In the Supreme Court No. ____
(COA No. 39994-0-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BLAKE ANTHONY BROWN,

Petitioner.

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

PETITION FOR REVIEW

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Blake Anthony Brown, petitioner here and appellant below, asks this Court to accept review of the Court of appeals decision terminating review. RAP 13.3, RAP 13.4.

B. COURT OF APPEALS DECISION

Blake Anthony Brown seeks review of the Court of Appeals decision dated June 10, 2025, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

Issue 1: Whether review should be granted under RAP 13.4(b)(1) and (2) because the Court of Appeals ruling on the issue of prosecutorial misconduct conflicted with prior decisions of the Supreme Court and the Court of Appeals.

Issue 2: Whether review should be granted under RAP 13.4(b)(1) and (2) because the Court of Appeals ruling on ineffective assistance of counsel conflicted with prior decisions of the Supreme Court and the Court of Appeals.

Issue 3: Whether review should be granted under RAP 13.4(b)(1) and (2) because the Court of Appeals ruling on the admission of video evidence conflicted with prior decisions of the Supreme Court and the Court of Appeals.

D. STATEMENT OF THE CASE

Blake Brown met Morgan Hart in high school in Ellensburg, Washington. (RP 201). They married shortly after graduation. (RP 199, 201). Early in the marriage, Mr. Brown served in the United States Army. (RP 205). The couple had two children, a girl, E.H., and a boy, T.B. (RP 200-01).

Years later, they returned to Ellensburg. (RP 379-80). E.H. made allegations that Mr. Brown had inappropriately touched her. (RP 382-83). The police became involved in the case. (RP 382, 392).

After the completion of a police investigation, the State of Washington charged Mr. Brown with three counts of child molestation in the first degree against E.H., two counts of assault in the second degree, one pertaining to E.H. and one to T.B., and incest

against E.H. (Clerk's Papers (hereinafter "CP") 63-65). The case proceeded to trial.

Before jury selection, the court heard motions in limine brought by both parties. (RP 15-55), (CP 5-9, 66-68). The prosecutor stated she would not be offering any exhibits. (RP 28). The prosecutor argued Mr. Brown's bad behavior should be admissible to explain why his children would not say no to him as well as explain the delayed reporting. (RP 39-47). The court allowed E.H. and T.B. to testify about their feeling Mr. Brown had control over them, but the court prohibited testimony of specific incidents that would run afoul of ER 404(b). (RP 46).

Following this ruling, the prosecutor argued the state was not claiming Mr. Brown acted in conformity with these bad acts when he strangled his children or molested E.H. (RP 47). The prosecutor claimed the point of the evidence was not "he's a bad guy and he did all these other things, so he must have done these things." "That's absolutely not the argument we are making." (RP 47).

The state called Ms. Hart who testified about Mr. Brown being controlling and abusive. (RP 204). Ms. Hart also described abusive things Mr. Brown did to their children. (RP 205-06). She testified after he came home from deployments in Iraq he was "still just as horrible." (RP 207).

Eighteen-year-old E.H. testified after her mother. (RP 283). Without objection, she testified Mr. Brown physically, emotionally, and sexually abused her. (RP 285). E.H. testified when she was 10 or 11, her father engaged in sexual misconduct with her several times. (RP 293-94, 297, 312). E.H. testified Mr. Brown strangled her and T.B. (RP 315-16). She testified on one occasion when they blacked out, she called her mother and told her about the incident. (RP 316).

T.B. testified following his sister. (RP 350). T.B. stated his childhood was not happy because he was constantly yelled at, hit, and chastised by Mr. Brown. (RP 354). The defense did not object. T.B. further testified about Mr. Brown's bad behavior. (RP 354-55).

The state called Detective Ryan Shull. (RP 368). He interviewed E.H. with Ms. Hart and the CPS investigator present. (RP 392). On a later date, the detective interviewed T.B. with Ms. Hart and Ms. Dombcik. (RP 398-99).

The prosecutor stated she intended to play the recorded interviews of E.H. and T.B. (RP 435). Mr. Brown's attorney objected. (RP 435). The court conducted a hearing outside the presence of the jury. (RP 435-46). The court allowed the evidence. (RP 436).

The court admitted the video and played it for the jury. (RP 450-52, State's Ex. 12). In the video, E.H. recounted cruel acts by Mr. Brown. (RP 446-73). The defense objected on the basis the statement violated motions in limine. (RP 458). The court overruled the objection. (RP 458).

Following the video of E.H.'s interview, the court admitted the video and played it for the jury. (RP 507-08). This video also contained statements which repeated statements of T.B. (RP 514). The video also contained statements about bad things Mr. Brown

did. (RP 514-34). The state rested. The defense rested without presenting any evidence. (RP 579).

The prosecutor began her closing argument by saying:

> We are here this week because the defendant chose to violate his position of authority, chose to have a house in which he was the dad where things like name calling, excessive punishments, spanking with a belt, and the mean comments were the norm. His children were terrified of him. (RP 629).

The prosecutor continued by referencing comments E.H. made during the video interview. (RP 630). At another point the prosecutor stated:

> Instead, years later, they come in here, they swear to tell the truth, they take an oath even though they have nothing personal to gain except the knowledge that they did what was brave and right and true and good. That's all they have to gain. (RP 632-33).

The prosecutor later stated: "For years he's—he's ruined their entire family. Their dignity, their life, their purity, all the things. Their innocence." (RP 633).

