying responsibilities of doctors and nurses. Defense counsel was also concerned that the juror had been given training "to avoid exactly this type of thing." The court noted, however, that the juror did not have any particular awareness of nursing standards and that "doctors are given training on this, just as lawyers are and every other professional." The court also pointed out that this juror, in contrast to a juror who had been excused, gave no indication that she was unable to separate her position and responsibilities from

the allegations against Ibarra. The court concluded that there was no basis to strike this juror as compared to any other witness. Because there was no "cause" upon which to excuse the juror, the court did not violate Ibarra's right to challenge jurors for cause.

2. Improper Time Restraints

Ibarra asserts that the court put improper time restraints on the trial that prevented defense counsel from addressing pertinent issues and that allowing I.W. to take breaks during testimony portrayed a sympathetic and biased court. This argument is unpersuasive.

"The trial court has broad discretion to make trial management decisions . . . because the trial court is generally in the best position to perceive and structure its own proceedings." State v. Bejar, 18 Wn. App. 2d 454, 460-61, 491 P.3d 229 (2021). We will not reverse a trial court's decision unless it is manifestly unreasonable or based on untenable grounds or reasons. State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013).

Ibarra first points to the fact that the court casually stated timeline expectations throughout the trial. He notes that the court made comments about not wanting to lose time and promised the jury that they would be done by a certain day. He does not, however, explain how this interfered with defense counsel's ability to present its case. He also does not articulate any of the "pertinent issues and concerns" that were interfered with because of to the court's time constraints.

Ibarra next argues that the court "coddled" I.W. by allowing her to take breaks during testimony. This then supposedly cut into Ibarra's time to present his case while suggesting a bias in her favor. But again, Ibarra fails to establish that allowing I.W. to take breaks during testimony prejudiced him in any way. The court stated that it told I.W. she could take a break because I.W. was beginning to cry. The court elaborated, stating "I do this for all witnesses who appear to be getting emotional on the stand. . . . it wouldn't, frankly, improve the fairness of our proceedings for the Court to allow people to just burst into tears and have emotional displays on the stand." Ibarra has not shown how forcing I.W. to testify through her emotional response, as opposed to allowing her a break, would avoid a bias in her favor. And there is no evidence that the few minutes of respite had any impact, let alone a negative impact, on Ibarra's time before the court.

The court did not impose any improper time restraints and did not abuse its discretion in allowing I.W. to pause during her testimony.

3. Ineffective Assistance of Counsel

Ibarra contends that defense counsel was ineffective in failing to introduce evidence that Ibarra believed demonstrates I.W. had motive to fabricate an assault. He argues that his chance at a fair trial was hindered "because [defense counsel] wanted to maintain a professional, non-confrontational reputation." This is again unpersuasive.

We review ineffective assistance of counsel claims de novo. State v. Estes, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). The Sixth Amendment to the

United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. Estes, 188 Wn.2d at 457. To prevail on an ineffective assistance claim, the defendant must establish that (1) counsel's performance was deficient, and (2) that deficiency resulted in prejudice. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To show prejudice, the appellant must show a " 'reasonable probability' " that but for the deficient performance, the outcome of the proceedings would have been different. State v. Jones, 183 Wn.2d 327, 339, 352 P.3d 776 (2015) (quoting Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). There is a strong presumption that representation was effective. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). And "[w]hen counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." Kyllo, 166 Wn.2d at 863.

Ibarra provides four reasons that he contends establish I.W. had motive to lie and that defense counsel was unwilling to argue at trial. He asserts that she felt too guilty to face her husband after consenting to sexual behavior with someone else, that her husband was older than she was so it had likely "been a while" for I.W., that she had been assaulted before and had a "vindictive nature towards men," and that she was hoping for a big settlement from Swedish.

Defense counsel's choice not to pursue any of these theories does not fall below an objective standard of reasonableness. Ibarra does not provide any evidence to support any of the theories nor present any legal argument regarding them. Rather, his proposed evidence centers on accusing I.W. of lying, embarrassing her or exploiting her past trauma. And while Ibarra asserts that his proposed reasons establish motive for I.W. to lie, they involve pure conjecture. There is no evidence to support that I.W. lied for any of these reasons. It was not unreasonable for defense counsel to choose not to raise these issues at trial.

As to the second factor, Ibarra cannot establish that, had defense counsel introduced the fact that her husband was older than she was or had cross-examined I.W. on the fact that she had been sexually abused in the past, the outcome of the proceedings would have been any different. Ibarra is correct in that this case centered on credibility. However, Ibarra's proposed statements, not backed by evidence, were unlikely to diminish I.W.'s credibility. In fact, it is not unreasonable that Ibarra's attorney may have determined that it would have harmed Ibarra's case or diminished his credibility to highlight irrelevant but highly personal facts about I.W.

Defense counsel was not deficient.

4. Sufficient Evidence

Finally, Ibarra asserts that there was insufficient evidence to support the conviction of rape in the second degree because I.W.'s testimony was vague as to penetration. We disagree.

In reviewing a challenge to the sufficiency of evidence, the inquiry is whether by "viewing the evidence 'in a light most favorable to the State, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt.' " State v. Sweany, 174 Wn. 2d 909, 914, 281 P.3d 305 (2012) (internal quotation marks omitted) (quoting State v. Randhawa, 133 Wn.2d 67, 73, 941 P.2d 661 (1997)).

RCW 9A.44.050(d) defines rape in the second degree as sexual intercourse "[w]hen the perpetrator is a health care provider, the victim is a client or patient, and the sexual intercourse occurs during a treatment session, consultation, interview, or examination." Sexual intercourse includes its "ordinary meaning," as well as "any penetration of the vagina or anus however slight, by an object [including a body part] . . . except when such penetration is accomplished for medically recognized treatment or diagnostic purposes." RCW 9A.44.010(14)(b).

Ibarra asserts that there was insufficient evidence to establish that he penetrated I.W.'s vagina, and that as there were no threats, coercion, or violence, that he did not rape her. Because threats, coercion, or violence are not required to establish rape in the second degree, that is irrelevant. And I.W. consistently recounted that Ibarra had put his fingers inside of her body. She first informed Detective Atkinson that Ibarra put his fingers inside her vagina. On direct examination, I.W. reiterated multiple times that Ibarra put his fingers "right inside of [her]." The fact that I.W. did not explicitly state that she was penetrated

does not mean there was insufficient evidence to determine that there was penetration.

Given I.W.'s testimony, the jury had sufficient evidence to convict Ibarra of rape in the second degree.

We affirm the convictions and remand for the court to strike the VPA, DNA collection fee, and community custody condition requiring urinalysis and/or breathanalysis upon request.

Smith, C.J.

WE CONCUR:

Birk, J.

Mann, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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