No. _____

COA No. 58463-8-II
Pierce Cty. No. 22-1-01901-0

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff / Respondent / Respondent,

v.

JERRY LEE MICHEAU,
Defendant / Appellant/ Petitioner.

ON REVIEW FROM
THE COURT OF APPEALS, DIVISION TWO,
AND PIERCE COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PARTY AND DECISION BELOW

Petitioner Jerry Micheau, appellant below, seeks review of a portion of the unpublished decision of the Court of Appeals, Division II, issued on July 29, 2025. A copy of the decision is attached as Appendix A.

In the relevant portion, Division Two affirmed two convictions for first-degree child molestation based on allegations raised by teens LG and GG years after the fact.

B. ISSUES FOR WHICH REVIEW SHOULD BE GRANTED

Division Two erred in applying sufficiency of the evidence standards of review and in other parts of its analysis under the "reasonable probability" standard in concluding a lack of prejudice from improper admission of bolstering evidence, counsel's ineffectiveness, if any, regarding that evidence, and in finding no prosecutorial misconduct in misleading the jury as to its burden of proof and misstating the law below.

1. Does a reviewing court consider the evidence in the light most favorable to the state and ignore any weaknesses in the prosecution's case in determining prejudice from errors other than "sufficiency of the evidence" or did Division Two err in using those standards for evaluating prejudice for evidentiary error and ineffectiveness relating to that error?

   Should the Court grant review under RAP 13.4(b)(4) because ensuring that lower appellate courts use the proper standards of review is of significant public interest and import?

2. Should review be granted under RAP 13.4(b)(1) because Division Two's decision conflicts with this Court's decision in *State v. Bertrand*, 3 Wn. 3d 116, 546 P.3d 1020 (2024), which held that prejudice for ineffective assistance is not evaluated by using the "sufficiency of the evidence" standard? Does Division Two's decision also conflict with *Bertrand* because the lower appellate court here did not consider the totality of the evidence as *Bertrand* requires?

3. In *State v. Jones*, 183 Wn.2d 327, 352 P.3d 776 (2015), this Court rejected the same theory of evidence Division Two relied on here - that a witness' testimony has no effect on jurors if it is "similar to that of others" or cumulative in a case where credibility is crucial. Division Three reached a similar conclusion in *State v. Stotts*, 26 Wn. App. 2d 154, 527 P.3d 842 (2023), holding that if credibility is crucial and the evidence of

guilt sufficient to convict but not overwhelming, testimony which is cumulative but bolstering causes prejudice under the "reasonable probability" standard. Does the decision below conflict with this decision as well as *Jones* and should review be granted under RAP 13.4(b)(1) and (2)?

4. The prosecutor told jurors over defense objection that if they found the alleged victims were "credible" when the teens had testified that they were telling the truth and had only disclosed the sexual assaults they claimed Mr. Micheau had committed because those assaults had actually happened, jurors then had "no reasonable doubt." Should this Court grant review to address whether a prosecutor commits misconduct and misstates their burden in so declaring because that jurors could believe an accuser was credible and was doing her best to tell the truth but still find that the state had not proved guilt beyond a reasonable doubt?

C. STATEMENT OF THE CASE

For years, LG, GG, their little brother, their mom, Stacy Bleuel and her girlfriend, Trina Climer, were homeless off and on and Petitioner Jerry Micheau, a family friend, helped out, letting them stay with him periodically in his one-bedroom apartment and, sometimes with his girlfriend, babysitting and

assisting with homework. RP 387-402, 414, 433-35, 469-70, 493, 504-505.

Mr. Micheau's apartment had a bunk bed and the kids slept on the top while he and his girlfriend, if she was there, were on the bottom. RP 357-88, 404-405, 418-20. Although they admitted he had never once suggested it, the girls actually would fight to be the one who got to cuddle with Mr. Micheau or sleep next to him on the bed. RP 357-88, 404-405, 418-20.

Many years later the girls were teens getting in trouble in high school and home, skipping school, lying about it, and losing phone privileges when, during an effort to get the phones back, LG disclosed to her mom that she had been improperly touched as a child. RP 362-64, 381, 396-97, 429-39, 481, 507-12. After asking first and being told what LG had claimed, GG then made a similar claim. RP 473-74, 481-82. At that point, the teens were not longer in trouble and got their

phones back, also staying home from school without issue the next day. RP 517-18.