In the prosecutor's rebuttal closing argument, the prosecutor stated:

> Bravo. Bravo to [E.H.] and Morgan that after eight years after they left Blake Brown they had a voice. Bravo to them to having a voice in this courtroom. Bravo for – to Morgan for saying he was a terrible person. Do you blame her? (RP 653).

Shortly after that remark, the prosecutor stated: "He wasn't a terrible person after he came back from Iraq. He was always a terrible person." (RP 653). At another point in her argument, the prosecutor addressed E.H.'s lack of tears by stating:

> I don't know what video Mr. Chmelewski watched but I certainly watched a video where [E.H.]'s crying to the point where Detective Shull hands her a tissue. And bravo to [E.H.].

(RP 654).

The prosecutor also stated:

> …she doesn't want to have the – doesn't want to lose the dignity to have him win over her again. She wants to appear strong and confident.

(RP 654).

Addressing the same issue the prosecutor stated:

> Four years of being away from him, that she didn't want to crumble and let him see her cry. That she was brave enough to hold it together in here.

(RP 654).

Mr. Brown's attorney made no objections.

The jury returned verdicts of guilty to all the remaining counts and answered in the affirmative to the questions on the special verdict forms. (RP 675-77), (CP 159-69).

The Washington Court of Appeals, Division III, affirmed the trial court's rulings. (APP 1). Mr. Brown now petitions this Court to accept review.

E. ARGUMENT

Issue 1: Whether review should be granted under RAP 13.4(b)(1) and (2) because the Court of Appeals ruling on the issue of prosecutorial misconduct conflicted with prior decisions of the Supreme Court and Court of Appeals.

The Supreme Court may accept review when a decision of the Court of Appeals conflicts with a decision of the Supreme Court or of the Court of Appeals. RAP 13.4(b)(1) and (2). The Court of Appeals ruled Mr. Brown did not construct a sufficient argument on the issue. (Attachment). This argument was sufficiently developed because the misconduct was flagrant and could not be cured with an

instruction from the court. The prosecutor encouraged the jury to convict Mr. Brown because he had a bad character.

The prosecutor's closing argument and rebuttal closing argument attacked Mr. Brown's character and appealed to the passions of the jury. The prosecutor's remarks vouched for the state's witnesses. This misconduct deprived Mr. Brown of a fair trial.

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. *State v. Glasmann,* 175 Wash.2d 696, 703, 286 P.3d 673 (2012). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *Id.* at 703-04. Prosecutors are presumed to act impartially in the interest of justice. *State v. Loughbom,* 196 Wash.2d 64, 69, 470 P.3d 499 (2020). Prosecutors are expected to subdue courtroom zeal, not add to it, to ensure the defendant receives a fair trial. *Id.* Justice can be secured only when a conviction is based on specific evidence in an individual case and

not on rhetoric. *Id.* at 69-70. Although a prosecutor has wide latitude to argue reasonable inferences from the evidence, a prosecutor must seek a conviction based only on probative evidence and sound reason. *Glasmann* at 704.

To prevail on a claim of prosecutorial misconduct, a defendant who timely objects must show the conduct was both improper and prejudicial in the context of the entire trial. *Loughbom* at 70. When a defendant fails to object, as in this case, a defendant must also show that the conduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Id.* Under this heightened standard, the inquiry is whether the defendant received a fair trial considering the prejudice caused by the violation of existing prosecutorial standards and whether the prejudice could have been cured with a timely objection. *Id.* at 74-75. This must be assessed in the context of the total argument. *Id.* at 75.

The prosecutor made improper remarks in both her closing argument and rebuttal closing argument. The prosecutor immediately attacked Mr. Brown's character by telling the jury the

parties were in court that week because of how Mr. Brown chose to run his home with name calling, spanking with a belt, and mean comments. (RP 629). The attack on Mr. Brown's character continued when the prosecutor praised Ms. Hart for calling Mr. Brown a horrible person. (RP 653). Shortly after that, the prosecutor stated that Mr. Brown was "always a terrible person." (RP 653). The prosecutor's misconduct was especially egregious because at least four times during the trial the prosecutor claimed Mr. Brown's prior bad conduct was only being used for the purpose of explaining why there was a delay in reporting the crimes. (RP 29-30, 40-42, 46-47, 225). The prosecutor also used the video evidence as substantive evidence rather than using it to show outside influence on the interview.

The prosecutor misrepresented the purpose of the evidence to the court; then she used it to show propensity. This runs afoul of Evidence Rule (ER) 404(a) and (b). Misusing such evidence constitutes misconduct. *State v. Fisher,* 165 Wash.2d 727, 749, 202 P.3d 937 (2009). In *Fisher,* the Washington State Supreme Court

found that using evidence for reasons other than its purported purpose constituted misconduct and deprived the defendant in that case of a fair trial. *Id.* at 748-49. Like the prosecutor in *Fisher,* the prosecutor in Mr. Brown's case used the evidence to generate a theme that Mr. Brown's sexual abuse was consistent with his physical abuse and ill treatment of his children. The court in *Fisher* found that sort of conduct deprived the defendant of a fair trial. *Id.* at 749.

