SUPREME COURT NO. 1042914
COURT OF APPEALS NO. 39808-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

V.

LORENZO JUAREZ,

Petitioner.

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

The Honorable Sonia Rodriguez-True, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Lorenzo Juarez asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of State v. Lorenzo Juarez, COA No. 39880-1-III, filed on May 15, 2025, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the court violated Juarez' constitutional right to notice by permitting the state to amend the information after its case?

2. Whether prosecutorial misconduct denied Juarez his right to a fair trial?

3. Whether ineffective assistance of counsel denied Juarez his right to a fair trial?

4. Whether this Court should accept review of these significant questions of law under the state and federal constitutions? RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

The state charged Juarez with first degree rape of a child, M.H., allegedly occurring "[o]n, about, during or between October 1, 2014 and March 31, 2015." CP 6. This represents a period of time M.H. was 6 and 7 years old. In 2021, when M.H. was 13 years old, she told her father Raymond Hernandez something that caused him to call police, leading to the current charge. RP 423-448.

Hernandez testified Juarez babysat M.H. and her older brother in October 2014, when Hernandez was having daycare issues. RP 417, 419-20. Juarez and Hernandez sometimes hung out together after Hernandez got off work. RP 424.

Hernandez testified one time stood out. RP 424. They had been drinking beer together at Hernandez's

apartment until 2:00 a.m. when they said goodbye and Juarez left. RP 425, 428, 450. M.H. and her older brother were sleeping in Hernandez's room. RP 457.

Hernandez passed out on the couch but claimed he saw Juarez at his house again later that night. RP 425, 428-429, 448. Hernandez claimed he was awoken later by M.H. who was upset Hernandez did not lock the door and said Juarez was there. RP 425. Hernandez went outside to look but did not see anyone. RP 425, 449.

Hernandez claimed this happened during the same time Juarez was babysitting. He believed it was in October 2014, because he confirmed with DSHS they stopped funding his daycare at that time. 453-54. Hernandez testified M.H. was 5 or 6 years old. RP 429.

Yakima detective Mario Vela conducted an interview of M.H. in August 2021. RP 464. The prosecutor elicited from Vela that forensic interviews can weed out fabrications and/or manipulations and the

detective did not note any fabrications or manipulations in this case. RP 478.

M.H. remembered a time when Juarez babysat. RP 577. She testified Juarez touched her in places she was uncomfortable with. RP 579. She testified she was 5 or 6 years old but that it was in 2012-2013. RP 579. She would have been 4 or 5 at that time.

M.H. testified she was sleeping with her brother in her father's room one night when Juarez came in and picked her up from the bed. RP 580, 594. According to M.H., Juarez came into the room and picked her up from the bed even though their dog was barking at him. RP 580, 594. M.H. claimed Juarez walked her around the house for about ten minutes, then stood her on the kitchen counter. RP 581-82, 598. M.H. claimed Juarez pulled her pants down and licked her vagina. RP 582. RP 583. M.H. testified this happened in 2013. RP 590.

M.H. testified she tried to wake her father and told him Juarez was in the house. M.H. testified Hernandez went back to sleep. RP 583.

Following M.H.'s testimony, the state rested its case. RP 618. The defense moved to dismiss the charges[1] due to M.H.'s testimony the events occurred outside the charging period. RP 619-20.

The prosecutor responded the state was permitted to amend the charges any time up until the jury is excused to deliberate. RP 621. The prosecutor moved to amend the information to include the period M.H. indicated in her testimony. RP 621. The defense objected to any amendment. RP 624.

The court indicated it would recess to review the testimony and to allow the parties an opportunity to provide authority on the state's ability to amend the information. RP 626. Defense counsel agreed but

offered in the alternative to proceed with the testimony and resolve the issues later. RP 627. The court and prosecutor agreed to proceed with testimony. RP 627-28.

Juarez testified and agreed he babysat M.H. and her brother at their home for a short period of time when the daycare was having issues with DSHS. RP 637. He denied that he never touched M.H.'s genitals, licked her vagina or did anything untoward. RP 836-37.

Juarez tried to testify about his work history. RP 635. There was a time he was working for a person named Steve Phillips in Selah driving to Boston and back. RP 635. Juarez testified he only babysat when he was in between jobs. RP 642.

Following Juarez's testimony, the defense rested. RP 653. After excusing the jury, the court and parties returned to the motion to dismiss/amendment issues. RP 661. The state argued the charging period was not an

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[1] Juarez was acquitted of the other charge, child

essential element of the offense and could be amended at any time under State v. Brooks, 195 Wn.2d 91, 455 P.3d 1151 (2020).

Defense counsel pointed out Juarez's testimony suggested he was working during 2012 and 2013, but the events were charged as occurring during a 7-month window in 2014-2015. RP 666. Counsel argued that had he known they would have to defend against events alleged to have occurred in 2012 or 2013, he would have prepared the case differently. RP 666. Because Juarez indicated he was working, defense counsel could have obtained employment records that could have established an alibi. RP 666. Because the events were alleged to occur between October 1, 2014, and March 31, 2015, there was no reason for counsel to research Juarez's employment in 2012-2013. RP 669-70.

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molestation. CP 47-48.

After taking the matter under advisement and allowing the parties to present briefing, the court agreed with the prosecutor that the state was permitted to amend the charging period under State v. Brooks, 195 Wn.2d 91 (2020). RP 673-684. The state was permitted to expand the charging period by two years and nine months.

On appeal, Juarez argued the court erred and violated his right to notice by permitting the state to amend the information after resting its case. Brief of Appellant (BOA) at 17-29; Reply Brief of Appellant (RBOA) at 1-7. The appellate court disagreed, based on this Court's opinion in Brooks. Appendix at 18-19.

Juarez also argued the prosecutor committed misconduct in eliciting Vela's vouching testimony. BOA at 30-36; RBOA at 7-17. Juarez' attorney's failure to object to the testimony violated Juarez' right to effective assistance of counsel. BOA at 36-39; RBOA at 18-19.

The appellate court found nothing inappropriate about Vela's testimony he did not observe any indication of fabrication or manipulation when interviewing M.H.. Appendix at 20.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. THIS COURT SHOULD ACCEPT REVIEW OF JUAREZ'S NOTICE ISSUE BECAUSE IT PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS.