The comments by the prosecutor appealed to the passions of the jury. A prosecutor should not use arguments to inflame the passions of the jury. *Glasmann* at 704. In addition to those mentioned above, the prosecutor applauded "Bravo" to E.H. and Ms. Hart for having a voice. (RP 653). The prosecutor told the jury Mr. Brown ruined his family's life, dignity, purity and innocence. (RP 633). The prosecutor also told the jury what Ms. Hart, E.H. and T.B. did when they testified was brave, right, true and good. (RP 632-33).

With these comments, the prosecutor not only appealed to the passion of the jury, but she vouched for the veracity of the state's witnesses. A prosecutor commits misconduct when they vouch for a witness's credibility. *State v. Stotts,* 26 Wash. App. 2d 154, 167, 527 P.3d 842 (2023). Vouching may occur in one of two ways: the prosecution may place the prestige of the government behind the witness or may indicate the information not presented to the jury supports the witness's testimony. *Id.*

The prosecutor's comments about why E.H. did not cry constituted misconduct. (RP 654). In addition to their inflammatory nature, the comments contained facts that were not in evidence. A prosecutor must not refer to evidence that has not been admitted. *State v. Slater,* 197 Wash.2d 660, 681, 486 P.3d 873 (2021).

The pervasiveness of the prosecutor's improper comments can only lead to the conclusion that Mr. Brown was prejudiced. The comments encouraged the jury to convict him because of his bad character. The jury was encouraged to believe he was guilty because he had a propensity to do bad things. The whole case against Mr.

Brown was infected by this theme of Mr. Brown's bad character and conducted along the lines that the prosecutor argued. The misconduct permeates the prosecutor's closing argument and rebuttal closing argument. In *Glasmann,* the court found that the misconduct in the argument was so pervasive that it could not be cured by an instruction. *Id.* at 707. In *Loughbom,* the court also found that repetitive misconduct can have a cumulative effect. *Id.* at 77. In that case the repetitive misconduct created incurable prejudice. *Id.* The conduct was flagrant and ill-intentioned and denied the defendant a fair trial. *Id* at 77-78. The repetitive misconduct in Mr. Brown's case was just as flagrant and ill intentioned. The prosecutor's misconduct denied Mr. Brown a fair trial.

Issue 2: Whether review should be granted under RAP 13.4(b)(1) and (2) because the Court of Appeals ruling on ineffective assistance of counsel conflicted with prior decisions of the Supreme Court and Court of Appeals.

The Washington Supreme Court can accept review when a Court of Appeals ruling conflicts with prior decisions of the

Supreme Court and Court of Appeals. RAP 13.4(b)(1) and (2). The Court of Appeals ruling in Mr. Brown's case conflicts with prior decisions. The Court of Appeals ruled counsel's failures to object were a legitimate trial tactic. (Appendix 9). The actions attributed to Mr. Brown went beyond strict parenting and did not constitute a defense to the charges. The Court of Appeals erred ruling the failure to object was a legitimate trial tactic.

Mr. Brown received ineffective assistance of counsel when his lawyer failed to object to inadmissible character evidence and prior bad acts. Both the United States and Washington State Constitutions guarantee a criminal defendant the right to effective assistance of counsel. *State v. Vazquez,* 198 Wash.2d 239, 247, 494 P.3d 424 (2021); *see also* U.S. CONST. amend. VI; WASH. CONST. art. I, section 22. Courts indulge a strong presumption that the counsel is effective. *Vazquez* at 247. To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all

the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 247-48, *see also Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Vazquez* at 248. A reasonable probability is lower than a preponderance standard. *Id.* at 248.

A defendant has the burden of showing that defense counsel's performance was deficient based on the trial court record. *Id.* at 248. A defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *Id.* at 248. A classic example of trial tactic is when and how counsel makes objections during trial testimony. *Id.* A defendant claiming ineffective assistance of counsel must show the objection would likely have succeeded. *Id.* If defense counsel fails to object to inadmissible evidence, counsel has performed deficiently, and

reversal is required if the defendant can show the result would likely have been different with the inadmissible evidence. *Id.* 248-49.

Mr. Brown's trial counsel repeatedly failed to object when the state offered evidence impugning Mr. Brown's character. The admissibility of character evidence is governed by ER 404(a)(1) which generally prohibits the admission of such evidence. Although the concept of character is amorphous, it is generally thought to include traits such as honesty, temperance, or peacefulness. *City of Kennewick v. Day,* 142 Wash.2d 1, 6, 11 P.3d 304 (2000). Under ER 404(a), evidence of Mr. Brown's character was not admissible.

From the first witness, the state elicited character evidence. Morgan Hart testified Mr. Brown was controlling. (RP 204). She testified that when Mr. Brown came home from Iraq he was "still just horrible". (RP 207). At another point in her direct examination, she called Mr. Brown "a controlling person." (RP 218). None of these comments drew an objection. E.H. testified that Mr. Brown had never been "a nice man." "He made us all miserable." (RP 348). Again, defense counsel did not object.

Since this testimony was prohibited under ER 404(a), an objection to character evidence would have been sustained. Failure to object was deficient performance by Mr. Brown's attorney. No legitimate reason existed to not object as a trial strategy. The testimony impugned Mr. Brown's character to the jury. The testimony was then used by the prosecuting attorney in her closing argument. The jury convicted Mr. Brown because he was a bad person not because the state had a strong case.