After the state rested its case and over defense counsel's objection, the court granted the state's motion to amend the information to expand the charging period by two years and nine months. This was erroneous and violated Juarez's right to notice and an opportunity to defend against the charges. This Court should accept review of this significant question of law under the state and federal constitutions. RAP 13.4(b)(3).

Courts review a decision to grant a motion to amend the information for abuse of discretion. State v. Lamb, 175 Wash.2d 121, 130, 285 P.3d 27 (2012). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. Lamb, 175 Wash.2d at 127, 285 P.3d 27.

As required by the federal and state constitutions, the state must allege in the charging document all essential elements of a crime to inform a defendant of the charges against him and to allow for preparation of his defense. See U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; cf. State v. Mason, 170 Wash. App. 375, 378-79, 285 P.3d 154 (2012) (charging document is constitutionally sufficient if the information states each essential element of the crime, even if it is vague as to some other matter significant to the defense).

CrR 2.1(d) provides that an information may "be amended at any time before verdict or finding if

substantial rights of the defendant are not prejudiced." This rule, however, "necessarily operates within the confines of article 1, section 22." State v. Pelkey, 109 Wash.2d 484, 490, 745 P.2d 854 (1987). In Pelkey, this Court adopted a bright-line rule, stating:

> A criminal charge may not be amended *after* the State has *rested* its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense. Anything else is a violation of the defendant's article 1, section 22 right to demand the nature and cause of the accusation against him or her. Such a violation necessarily prejudices this substantial constitutional right, within the meaning of CrR 2.1(e) [(now CrR 2.1(d))].

Id. at 491, 745 P.2d 854.

In Brooks, this Court distinguished Pelkey:

> Pelkey addressed the State's amendment of the information to a new offense, that is, a different crime with different elements (from bribery to trading in special influence). Id. at 487, 745 P.2d 854; see also State v. Peterson, 133 Wash.2d 885, 893, 948 P.2d 381 (1997) (Pelkey held "no prejudice need be shown when the amendment is to a *different charge* and the amendment is made

> after the State has rested." (emphasis added)). That is not the case here: before and after the amendment, the crime charged (third degree child molestation) and its essential elements remained the same; only the date was expanded. Accordingly, the Court of Appeals here correctly rejected Brooks' contention that the date amendment at issue was reversible error under Pelkey. See Brooks, No. 50299-2-II, slip op. at 7.
>
> "Where the Pelkey rule does not apply, the defendant has the burden of demonstrating prejudice under CrR 2.1(d)." . . . Here, because the amendment concerns only a date expansion, Brooks cannot show the required prejudice.
>
> Cases involving amendment of the charging date in an information have held that the date is usually not a material element of the crime. Therefore, amendment of the date is a matter of form rather than substance, and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant.

State v. Brooks, 195 Wash. 2d at 98–99 (emphasis added).

At first blush, this Court's decision in Brooks appears to allow the amendment at issue here. However,

a closer look reveals the holding of Brooks is very narrow and does not permit amendment under the facts of this case where Juarez articulated tangible and substantial prejudice.

Ken Brooks was charged with third degree child molestation and third degree rape of a child for allegations involving C.H. Brooks was a friend of C.H.'s older brother. As of January 2014, Brooks had moved away to San Francisco but came back to Washington to visit friends and family, including C.H. and her family. Brooks, 195 Wn.2d at 94.

C.H. testified that in January 2014, when Brooks was visiting, he rubbed her breast while they were watching a movie. C.H. further testified that on the evening of August 16, 2014, during another visit, Brooks had sex with her after she passed out from drinking. C.H. told her sister the next day and police were notified. Id. at 94.

After the state rested, Brooks testified. He likewise testified he would stay with C.H. and her family when visiting in 2014. When asked if he was in Washington in January 2014, Brooks responded he was unsure but knew he was in Washington in May 2014. He admitted that when he visited in May 2014, he touched C.H.'s breast inappropriately. But that was the only inappropriate touch. Regarding the rape allegation, Brooks acknowledged carrying C.H. upstairs so she could go to bed but denied having sex with her. Id. at 95.

After the defense rested, the state moved to amend the information to expand the date range for the molestation count. Brooks objected but provided no basis. The court granted the state's motion to amend to provide a date range of "on or about or between" January 1, 2014 and May 31, 2014. Id. at 96.

In closing argument, Brooks conceded the state proved the molestation charge beyond a reasonable

doubt. The defense pointed out Brooks admitted it and apologized; he contrasted that admission with his denial of the rape and argued the former admission made the latter denial more credible. The jury disagreed and convicted Brooks of both offenses. Id. at 96.

Brooks appealed the molestation charge, arguing the court abused its discretion allowing the amendment. After-the-fact, Brooks argued that had he known the state would move to amend the date range, he might not have testified. The Court of Appeals disagreed he was prejudiced, as did this Court. Brooks, 195 Wn.2d at 96-98.

First, this Court ruled that the date of the offense is not an essential element of the crime of third degree molestation. Id. at 97. Second, the court noted that CrR 2.1(d) allows for amendment of the information at any time before verdict provided the substantial rights of the defendant are not prejudiced. As this Court noted,

however, this rule has constitutional limitations. But the Court ruled the Pelkey rule of presumed prejudice applies only to amendments to a different charge with different elements. Because the date of child molestation is not an element, Brooks was required to show prejudice under CrR 2.1(d). Brooks, at 98.

The Court concluded Brooks had not. While the Court stated, "because the amendment concerns only a date expansion, Brooks cannot show the required prejudice," the statement must be read in context of the circumstances of the case. Importantly, Brooks admitted he molested C.H. He used that admission strategically to argue against conviction on the greater charge. Moreover, when the state moved to amend, he offered no reason the amendment would prejudice him. Under these circumstances, it makes sense this Court found Brooks could not show prejudice by the date expansion.

Moreover, this Court also found no prejudice because the "on or about or between" January 1, 2014 and January 31, 2014 put Brooks on notice the molestation charge was alleged flexibly as to the timing of that incident. Id. at 99. Significantly, the amendment only expanded the date by four months.

As the concurrence noted, the expanded date was "reasonably near" the amended date:

> I write separately only to emphasize the generally accepted rule that also protects those rights: the rule that although the State is not absolutely bound by the "on or about or between" date range listed in the information, Clerk's Papers at 1, any deviation from that date range must be reasonable. As other jurisdictions that have considered this question have said, the State must prove that the defendant's conduct occurred on a date that is "reasonably near" the date range listed in the charging document.

State v. Brooks, 195 Wash. 2d at 104–05 (McCloud, J., concurring).

The same cannot be said here. Whereas the amendment in Brooks expanded the charging period by four months, the amendment here expanded the charging period by two years and 9 months. That is not "reasonably near" the date range included in the original information. Although Juarez may have been on notice the time period was somewhat flexible, he was not put on notice the state would allege the charges occurred over two and a half years prior to that originally charged.

And unlike Brooks who alleged no prejudice at the time of the amendment – and with good reason because he admitted the charge – Juarez indicated he was likely working driving a truck to Boston and back during the expanded time period. Due to the lack of notice, however, his attorney had no reason nor opportunity to investigate Juarez's employment records during that time. Juarez agreed he babysat the kids sometime in October 2014, when DSHS closed their childcare facility. Had he

known M.H. would allege a much earlier time period, however, it is likely he could have established a full or partial alibi for the extended time period.

Accordingly, Juarez did establish prejudice. This Court should accept review of this significant question of law under the state and federal constitutions.

2. THIS COURT SHOULD ACCEPT REVIEW OF JUAREZ' PROSECUTORIAL MISCONDCUT ISSUE BECAUSE IT INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS.

On redirect of detective Mario Vela, who conducted M.H.'s forensic interview, the prosecutor elicited that forensic interviews can "weed out fabrications or manipulation," that Vela is sometimes able to do so when conducting a forensic interview and that he did not note evidence of fabrication or manipulation when interviewing M.H. RP 478. By eliciting this, the prosecutor committed misconduct. This Court should accept review. RAP 13.4(b)(3).

Prosecutorial misconduct may deprive a defendant of the fair trial guaranteed him under the state and federal constitutions. Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); State v. Monday, 171 Wn.2d 667, 676-77, 257 P.3d 551 (2011). The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976).

Prosecutorial misconduct is grounds for reversal if the prosecuting attorney's conduct was both improper and prejudicial. Monday, 171 Wn.2d at 675 (citations omitted); see also United States v. Yarbrough, 852 F.2d 1522, 1539 (9th Cir.1988). Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. Monday, 171 Wn. App. at 675.

A prosecutor is a quasi-judicial officer who has a duty to ensure a defendant in a criminal prosecution is given a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). When a prosecutor commits misconduct, he may deny the accused a fair trial. Id. at 518; U.S. Const. amend. 14; Const. art. 1, § 3.

Where there is no objection, reversal is still required when the prosecutor's statements are so flagrant and ill intentioned they could not have been cured by instruction. State v. Boehning, 127 Wash. App. at 522 (despite the lack of an objection, prosecutor's references to dismissed rape charges improperly appealed to passions and prejudices of jury and invited jury to decide case on improper grounds).

The prosecutor committed misconduct when he elicited Vela's vouching testimony. Generally, no witness may offer testimony in the form of an opinion regarding the veracity of another witness. Such testimony is unfairly

prejudicial because it invades the exclusive province of the jury. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

In determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including (1) the type of witness involved; (2) the specific nature of the testimony; (3) the nature of the charge; (4) the type of evidence; and (5) the other evidence before the jury. Demery, 144 Wn.2d at 579.

These factors show Vela's testimony amounted to improper opinion testimony. First, testimony from a law enforcement officer, such as Vela, is considered especially prejudicial because an officer's testimony often carries a special aura of reliability. Demery, 144 Wn.2d at 765. Second, the specific nature of the testimony amounted to an opinion that M.H. is telling the truth. Vela testified he and his forensic interviewing technique can

"weed out" falsity and manipulation, yet he did not detect such when interviewing M.H. This implies he believes M.H. is telling the truth about her allegations against Juarez. See e.g. State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). Third, the nature of the charges are such that typically there are no witnesses. Accordingly, credibility of the accuser is of primary importance to conviction. Fourth, the type of defense was general denial; Juarez testified he never touched M.H. inappropriately, contrary to her allegation. Thus, credibility was the central issue in the case. Fifth, there was no other evidence before the jury. The state presented no medical or physical evidence to corroborate M.H.'s allegation. The state's case rested on the jury believing M.H.

Vela's testimony amounted to improper vouching. There are scores of cases holding this type of testimony is improper. It was therefore misconduct for the

prosecutor to elicit it. And the prosecutor's questions were not made permissible based on defense counsel's cross-examination. All the defense elicited was that sometimes complainants make false allegations, not necessarily that such was the case here. In other words, the defense did not open the door to Vela's improper vouching.

Considering Vela was a police officer with years of experience, it is likely the jury believed M.H., based on his testimony he did not detect falsity or manipulation when interviewing her. Thus, it is likely the misconduct affected the verdict.

Although there was no objection, the prosecutor's misconduct was flagrant and ill-intentioned. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996). In Fleming, the court held a prosecutor's arguments constituted flagrant and ill-intentioned misconduct in part because binding precedent, published prior to Fleming's

trial, clearly established the impropriety of such arguments. The same is true here.

And regardless, even had defense counsel objected, a curative instruction could not have obviated the error. The prosecutor's misconduct struck at the amin issue in the case – credibility between M.H. and Juarez. See e.g. State v. Holmes, 122 Wn. App. 438, 446, 93 P.3d 212 (2004). This Court should accept review. RAP 13.4(b)(3).

3. THIS COURT SHOULD ACCEPT REVIEW OF JUAREZ' INEFFECTIVE ASSISTANCE OF COUNSEL ISSUE BECAUSE IT INVOLVES A SIGNFICIANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS.

Although defense counsel did not open the door to the state's improper opinion testimony or "invite the error," defense counsel should have objected to Vela's testimony (and the prosecutor's questioning eliciting it). Counsel's failure to do so constituted ineffective assistance of

counsel. This Court should accept review. RAP 13.4(b)(3).