Mr. Brown's counsel also failed to object to evidence of prior bad acts under ER 404(b). Evidence of a defendant's prior bad acts is not admissible to show the defendant has a propensity to commit crimes but may be admissible for some other purpose. *State v. Gunderson,* 181 Wash.2d 916, 921, 337 P.3d 1090 (2014). ER 404(b) is a categorical bar to admission of evidence of a prior bad act for the purpose of proving a person's character and that the person acted in conformity with that character. *Id.* at 922. For evidence of prior bad acts to be admissible, a trial judge must (1) find by a preponderance of the evidence that the misconduct

occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. *Id.* 923. The analysis must be conducted on the record. *Id.* If the evidence is admitted, the trial court must give a limiting instruction to the jury. *Id.* A reviewing court reviews a trial court's interpretation of ER 404(b) de novo as a matter of law. *Fisher* at 745. If the trial court correctly interprets ER 404(b), the standard of review is abuse of discretion. *Id.*

Morgan Hart testified that Mr. Brown verbally and emotionally abused her and that it affects her to this very day. (RP 204). When asked how he treated their kids, Ms. Hart replied "bad." (RP 217). This did draw an objection, but the objection was not on the correct basis and was overruled. (RP 217). Ms. Hart continued to testify about Mr. Brown's harsh behavior toward his children generally without drawing objections. (RP 218-19). When defense counsel did object, the basis was wrong. (RP 220). Both E.H. and T.B. repeatedly testified about bad acts.

An objection to this testimony would have been sustained because ER 404(b) forbids the use of bad acts to show propensity. The state misrepresented its purpose for admission of the evidence. It assured the court the evidence was to explain the delay in reporting. (RP 29-30, 40-42, 46-47, 225). E.H. was the only person who delayed reporting and the failure to report only concerned the sex offenses. However, the prosecutor did not even ask E.H. why she delayed reporting. Instead, during cross examination, E.H. stated she kept the sexual misconduct to herself because she was embarrassed. (RP 338). There was no delay in reporting the choking incidents. E.H. called and told her mother about them. (RP 316). Thus Ms. Hart knew about the acts. The testimony was not used for its intended purpose. There was never any jury instruction given limiting its use. Any testimony about bad acts directed toward Ms. Hart and T.B. could have no other purpose other than to show propensity.

Even when Mr. Brown's attorney objected, the objection was on the wrong grounds. An objection is not properly preserved if an

objection is made for one reason and then raised on appeal for another reason. *State v. Powell,* 166 Wash.2d 73. 82-83, 206 P. 3d 321 (2009).

The court did not do the required four-part analysis and no limiting instruction was given. This could be because there were no objections. Mr. Brown's attorney did not object when the state elicited testimony which violated a defense motion in limine the court granted. (RP 354-55). No strategic purpose could be served by allowing Mr. Brown's character to be attacked as being cruel in a case concerning violent charges. Mr. Brown's character became the theme of the case. A few or even several failures to object are generally not the cause for finding an attorney's conduct has fallen below an objective standard of conduct. *Vazquez* at 250. However, effective representation entails certain basic duties such as bringing skill and knowledge to bear which renders the trial a reliable adversarial testing process. *Id.* at 268. The test for prejudice is concerned with the fundamental fairness of the proceeding. *Id.* In *Vazquez,* our state supreme court found that the cumulative effect of

counsel's subpar performance of failing to object to certain evidence likely affected the outcome of the case. *Id.* at 268-69. The same logic applies to Mr. Brown's case.

Issue 3: Whether review should be granted under RAP 13.4(b)(1) and (2) because the Court of Appeals ruling on the admission of video evidence conflicted with prior decisions of the Supreme Court and the Court of Appeals.

Under RAP 13.4(b)(1) and (2), the Supreme Court may grant review if a decision of the Court of Appeals conflicts with prior decisions of the Supreme Court and the Court of Appeals. The decision in Mr. Brown's case to admit prior video evidence conflicts with prior decisions. The Court of Appeals incorrectly distinguished *State v. Rushworth,* 12 Wash. App.2d 466, 458 P.3d 1192 (2020).

The court admitted two video recordings containing police interviews of E.H. and T.B. A trial court's interpretation is reviewed de novo. *Rushworth* at 470. Decisions involving evidentiary issues lie largely within the discretion of the trial court and ordinarily will not be reversed on appeal absent a showing of abuse of discretion. *State v, Nava,* 177 Wash. App. 272, 289, 311 P.3d 83 (2013). A trial

court abuses its discretion if it improperly applies an evidence rule. *Id.*

A recorded statement given to police is inadmissible hearsay unless it qualifies for an exception to the hearsay rule. *Id.* at 290. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is not admissible except as provided by the rules of evidence. ER 802. The Court of Appeals ruled the statements in the video were not hearsay. (Appendix 13). However, to prove a lack of interference with the interview, the truth of the statements was at issue. The court did not limit the consideration of the statements to the issue of interference. The prosecutor used the video statements in her closing argument for the truth they asserted. (RP 630, 654). Thus, the statements were hearsay.

In the present case, neither prosecutor nor the court articulated a valid hearsay exception which would allow the admission of the video evidence. The prosecutor claimed that if the interview is

attacked, the video evidence is admissible despite any hearsay objection. (RP 442). She cited no authority to support her claim. The court ruled whether Ms. Dombcik took over the interview had been put into issue. (RP 439). The court felt the best way for the jury to evaluate the effect of other people on the interview was to allow the jury to see the videos. (RP 436).

The open-door doctrine is a theory of expanded relevance. *Rushworth* at 473. It permits a court to admit evidence on a topic that would normally be excluded for reasons of policy or undue prejudice. *Id.* The fact that an ordinarily forbidden topic has gained increased relevance does not result in automatic admission of evidence. *Id.* at 474. Relevance is only one test for admissibility. *Id.* Evidence is still subject to possible exclusion based on constitutional requirements pertinent states, and the rules of evidence. *Id.*

The question of whether Ms. Dombcik took over the interviews did not justify the trial court disregarding the rules of evidence. The video interviews were inadmissible hearsay. The

videos also contained evidence which violated ER 404(b). E.H. made a statement on the video that her father tried to rape her. (RP 457). A motion in limine prohibited the use of the phrase "tried to rape me." The video contained statements by E.H. saying her father called her names and hit her with a belt. (RP 465, 469). She also talked about being forced to drink alcohol which was inadmissible and violated a motion in limine. (RP 472-73). The second video contained T.B. making comments about the belt. T.B. talked about Mr. Brown trying to cheat on his mother. (RP 529). T.B. also repeated hearsay statements from his sister about the sexual misconduct. (RP 514). Admission of the videos violated evidence rules.

The *Rushworth* case involved the admission of a police officer's testimony which included a conversation with a third party. *Rushworth* at 470-73. The court reviewing the case held that the problem was not one of relevance. *Id.* at 478. The problem was that it was hearsay and was not admissible under the open-door doctrine. *Id.* Its admission was error. *Id.*

The evidence in Mr. Brown's case suffers from the same problem. The issue was not that the videos were relevant. Simply because evidence becomes relevant does not mean it still is not inadmissible under other evidence rules. The videos violated the evidence rules. A prosecutor has an ethical duty to ensure a fair trial by presenting only competent evidence on the subject. *Id.* at 476. That did not happen in Mr. Brown's case. Admitting the hearsay evidence in Mr. Brown case was error just as it was in the *Rushworth* case.

F. CONCLUSION

The Court of Appeals ruling in Mr. Brown's case conflicts with prior decisions by the Supreme Court and Court of Appeals because the prosecutor committed flagrant misconduct. This makes it a matter which is appropriate for review under RAP 13.4(b)(1) and (2).

The Court of Appeals ruling that Mr. Brown did not receive ineffective assistance of counsel conflicts with prior decisions by the

Supreme Court and the Court of Appeals. This makes it a matter which is appropriate for review under RAP 13.4(b)(1) and (2).

The Court of Appeals ruling that admission of video evidence was not error conflicted with prior decisions of the Supreme Court and the Court of Appeals. This makes it a matter which is appropriate for review under RAP 13.4(b)(1) and (2).

Based on the preceding, Mr. Brown request review be granted. RAP 13.4(b).

I certify this document contains 4,681 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 10th day of July, 2025.

/S/ Jeff Compton_____
Jeff Compton, WSBA #24082

APPENDIX

Court of Appeals Decision dated June 10, 2025

FILED
JUNE 10, 2025
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. BLAKE ANTHONY BROWN, Appellant.	)	No. 39994-0-III UNPUBLISHED OPINION

COONEY, J. — At the conclusion of trial, a jury found Blake Brown guilty of two counts of child molestation in the first degree, two counts of assault in the second degree, and one count of incest in the second degree.

Mr. Brown appeals, arguing: (1) the prosecutor engaged in multiple acts of misconduct; (2) he received ineffective assistance from his trial counsel; and (3) the court erred in admitting recordings of child forensic interviews, denying his motion for a mistrial, and failing to give the jury a unanimity instruction for the assault charges. We disagree with each argument and affirm.

BACKGROUND

Mr. Brown and Morgan Hart are the parents of two children, daughter, E.H., and son, T.B. When T.B. and E.H. were 13 and 14 years old, respectively, the Ellensburg Police Department received a Child Protective Services (CPS) referral alleging Mr. Brown had inappropriately touched E.H.

Detective Ryan Shull contacted Ms. Hart and arranged an interview with E.H. Ms. Hart and E.H. did not return to their home after the interview. Detective Shull later interviewed Mr. Brown, who denied the allegations of sexual abuse, but admitted to strangling the children, claiming he was teaching them mixed martial arts.

The State charged Mr. Brown with three counts of child molestation in the first degree listing E.H. as the victim,[1] two counts of assault in the second degree, one count naming E.H. as the victim and the other naming T.B., and one count of incest in the second degree, listing E.H. as the victim.

Mr. Brown moved, in limine, to exclude evidence of him spanking the children and hitting them with a belt. The State opposed the motion, arguing the evidence was relevant to demonstrate that Mr. Brown's disciplinary methods created fear in the children, thus explaining their delay in reporting. The court ruled the State could

[1] The State dismissed count 3 after resting its case.

introduce evidence of the children being hit with a belt or spanked, but prohibited witnesses from using the term "beaten." Rep. of Proc. (RP) at 31.

Mr. Brown also moved to exclude evidence of him forcing his children to drink alcohol or consume certain foods. The prosecutor responded that the evidence was relevant to explain why the children were unable to refuse Mr. Brown's demands and why they delayed reporting the abuse. The court granted the motion but allowed E.H. and T.B. to testify generally about their perception that Mr. Brown exerted control over them.