Both the federal and state Constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when (1) his or her attorney's conduct falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a reasonable probability that the outcome would be different but for the attorney's conduct. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289, cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993).

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. A reasonable probability is lower than a preponderance standard. State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

When a defendant centers their claim of ineffective assistance of counsel on their attorney's failure to object, then:

> "[T]he defendant must show that the objection would likely have succeeded." [State v. Crow, 8 Wn. App. 2d 480, 508, 438 P.3d 664 (2019)]. "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." Id. However, if defense counsel fails to object to *inadmissible* evidence, then they have performed deficiently, and reversal is required if the defendant can show the result would likely have been different without the inadmissible evidence.

State v. Vazquez, 198 Wn.2d 239, 431-32, 494 P.3d 424 (2021).

Likewise, if a prosecutor engages in misconduct and defense counsel fails to object, counsel's performance is deficient. In re Personal Restraint of Yates, 177 Wash.2d 1, 61, 296 P.3d 872 (2013).

Under Vazquez, defense counsel's failure to object to the prosecutor's questioning and Vela's improper

vouching constituted deficient performance. Vela's opinion was impermissible under the authorities cited above. There was no strategic reason not to object.

Counsel's deficient performance undermines confidence in the outcome. As indicated by counsel's recross, it is apparent counsel understood (albeit too late) the damaging nature of Vela's opinion testimony and attempted to mitigate the damage. Unfortunately, counsel made it worse by eliciting further that Vela previously uncovered falsity using the same interview techniques and that in his experience, falsity is not typically uncovered later at trial. This further reinforced his opinion M.H. was telling the truth.

There is a reasonable probability that but for counsel's failure to object the outcome of the trial would have been different. There was no evidence but M.H.'s delayed accusation. The state presented no medical or physical evidence. Considering the lateness of the

accusation, the youth of the complainant at the time of the alleged event (4 or 5 years old) and therefore the possibility of misremembering, and the lack of corroborating evidence, it is likely the jury would not have convicted Juarez absent Vela's improper vouching. This Court should accept review. RAP 13.4(b)(3).

F. CONCLUSION

For the reasons stated above, this Court should accept review. RAP 13.4(b)(3).

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Dated this 16th day of June, 2025.

Respectfully submitted,

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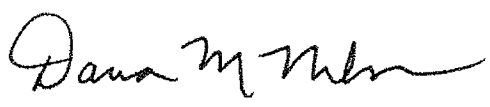

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APPENDIX

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CASE # 398081
State of Washington v. Lorenzo Jose Juarez
YAKIMA COUNTY SUPERIOR COURT No. 2110157939

Counsel:

Enclosed please find a copy of the opinion filed by the court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review of this decision by the Washington Supreme Court. RAP 13.3(b), 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact that the moving party contends this court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration that merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of a decision. RAP 12.4(b). Please file the motion electronically through this court's e-filing portal. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of the decision (should also be filed electronically). RAP 13.4(a). The motion for reconsideration and petition for review must be received by this court on or before the dates each is due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:btb
Attachment

c: **E-mail** Honorable Sonia Rodriguez True

c: Lorenzo Jose Juarez [address on file]

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

STATE OF WASHINGTON, Respondent, v. LORENZO JOSE JUAREZ, Appellant.	)	No. 39808-1-III UNPUBLISHED OPINION

FEARING, J.—Lorenzo Jose Juarez seeks reversal of his conviction for rape of a child in the first degree. He contends the superior court committed error when allowing the State to amend the information, after both parties rested at trial, to expand the charging period of the crime. He also asserts that his trial counsel performed ineffectively when failing to object to a law enforcement officer's vouching for the victim, which vouching separately constituted prosecutorial misconduct. We reject each contention. We remand, however, for the superior court to correct a scrivener's error in the judgment and sentence and to delete a community custody condition that requires polygraph examinations to detect deviant sexual behavior.

FACTS

This appeal surrounds charges brought against Raymond Hernandez for raping M.H., a child. Raymond Hernandez, M.H.'s father and a friend of Juarez for thirty years, had procured Juarez to babysit M.H. No one knows for sure the date of the rape, which in part gives rise to this appeal. M.H. was born on March 20, 2008.

In March 2021, at the age of 13, M.H. reported two earlier sexual assaults by Lorenzo Juarez. According to M.H., during the first assault, Juarez, while at her house, took her into the kitchen, sat her on a counter, pulled down her pants, and put his tongue on her vagina. On the second occasion, Juarez found a condom in Raymond Hernandez's bedroom. Juarez began placing the condom on his penis and then directed M.H. to "put it all the way on." Clerk's Papers (CP) at 3. The first assault formed the conviction for rape of a child.

On August 30, 2021, Yakima Police Department Detective Mario Vela conducted a child forensic interview of M.H. During the interview, M.H. reported that her father requested Lorenzo Juarez to babysit her and her brother instead of sending them to daycare. The assaults occurred during the babysitting. M.H. estimated she was five or six years old at the time of the assaults. During the interview, M.H. stated the conduct started in 2016 or 2017, although she "was not sure of the date." CP at 2. Based on her birthdate, M.H. was seven, eight, or nine, not five or six years of age, assuming the

assaults occurred in 2016 or 2017.

During trial, M.H. testified, contrary to her police interview, that the assaults by Lorenzo Juarez occurred in 2012 or 2013. She further averred, consistent with her law enforcement interview, that the assaults occurred when she was five or six years old. Nevertheless, with a birthdate of March 20, 2008, the assaults occurred in 2013 through 2016 if they transpired when M.H. was five or six years old. During cross-examination, defense counsel questioned M.H. regarding the timing of the alleged assaults:

> Q Okay. Do you recall which incident it was that occurred in 2012 or '13?
>
> A: Can you say that again?
>
> Q. Sure. The incident -- did the incident with the condom occur in 2012 or '13 or the incident with the licking occur in 2012 or '13?
>
> A. I'm not sure what days I got taken care of, but I'm not sure how old I was.
>
> Q. But you did testify that one of these incidents occurred in 2012 or '13?
>
> A. Yes.
>
> Q. Do you recall which one?
>
> A. 2013.
>
> Q. Which incident, the licking incident or the incident with the condom?
>
> A. The incident with the licking.
>
> Q. Okay. That occurred in 2012 or '13. Very well.