At trial, Ms. Hart testified about her relationship with Mr. Brown. She described Mr. Brown as "controlling" throughout the marriage and testified that she felt "verbally and emotionally abused." RP at 204. She further stated that it was not a happy marriage, and that Mr. Brown remained "just as horrible," even after returning from deployments in Iraq. RP at 207.

E.H. testified that Mr. Brown had physically, emotionally, and sexually abused her. She described Mr. Brown as intimidating and lived in fear of him lashing out at her over the smallest things. She testified that Mr. Brown used physical discipline, including hitting her with a belt and strangling both her and T.B. to the point of unconsciousness. She further testified that Mr. Brown engaged in sexual misconduct with her several times when she was 10 or 11 years old.

E.H. testified that she confided in Mr. Brown's aunt about the abuse when she was 14 years old, who then reported the abuse to CPS. E.H. testified Detective Shull interviewed her in the presence of a social worker and Ms. Hart.

T.B. testified that his childhood was marked by frequent yelling, hitting, and punishment by Mr. Brown. He recalled that Mr. Brown had struck both he and E.H. with a leather belt and had taken their money. He testified to Mr. Brown strangling him multiple times and attested to a specific incident when Mr. Brown strangled him and E.H. to the point of passing out. T.B. testified that he was interviewed by Detective Shull in the presence of Ms. Hart and his step-grandmother, Rebecca Domcbik.

Throughout the trial, Mr. Brown's attorney questioned whether the presence of others during Detective Shull's interviews of the children tainted the quality of the interviews. To rebut this allegation, the State requested it be allowed to play the recorded interviews for the jury. Mr. Brown's attorney objected, arguing he had not attacked the interviews sufficient to open the door to the recordings being played to the jury, that the recording would be duplicative of other evidence, and that the recordings would not show the presence of others in the room. The court disagreed, reasoning that the jury should be able to evaluate the effect of others being present during the interviews.

Ultimately, the jury found Mr. Brown guilty of two counts of child molestation in the first degree, two counts of assault in the second degree, and one count of incest in the second degree. The jury further found the crimes were committed against family

members. Mr. Brown was thereafter sentenced to 173.5 months to life of confinement on the child molestation charges.

Mr. Brown timely appeals.

ANALYSIS

PROSECUTORIAL MISCONDUCT

Mr. Brown argues the prosecutor engaged in acts of misconduct that, individually and collectively, deprived him of a fair trial. We disagree.

Prosecutorial misconduct warrants reversal if the defendant establishes the prosecutor's conduct was both improper and prejudicial. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011); *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). A prosecutor's misconduct is prejudicial when there is a substantial likelihood the misconduct affected the jury's verdict. *Emery*, 174 Wn.2d at 760. If a defendant failed to object to the prosecutor's alleged misconduct, then "the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." *Id.* at 760-61.

Character, Prior Bad Acts, Vouching, and Appeal to Passion of Jury

Mr. Brown argues the prosecutor attacked his character, appealed to the passions of the jury, and vouched for the State's witnesses during its summation.

Aside from citing principles of law and cataloging the offending comments, Mr. Brown fails to provide a meaningful analysis or clear argument as to why the comments were improper, how the comments were prejudicial, or why an instruction from the court could not have cured any resulting prejudice. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *Brownfield v. City of Yakima*, 178 Wn. App. 850, 876, 316 P.3d 520 (2014). Moreover, this court refrains from creating arguments for the parties. *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 138, 267 P.3d 324 (2011). Consequently, we decline review of the prosecutor's alleged improper comments.

Children's Recorded Interviews

Relying on *State v. Fisher*, 165 Wn.2d 727, 202 P.3d 937 (2009), Mr. Brown contends the State improperly used the recorded interviews as substantive evidence rather than its stated purpose of rebutting Mr. Brown's claim that the interviews were tainted by outside influences.

Mr. Brown fails to direct us to any portion of the record where the State presented the recorded interviews as substantive evidence. "Appellate courts need not consider arguments that are unsupported by pertinent authority, references to the record, or meaningful analysis." *Cook v. Brateng*, 158 Wn. App. 777, 794, 262 P.3d 1228 (2010). The recorded interviews presented to the jury were consistent with the State's intended purpose of dispelling any notion that they were tainted by outside influences.

INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Brown argues he received ineffective assistance of counsel when his attorney failed to object to testimony about his character and prior bad acts. We disagree.

Criminal defendants have a constitutionally guaranteed right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018). A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Claims of ineffective assistance of counsel are reviewed de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

A defendant bears the burden of showing (1) that his counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and, if so, (2) there is a reasonable probability that but for counsel's poor 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).

In reviewing the record for deficiencies, there is a strong presumption that counsel's performance was reasonable. *McFarland*, 127 Wn.2d at 335. The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation. *Id*. The reasonableness of counsel's performance is to be evaluated from counsel's

perspective at the time of the alleged error and in light of all the circumstances. *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Kyllo*, 166 Wn.2d at 863. A sufficient basis to rebut legitimate trial strategy exists when the defendant demonstrates there is "no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

The decision whether to object can be a trial tactic. *State v. Stotts*, 26 Wn. App. 2d 154, 165, 527 P.3d 842 (2023). Defense counsel may choose not to object to avoid highlighting otherwise inadmissible low-value evidence. *Id.* Our courts typically do not consider a failure to object as incompetence of counsel unless it occurs in egregious circumstances involving testimony central to the State's case. *State v. Vazquez*, 198 Wn.2d 239, 248, 494 P.3d 424 (2021). Absent a valid strategic reason, "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." *Id.* at 248-49.

Mr. Brown claims his trial counsel was ineffective for failing to object to inadmissible character evidence and prior bad acts. Among other statements, Mr. Brown challenges his attorney's failure to object to Ms. Hart's testimony that he is "a controlling person" and was "still just terrible" upon his return from Iraq. RP at 218, 247. He

further asserts his attorney was deficient in failing to object to E.H.'s testimony that he had "never been a nice man" and "made us all miserable." RP at 348. Mr. Brown also claims his attorney was deficient in failing to object to T.B.'s testimony that Mr. Brown had hit him with a leather belt, took his money, and constantly yelled at him.

In light of all the circumstances, defense counsel's failure to object to evidence of Mr. Brown's character and prior bad acts amounted to a legitimate trial strategy. From his opening statement, defense counsel presented a consistent theory of the case—that Mr. Brown was on trial for his manner of parenting, that E.H. and T.B. were biased against Mr. Brown due to his strict parenting, and that Ms. Hart was afraid Mr. Brown would take the children from her. Defense counsel posited that these issues motived coaching the children in what to report.

While delivering his opening statement, the State objected to defense counsel's comment, "Anytime there's a divorce, one party is trying to advance their interest, whether it's economic." RP at 195. In response to the objection, defense counsel explained to the court that "[t]his is part of my case." *Id*. Thereafter, defense counsel told the jury, "Clearly, [Ms. Hart] and the children didn't like this level of discipline." *Id*.

During the cross-examination of Ms. Hart, defense counsel attempted to impeach Ms. Hart with a declaration she had earlier authored. The State moved to exclude the declaration. In response, defense counsel argued:

> It goes to coaching the children, because here's where it ties together. This is the nexus. Because, this attorney, her stepmom [Ms. Dombcik], is present for the interview of [T.B.], is present for the interview of [Ms. Hart], and is present, I believe and I don't know this for sure, for the interview of [E.H.]. After they separate and—and [Mr. Brown] is out of the house, the children go and live with this attorney in Yakima [Ms. Dombcik]. I think she coached them as to what to say.

RP at 258. Defense counsel's theme continued when, during summation, he argued, "They wanted the discipline to stop. They were living in a disciplined household. And I told you at the very beginning of my opening, he's on trial for his parenting." RP at 643. Defense counsel further argued, "It's clear they hated him, and they wanted to get out of the house. That's their interest and they wanted to punish him." RP at 643.

Defense counsel's opening statement, arguments presented during the trial, and closing argument demonstrate his strategy was to use what may have otherwise been inadmissible evidence to Mr. Brown's benefit. Defense counsel used evidence of Mr. Brown's character and prior bad acts as proof that Ms. Hart, E.H., and T.B. harbored bias against Mr. Brown and were motived by their support of Ms. Hart gaining custody of the children.

Defense counsel's failure to object to character evidence and prior bad acts was a legitimate trial strategy. Mr. Brown did not receive ineffective assistance from his trial counsel.

ADMISSION OF RECORDING

Mr. Brown argues the court erred when, over his objection, it admitted the recorded interviews of E.H. and T.B. The State argues the admission of the recordings was within the court's discretion and necessary to rebut Mr. Brown's assertion that E.H. and T.B. were coached. We agree with the State.

We review a trial court's admission of evidence for abuse of discretion. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Deference is given to the trial court's determination even if we disagree with the trial court's ultimate decision. *State v. Curry*, 191 Wn.2d 475, 484, 423 P.3d 179 (2018).

During the cross-examination of Detective Shull, Ms. Hart, E.H. and T.B., defense counsel's questioning suggested that Ms. Dombcik participated in or inappropriately influenced the interviews or E.H. and T.B. had otherwise been improperly coached. To rebut these assertions, the State requested the recorded interviews be played to the jury. After considering the arguments of the parties, the court ruled that Mr. Brown had opened the door to the recordings being played, but ordered portions of the recordings be redacted.

Mr. Brown asserts the trial court erred in admitting the recordings because recorded statements given to law enforcement are inadmissible hearsay. Here,

Mr. Brown claims that neither the State nor the court articulated an exception to the hearsay rule sufficient to warrant admission of the recordings.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). "Hearsay is not admissible except as provided by these rules, by other court rules, or by statute." ER 802.

Mr. Brown directs us to *State v. Rushworth*, 12 Wn. App. 2d 466, 458 P.3d 1192 (2020), to support his contention that the open door doctrine is a theory of expanded relevance, not a means of admitting hearsay in violation of the rules of evidence. *Rushworth* is distinguishable. In *Rushworth*, the State sought to admit inadmissible hearsay after the defense elicited hearsay during its questioning of a witness. *Id.* at 478. There, we rejected application of the curative admissibility doctrine, instead noting that the State should have simply objected to the inadmissible hearsay. *Id.*

The facts before us are more similar to those in *State v. Wafford*, 199 Wn. App. 32, 397 P.3d 926 (2017). In *Wafford*, defense counsel explicitly referred to the victim's recorded interview during her opening statement and misrepresented that the victim had denied the abuse. At the State's prompting, the trial court held that defense counsel had opened the door to admission of the relevant portion of the video. *Id.* at 35, 39. In *Wafford*, we reasoned it did not matter whether the open door doctrine was triggered by

opening statements or the admission of evidence; the question was whether having done so affected the fairness of the trial. *Id.* at 39.