Report of Proceedings (RP) at 590.

> Q. All right. Do you recall approximately how old were you when the incident with the condom occurred?
>
> A. No.

Q. Well, other than you must have been older than when the licking occurred.
A. (Witness nods head).
Q. I'll let the record reflect the witness nodded her head yes.

RP at 600.

Q. And you told Detective Vela these incidents occurred in 2016 or '17, didn't you?
A. Yes. Because I'm not sure what years they were or how old I was.
Q. Okay. Well, to be—we have already established that you turned seven years of age in 2015; is that correct?
A. Yes.
Q. And you turned eight years of age in 2016?
A. Yes.
Q. And nine years of age in 2017?
A. Yes.

RP at 611-12.

The prosecutor reexamined M.H.:

Q. I just have a few questions for you, [M.H.]. So you had indicated earlier that you thought that this happened when you were five or six?
A. Yes.
Q. Why do you think it happened when you were five or six?
A. Because that's when I like, I was smaller.

RP at 612.

During an interview by Detective Mario Vela, M.H.'s father, Raymond Hernadez, commented that the babysitting by Juarez occurred during the months of October 2014

through March 2015. Hernandez's identification of the time of the babysitting conflicted with M.H.'s guesses as to the date of the sexual assaults.

At trial, Raymond Hernandez confirmed his statement to law enforcement. Hernandez testified that he encountered a need for childcare beginning in October 2014. Hernandez averred that, for four to six weeks, Lorenzo Juarez babysat M.H. and her brother while Hernandez worked. Hernandez calculated that, if the babysitting started in October 2014, M.H. would have been six years old at the time. He conceded, however, he lacked "precise recollection" of when the babysitting occurred. RP at 452.

PROCEDURE

On September 14, 2021, the State of Washington charged Lorenzo Juarez with rape of a child in the first degree and child molestation in the first degree against Lorenzo Juarez. This appeal only concerns the former charge. The rape charge arose from the placing of the tongue on the vagina. The child molestation charge related to placing a condom on the penis. The information alleged as to the rape:

> *On, about, during or between* October 1, 2014 and March 31, 2015, in the State of Washington, you engaged in sexual intercourse with and you were at least 24 months older than the victim, M.H., a person who was less than 12 years old and not married to you and was not in a state registered domestic partnership with you.

CP at 6 (emphasis added). The State filed Detective Mario Vela's declaration of probable cause with the charging information. The declaration repeated M.H.'s first

allegation, during her police interview, that the assaults occurred when she was five or six years of age. The declaration also retold M.H.'s later interview statement that the assaults occurred in 2016 or 2017. To repeat, M.H. changed the dates of the assaults to 2012 or 2013 during trial testimony.

During the cross-examination of Detective Mario Vela, Vela opined that complainants, such as M.H, delay reporting sexual assaults because of the need for time to gather the courage to disclose the abuse. Detective Vela acknowledged, however, that a delayed disclosure could potentially arise from fabrication or manipulation. On redirect, the State elicited:

> Q. Okay. And so let's talk briefly about forensic interviews. And you had indicated earlier that they are designed in a specific way to not be suggestive. Does that mean forensic interviews can weed out fabrications or manipulation? Are you able to tell that when you're doing an interview?
> A. Sometimes you can, yes.
> Q. Did you note that in this case?
> A. No.

RP at 478.

On re-cross-examination, defense counsel questioned Detective Vela about his methods for determining the veracity of statements made by child witnesses:

> Q. Okay. So you have your child forensic interviews and investigations to try to determine the veracity of complaints?
> A. Correct.
> Q. And, well, you're only human beings, right?
> A. Right.

Q. So you're not perfect?
A. Nobody is.
Q. And Yakima Police Department isn't perfect?
A. It's not.
Q. And the child forensic interviews or the child interview process isn't perfect?
A. Depends who you ask. It's a guideline.
Q. It doesn't always ferret out false allegations; does it?
A. It has— in my occasion it has.
Q. Do you think it always does?
A. No.
Q. So it's not perfect. And are you aware of any instances where the falsity of sexual abuse allegations are determined during trial or after trial?
A. don't think I understand your question.
Q. Are you aware—well, again we have established that sometimes allegations of sexual abuse, even child sexual abuse are false. Are you aware of any instances where that falsity has come to light when the case is at trial or even after trial?
A. I have not in my experience, no.
Q. Not in your experience. What about in your knowledge?
A. Not that I can recall or speaking to another detective or anything like that, not that it's come up.
Q. Do you pay attention to the current events?
A. Not necessarily, no.
Q. Okay.

RP at 479-80.

After the State rested, the State asked the trial court leave to amend the information to align with M.H.'s trial testimony. The proposed amendment revised the charging period to "[*o*]*n, about, during or between* January 1, 2012, and March 31, 2015." CP at 26 (emphasis added).

Lorenzo Juarez objected to the amendment to the information based on prejudice to him. His defense counsel commented that he prepared Juarez's defense based on a charging window of seven months in 2014 and 2015. If Juarez needed to respond to a charging period of three years and three months, counsel would have prepared the defense differently. Counsel added that: "we have employment records which could have provided an alibi." RP at 669. Counsel later conceded that the records might not exist, but he emphasized that he never searched for the records because of the limited charging period.

During argument on the motion to amend, the trial court asked defense counsel:

> THE COURT: Do you have any specific offer with regard to potential alibi or exculpatory information?
>
> MR. OAKLEY: No, Your Honor. In reliance of the charge of 2014 or '15, I didn't pursue that avenue of investigation.
>
> Mr. Juarez—Mr. Juarez testified that he was working during that time frame. And we may have been able to present evidence regarding his employment that would have bolstered his defense. So the amendment would necessarily prejudice under any standard.

RP at 679. The trial court granted the State's motion to amend the information.

During testimony in his own defense, Lorenzo Juarez acknowledged that he babysat M.H. and her brother while Raymond Hernandez experienced daycare challenges and difficulties with DSHS. The babysitting occurred shortly before his estrangement with Hernandez. He did not recall the year of the disaffection. Juarez averred that he

babysat only when he was between jobs. He denied ever touching M.H.'s genitals, licking her vagina, or demonstrating how to apply a condom.

The jury convicted Lorenzo Juarez of first degree rape but acquitted him of first degree child molestation. The superior court ordered a lifetime term of community custody. In the accompanying judgment and sentence, the court marked a box stating, "The crime in Count 1 was predatory, pursuant to RCW 9.94A.836." CP at 55. As a condition of community custody, Juarez is required to "[s]ubmit to regular polygraph examinations about deviant sexual behavior upon the request of the supervising community corrections officer." CP at 58.

LAW AND ANALYSIS

On appeal, Lorenzo Juarez contends the trial court violated his constitutional right to notice when the court permitted the State to amend the date of the allegations in the information after the parties rested. Juarez adds that prosecutorial misconduct and ineffective assistance of counsel denied him a fair trial. Assuming this court affirms his conviction, Juarez requests that this court direct the trial court to correct a scrivener error and to restrict the administration of polygraph examinations. We affirm the conviction, but remand to correct the judgment and limit the authority for polygraphs.

In a statement of additional grounds, Lorenzo Juarez contends the trial court violated his constitutional right to be present during an omnibus hearing. He also

requests that this court order discovery from the State's attorney. We reject Juarez's statements.

Amended Information

Lorenzo Juarez contends that the trial court violated his rights to notice and to present a defense by allowing the State to expand the charging period to include the timeframe described in M.H.'s testimony. The State responds that the original information included the words "*on, about, during or between* October 1, 2014 and March 31, 2015." CP at 6 (emphasis added). We label the emphasized words as "the flexible prepositions." Thus, according to the State, Juarez knew the charging time frame was flexible such that the State either did not need to amend the information to expand the charging window or the State held the prerogative to amend the information any time before verdict. The State also contends the superior court did not err when permitting the amendment because Juarez showed no prejudice.

We review a decision permitting such an amendment of the information for abuse of discretion. *State v. Brooks*, 195 Wn.2d 91, 96, 455 P.3d 1151 (2020). A trial court abuses its discretion by applying the wrong legal standard, when the facts fail to satisfy the standard, or if the decision falls outside the range of acceptable choices under the applicable facts and legal standard. *State v. Lamb*, 175 Wn.2d 121, 130, 285 P.3d 27 (2012).

One constitutional provision and one court rule govern amendments to a charging information. Under CrR 2.1(d), a charging document may be amended at any time before the verdict, provided that the "substantial rights of the defendant are not prejudiced." The State moved to amend the information against Lorenzo Juarez before the verdict.

CrR 2.1(d) operates within the confines of article I, section 22 of our state constitution. *State v. Pelkey*, 109 Wn.2d 484, 490, 745 P.2d 854 (1987). Article I, section 22 of the Washington Constitution declares:

> In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him.

Section 22 directs the trial court to exercise caution when allowing the amending of an information after trial has already begun because defense counsel has geared pretrial motions, voir dire of the jury, opening argument, and examination and cross-examination of witnesses to the precise charges. *State v. Pelkey*, 109 Wn.2d 484 (1987).

Article I, section 22 of the Washington State Constitution requires that every essential element of a crime be included in the charging document so that the defendant may prepare a defense to meet the allegations. *State v. Brooks*, 195 Wn.2d 91, 97 (2020). The charging instrument conforms to constitutional requirements, even if the information vaguely posits some allegations significant to the defense, if the information alleges every essential element of the offense. *State v. Mason*, 170 Wn. App. 375, 378-79,

285 P.3d 154 (2012).

Cases involving amendments to the charging date hold that the date is not a material element of the crime. *State v. Brooks*, 195 Wn.2d 91, 98 (2020). Thus, amendment of the date is a matter of form rather than substance. *State v. Brooks*, 195 Wn.2d 91, 98 (2020).

Article I, Section 22 imposes no requirement on the State to allege the date of the crime or crimes. In turn, Washington case law recognizes that the State need not fix a precise time for the commission of the offense if it cannot intelligently do so. *State v. Carver*, 37 Wn. App. 122, 126, 678 P.2d 842 (1984). Actually, Washington cases suggest that the State need not plead precise dates even if it could intelligently do so. The allegation of time in an information is immaterial other than the charges must show that the statute of limitations does not bar the prosecution. The law recognizes that young victims will not be able to identify a specific date of an assault. *State v. Carver*, 37 Wn. App. 122, 126 (1984). A child may also repress memory of the date. *State v. Brooks*, 195 Wn.2d 91, 99 (2020).

The State highlights that the original information inserted the flexible prepositions when listing the dates of between October 1, 2014 and March 31, 2015. The amended information revised the charging period to "[*o*]*n, about, during or between* January 1, 2012, and March 31, 2015." CP at 26 (emphasis added). Thus, the amendment also

utilized the flexible prepositions. The State asserts that the prepositions preclude a finding that the amendment prejudiced Lorenzo Juarez. The logical extension of the State's contention is that "on, about, during or between October 1, 2014 and March 31, 2015" means between January 1, 2012 and March 31, 2015, if not some broader period of time within the statute of limitations.

The State gives the accused notice that the charge is not confined to a single date when the charging document alleges the offense occurred "on or about" a specific time frame. *State v. Statler*, 160 Wn. App. 622, 640-41, 248 P.3d 165 (2011). In *State v. Statler*, this court noted the rule that an information charging a crime occurred "on or about" April 15 covered a crime occurring on April 17. Of course, April 17 arrives only two days after April 15. Despite noting this rule, the court rejected Paul Statler's appeal because he showed no prejudice, particularly when the trial court postponed the trial when the State amended to information to read "on or about April 17." Statler had not raised an alibi defense.

State v. Brooks, 195 Wn.2d 91 (2020) supports both contentions asserted by the State. —that it held the prerogative to amend the information even if Lorenzo Juarez shows no prejudice because of the flexible prepositions and also that Juarez shows no prejudice. While the date of an offense is not an essential element of the crime and the flexible preposition put Juarez on notice of an uncertain date of the offense, the law is

uncertain as to whether a claim of prejudice by the defense can defeat a late-filed motion to amend the information. Regardless, Juarez does not demonstrate prejudice.