Here, like in *Wafford*, the State did not offer the recordings to prove their truth. Rather, the recordings were offered, and admitted, to rebut Mr. Brown's contention that the children's statements had been improperly influenced by a third party. In allowing the jury to view the recordings, the court found, "the issue though has been about the presence and the effect of the presence of other people in the interview and the interviews seem, to me, to be the best way for the jury to make that—that decision themselves." RP at 438. Because the recordings were not offered to prove the truth of the matters asserted, the recordings were not hearsay.

Defense counsel consistently questioned the integrity of the interviews. Admission of the recordings restored fairness to the trial. The trial court did not abuse its discretion in allowing the jury to view the recorded interviews of E.H. and T.B.

UNANIMITY INSTRUCTION

Mr. Brown argues the trial court erred when it failed to provide the jury with unanimity instructions for the two charges of assault in the second degree. We disagree.

We review a challenged jury instruction de novo. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). "To convict a person of a criminal charge, the jury must be unanimous that the defendant committed the criminal act." *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990). A case is characterized as a multiple acts case if the

State presents evidence of multiple acts of alleged misconduct and any one of the acts could satisfy the elements of the count charged. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). In such cases, because the jury must unanimously agree that one such act satisfied the elements of the count charged, the court must either instruct the jury to agree on a specific criminal act, or the State must elect which act the jury shall rely on. *Id.* In a multiple acts case, if there is no election and no unanimity instruction to the jury, prejudice is presumed. *Id.* at 512. When such an error results in prejudice, the error is subject to constitutional harmless error analysis, and the conviction will be overturned unless the error was harmless beyond a reasonable doubt. *Id.*

Here, the court did not err when it failed to provide the jury with a unanimity instruction for the assault charges because the State elected one instance of strangulation for each count of assault. The prosecutor explained in her openings statement, "And, [T.B.] will describe one particular instance that he remembers at a house that they lived in on Spokane Street. Again, he says this is a very frequent occurrence with his dad, but he's able to describe specifically one instance with him and [E.H.]." RP at 192. Thereafter, the State elicited testimony from Ms. Hart, E.H., and T.B. about this specific instance of assault. Finally, the State focused on this same incident reported by Ms. Hart and the children in its closing argument.

Although similar instances of Mr. Brown strangling E.H. and T.B. were admitted, the State elected a single act for the jury to rely on for each count. Thus, a unanimity instruction was unnecessary.

The court did not err in failing to give the jury a unanimity instruction for the two counts of assault in the second degree.

DENIAL OF MOTION FOR A MISTRIAL

Mr. Brown argues the court abused its discretion when it denied his motion for a mistrial after evidence previously ruled inadmissible was shown to the jury.

A trial court's decision to deny a motion for a mistrial is reviewed for abuse of discretion. *State v. Thompson*, 90 Wn. App. 41, 45, 950 P.2d 977 (1998). The court should grant a mistrial only when the defendant is prejudiced such that nothing short of a new trial will ensure that the defendant will be tried fairly. *Id.* The trial court is best situated to determine the impact of any irregular occurrence during the trial. *Id.* at 45-46.

On review, this court will determine the prejudicial effect of any irregular occurrence by considering its seriousness, whether it involves cumulative evidence, and whether the court properly instructed the jury to disregard it. *Id.* at 46.

Here, the court excluded statements from T.B. about Mr. Brown's unfaithfulness to Ms. Hart. In violation of the court's ruling, evidence of Mr. Brown cheating on Ms. Hart was presented to the jury during T.B.'s interview:

> [DETECTIVE SHULL]: Can you remember anything else that may have been going on around that time?
>
> [T.B.]: No. *Only that he was trying to cheat on my mom.* Practically—I don't know what was going on, but my mom stayed with him. I don't know why.

RP at 529 (emphasis added). Before the recording was presented to the jury, the parties reviewed the transcript for necessary redactions. Nevertheless, the portion of the recording containing T.B.'s statement about Mr. Brown's alleged perfidy was not redacted.

Mr. Brown moved for a mistrial after the State rested its case. Although Mr. Brown did not object when the offending statement was made to the jury, Mr. Brown did timely move for a mistrial. A defendant must give the court the opportunity to take corrective action in order to preserve the issue for appeal. *State v. Koch*, 126 Wn. App. 589, 597-98, 103 P.3d 1280 (2005) (moving for a mistrial preserves the issue for appeal even if no objection is raised because it gives the court an opportunity to remedy). The court denied the motion, reasoning that even though T.B's statement violated an order in limine, it did not rise to the level of depriving Mr. Brown of a fair trial. We agree with the court's assessment.

While the statement was more prejudicial than probative, it was only one statement made in the context of substantial evidence that projected Mr. Brown in a

negative light. Further, the trial court offered to give a limiting instruction, directing the jury to disregard the statement. Defense counsel declined the court's offer.

Because the statement did not prejudice Mr. Brown to the point that nothing short of a new trial would ensure he was tried fairly, the trial court did not abuse its discretion in denying the motion for a mistrial.

Affirmed.

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.

Cooney, J.

WE CONCUR:

Fearing, J.

Murphy, M.

HAGARA LAW PLLC

July 10, 2025 - 11:05 AM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. Blake Anthony Brown
Superior Court Case Number:	19-1-00156-8

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