We now address *State v. Brooks*' handling of the first contention. The State sought to amend the information after both parties had rested their cases. The original information charged Kenneth Brooks with child molestation and rape based on two distinct dates. The State alleged the timing of the molestation was "on or about or between" January 1, 2014 and January 31, 2014. Brooks admitted to touching the victim's breasts, but testified that he could not recall being at the victim's home in January 2014. He added that he visited the home in May 2014. Brooks denied any rape regardless of the date alleged. The trial court allowed an amendment to allege the rape occurred between January 1 and May 31.

The state Supreme Court, in *State v. Brooks*, held that the trial court's permission to extend the date range did not constitute an abuse of discretion. The Supreme Court wrote that the use of "on or about or between" for the charging dates in the original information gave Kenneth Brooks notice of the flexibility of the timing of the incidents. The court hinted, but did not expressly rule, that the flexible language alone prevented Brooks from establishing prejudice.

A concurring justice, in *State v. Brooks*, objected to any ruling from the majority that use of "on or about of between" date range in the information precludes any

successful objection from the accused to an amendment of dates to a motion to amend before the verdict. The concurring opinion noted that the majority of jurisdictions require the State to prove the defendant's conduct occurred on a date "reasonably near" the date range in the charging document. *State v. Brooks*, 195 Wn.2d 91, 105 (2020) (Gordon McCloud, concurring). The concurring author concluded that the date proved at trial lay reasonably close to the date range in the original information.

Because the Supreme Court, in *State v. Brooks*, did not expressly hold that Kenneth Brooks need not show prejudice, we do not affirm the trial court's grant of the State's motion to amend Lorenzo Juarez's information because of the inclusion of the flexible prepositions. We also note that the amendment in Kenneth Brooks' information only changed the charging date two days. The amendment information arrayed against Juarez extending the charging period by two years and nine months.

We turn to the State's alternative contention that Lorenzo Juarez failed to show prejudice from the amended information. The trial court should permit an amendment absent an alibi defense or a showing of other prejudice to the defendant. *State v. Brooks*, 195 Wn.2d 91, 98-99 (2020). The accused bears the burden of demonstrating prejudice. *State v. Statler*, 160 Wn. App. 622, 640 (2011). No prejudice exists if time remains to prepare a defense. *State v. Statler*, 160 Wn. App. 622, 641 (2011). A defendant who claims prejudice by a late amendment may seek a trial continuance to secure time to

prepare a defense. *State v. Brooks*, 195 Wn.2d 91, 99 (2020).

Lorenzo Juarez alternatively contends that the law presumes prejudice and that he shows actual prejudice. In so arguing, Juarez astutely relies on *State v. Pelkey*, 109 Wn.2d 484 (1987). One sentence, in *State v. Pelkey*, when read literally, supports Juarez's assignment of error. The sentence reads:

> A criminal charge may not be amended after the State rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense.

109 Wn.2d at 491. The State amended its information after it rested its case against Lorenzo Juarez. The amendment did not seek to substitute charges to a lesser degree of the same crime or lesser included offense.

In *State v. Pelkey*, 109 Wn.2d 484 (1987), the State charged Chae San Pelkey with one count of bribery resulting from offering to pay a law enforcement officer money in exchange for advance warning of any undercover surveillance of her sauna parlors. At trial, the State forgot to introduce evidence that the importuned law enforcement officer acted in his official capacity at the time Pelkey offered the money, an element of bribery. When Pelkey moved to dismiss the charges after the State rested, the State asked to amend its information to charge the crime of trading in special influence, a crime that lacks the required element of the payment offeree functioning in an official capacity. The jury convicted Pelkey of the amended charge. The Supreme Court reversed.

The court applied a bright-line rule that an amendment during trial charging a different crime violates article I, Section 22. The only two exceptions to this inflexible rule are amending to charge a lesser included crime or amending to charge an inferior degree of the original charge.

A concurring opinion in *State v. Pelkey*, which opinion garnered two other justices, disagreed with the majority's blanket rule prohibiting an amendment, after the State rests, other than to charge an inferior degree of crime or a lesser included offense. The concurring author, however, agreed with the dismissal of the amended charge because Chae San Pelkey showed prejudice. Pelkey's counsel outlined for the court ways in which the late amendment impaired his trial preparation. Counsel briefed the crime of bribery, but not trading in special influence. He geared his examination of key witnesses based on the necessary elements of bribery, not trading in influence. His preplanned closing focused on the crime of bribery.

The Washington Supreme Court dispelled Lorenzo Juarez's contention in *State v. Brooks*, 195 Wn.2d 91, 98, (2020). The court's majority wrote:

> *Pelkey* addressed the State's amendment of the information to a new offense, that is, a different crime with different elements (from bribery to trading in special influence). (*Pelkey* held "no prejudice need be shown when the amendment is to a *different charge* and the amendment is made after the State has rested." (emphasis added)). That is not the case here: before and after the amendment, the crime charged (third degree child molestation) and its essential elements remained the same; only the date was expanded. Accordingly, the Court of Appeals here correctly rejected

> Brooks' contention that the date amendment at issue was reversible error under *Pelkey.*

State v. Brooks, 195 Wn.2d 91, 98, (2020) (internal citations omitted).

We write further about *State v. Brooks*, 195 Wn.2d 91 (2020). In addition to observing the flexible prepositions used in the original information against Kenneth Brooks, the Supreme Court added the Brooks showed no actual prejudice. A concurring justice, in *State v. Brooks*, objected to any ruling from the majority that use of "on or about of between" date range in the information precludes any successful objection from the accused to an amendment of dates to a motion to amend before the verdict. The concurring opinion noted that the majority of jurisdictions require the State to prove the defendant's conduct occurred on a date "reasonably near" the date range in the charging document. *State v. Brooks*, 195 Wn.2d 91, 105 (2020) (Gordon McCloud, concurring).

Lorenzo Juarez argues that extending the charging period by over two years prejudiced his defense. Until it rested its case, the State maintained that the offenses occurred between October 1, 2014, and March 31, 2015. Afterward, the State asserted that the incidents happened between January 1, 2012 and March 31, 2015.

We recognize the sizeable quantity of the State's extension of the charging period window. We do not consider the amendment "reasonably near" the initial charging dates, but Justice Gordon McCloud's *Brooks* opinion has yet to garner a majority on the

Supreme Court. Based on the current status of law, Lorenzo Juarez must show prejudice. Based on the current record, Juarez did not establish prejudice before the trial court, such that the court did not abuse its discretion in granting the amendment.

Juarez asserts that, due to this late notice, his defense counsel never sought Juarez's employment records to show employment during the extended charging period or from January 1, 2012 to October 1, 2014. As Juarez's argument continues, if the employment records showed employment between those two dates, the records would have provided an alibi because he never babysat during the months that he worked. But to his credit of courtroom honesty, defense counsel conceded on questioning from the trial court, that he could not represent that any employment records existed. Juarez failed in his burden. Lorenzo Juarez does not contend that counsel directed a pretrial motion, voir dire questioning, or opening argument to the timing of the charges. Juarez does not expressly argue that questioning of witnesses would have changed if his counsel knew of the expanding charging period. To the contrary, defense counsel effectively cross-examined M.H. about the confusion in dates. Juarez also never requested a trial continuance to allay any prejudice.

Lorenzo Juarez suggests that the State should have known, from the interviews with M.H. that the alleged assaults occurred earlier such that the State could have included the extended charging dates in the initial information. He cites no case law

to support this contention. The argument also harms Juarez because, by reading Detective Mario Velez's affidavit of probable cause, Juarez also should have known of a potential extension of the charging dates.

Prosecutorial Misconduct

Lorenzo Juarez argues that the State committed prosecutorial misconduct by eliciting testimony from Detective Mario Vela that improperly vouched for the veracity of M.H.'s allegations against Juarez. Generally, misconduct warrants reversal only if the prosecutor's actions are both improper and prejudicial. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). The accused establishes prejudice with a substantial likelihood that misconduct affected the jury's verdict. *State v. Monday*, 171 Wn.2d 667, 676 (2011). Nevertheless, when a defendant fails to object to such testimony, he must show the prosecutor's misconduct was flagrant and ill-intentioned. *State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996).

Lorenzo Juarez asserts that Detective Mario Vela's testimony that forensic interviews can "weed out fabrications or manipulation" implied that he believed M.H. truthful, as he did not observe any signs of deception during her interview. Detective Vela did not explicitly testify that he believed M.H. Rather, he stated that he noted no indications of fabrication or manipulation. When a witness does not expressly declare a belief in the victim's account, the testimony does not constitute manifest constitutional

error. *State v. Warren*, 134 Wn. App. 44, 55, 138 P.3d 1081 (2006).

Ineffective Assistance of Counsel

Lorenzo Juarez contends that his lawyer's failure to object to the prosecutor's questioning of Detective Mario Vela on redirect examination violated his constitutional right to effective assistance of counsel. The United States and state constitution's guarantee a criminal defendant effective assistance of counsel. *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018). To prevail on a claim of ineffective assistance, a defendant must establish that (1) counsel's performance fell below an objective standard of reasonableness under the circumstances, and (2) there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If either element is not satisfied, the inquiry ends. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

We have already ruled that the prosecution committed no misconduct when questioning Detective Mario Velez. Thus, the trial court likely would not have sustained any objection to the testimony of Velez. To use two negatives, counsel does not perform ineffectively when failing to raise an evidentiary objection the trial court would have denied.

Polygraph Examinations

Lorenzo Juarez challenges the community custody condition requiring him to "[s]ubmit to regular polygraph examinations about deviant sexual behavior upon the request of the supervising Community Corrections Officer." CP at 58. Under *State v. Combs*, 102 Wn. App. 949, 953, 10 P.3d 1101 (2000), the scope of polygraph testing must be limited to monitoring compliance with other community custody conditions and cannot be used "as a fishing expedition to discover evidence of other crimes, past or present." The State agrees that the condition should be clarified to restrict polygraph examinations to verifying Juarez's compliance with his release conditions.

Predatory Finding

The State acknowledges that the judgment and sentence erroneously reads that Lorenzo Juarez committed a predatory crime under RCW 9.94A.836. We remand to the superior court for correction of a scrivener's error in a judgment and sentence. *State v. Makekau*, 194 Wn. App. 407, 421, 378 P.3d 577 (2016).

Statement of Additional Grounds

Lorenzo Juarez's additional grounds for review assert that (1) he was denied the right to present a defense at his omnibus hearing and (2) he is entitled to obtain his case file from the prosecutor's office to collaterally challenge his sentence. When so arguing, he refers to records outside of the record.

While a statement of additional grounds does not require references to the record or citations to authority, the court will not review an alleged error unless the statement clearly identifies the nature and occurrence of the error. RAP 10.10(c). Also, on a direct appeal, this court will not consider evidence outside the record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Juarez may address these issues through a petition for personal restraint.

CONCLUSION

We affirm Lorenzo Juarez's conviction. We remand to the superior court with instructions to limit the scope of the polygraph conditions and to strike the reference to a predatory crime.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Cooney, J.

Staab, A.C.J.

No. 39808-1-III

FEARING, J. (Concurring)—In addition to penning the court's opinion, I write separately because the other judges disagree with one important point. I recognize some unfairness in requiring Lorenzo Juarez, in the middle or end of the trial, to establish that employment records would have confirmed employment from January 1, 2012 to October 1, 2014. Juarez had not expected the need to produce the records and any procurement of the records might require a subpoena and take weeks. Juarez should not be penalized when his counsel reasonably engaged in no investigation attended to the new time window. For this reason, Juarez should be able to seek relief through a personal restraint petition because of a late amendment if he produces new evidence in the form of records that show he worked during the new charging period.

Fearing, J.

Fearing, J.

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

June 16, 2025 - 3:19 PM

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Appellate Court Case Number:	39808-1
Appellate Court Case Title:	State of Washington v. Lorenzo Jose Juarez
Superior Court Case Number:	21-1-01579-6

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