Initially, the teens refused to go to police about the claims but eventually their mom forced the issue and a police sergeant, Kelly Custis, scheduled forensic interviews and watched while a child interviewer with the Pierce County Prosecutor's Office, Kari Arnold, performed them. RP 473-74, 507-508, 521-26, 558-59. Both Ms. Arnold and Sergeant Custis testified that LG and GG had identified Mr. Micheau as the perpetrator in those interviews. RP 521-26, 558-59.

At trial, LG testified that she was between seven and nine years old, "spooning" with Mr. Micheau when he touched her "over the clothes" and grabbed and squeezed for a second near where the pee came out. RP 379. He said nothing, did not touch anywhere else, and it never happened again. *Id.*

Teen GG testified at trial that she was between eight and ten, woke up one night when sleeping with him, felt his

hand "rubbing on" her stomach and his fingers go towards her waistband. RP 421, 424, 437-38. She first said they did not "go in," then said the touching was mostly on her stomach and just with his fingertips and he stayed at her waist but went inside the waistband, just below her belly button. RP 425-28, 438, 457.

When telling the forensic interviewer what happened, GG said LG was also on the bed at the same time that this alleged touching occurred. RP 438-43. She did not make that claim - or even recall it - at trial. *Id.*

Stacy Bleuel, the teens' mom, thought she had once walked by the open door to the bedroom in the middle of the night when the kids were younger and seen Mr. Micheau run his hand from GG's neck down her back and squeeze her buttock over her clothes for a second, but when she and Trina Climer, the teens' other parent, had asked explicitly if Mr. Micheau had ever touched them inappropriately they said no.

RP 388, 432-33, 448, 499-501, 513.

At trial, LG admitted she had thought it was all a dream but then she and GG had talked and LG decided it was not. RP 383-84, 388, 395-96, 403.

Before trial, the court ruled that the State could not elicit from either parent, Ms. Climer or Ms. Bleuel, that the teens had identified Mr. Micheau as the perpetrator when they disclosed. CP 41-45, RP 28-31, 135. The trial court's written order said that the State could not ask witnesses other than LG or GG "about the identity of the [alleged] perpetrator." CP 64-65, 82-83, 95-96.

But at trial, when Ms. Climer was the first parent on the stand, the prosecutor elicited that she had come home from work the day of the disclosure, seen LG and Ms. Bleuel crying, and asked what had happened and that LG had then responded, "**Jerry** [Micheau]." RP 472 (emphasis added). Counsel's hearsay objection was sustained. RP 472.

The prosecutor asked again and Ms. Climer repeated, "[a]ll she said was, '**Jerry**.' And then - -." RP 472 (emphasis added). Counsel's hearsay objection was overruled after the prosecutor raised "excited utterance." RP 472. A third time, the prosecutor asked and this time Ms. Climer said that LG "said **Jerry** had touched her[.]" RP 472-73, 481 (emphasis added).

Ms. Climer also testified that she had gone upstairs and asked GG "if **Jerry** had ever touched her inappropriately, because we just found out from L[. G] . . .that **he had been touching her.**" RP 473-74 (emphasis added). Ms. Climer said GG confirmed being touched but not "what he did." RP 473-74. Counsel did not repeat the overruled objection. RP 472-74.

Then, when Ms. Bleuel was testifying, she said that GG had left during the fight, Ms. Bleuel had demanded the "truth" from LG about why the teen was behaving this way, LG

started crying and said she had been touched by somebody and Ms. Bleuel then asked, ""[b]y who? **Jerry** [Micheau]?" RP 507 (emphasis added). Ms. Bleuel testified her daughter had responded "yeah," and Ms. Bleuel had asked LG if she was kidding but LG repeated her claim. RP 506-508.

The defense was always that the crimes had not occurred and the teens had made up the allegations to try to get out of trouble and get their phones back. On direct examination, the prosecutor asked each teen if they had disclosed the alleged sexual assaults because they were telling the truth and the assaults had actually occurred or if they were lying to get their phones back. Each teen said they had disclosed because it was the truth.

On review, Mr. Micheau argued *inter alia* that the admission of the identifications through Ms. Climer and Ms. Bleuel was reversible error, that if any of that testimony was not preserved because of trial counsel not continuing to object

that was prejudicial ineffective assistance, and that the prosecutor committed serious misconduct which required reversal by telling jurors over defense objection in rebuttal closing that if they found that LG and GG were credible when they testified they had been truthful in making the accusations, there was no "reasonable doubt."

The Court of Appeals, Division Two, ultimately held that assuming there was evidentiary error, or ineffective assistance, or misconduct, reversal was not still required because there was not a "reasonable probability" that the outcome would have been different if any of those errors had not occurred, even though the entire case was about credibility and without considering the impact of those errors on that issue. App. A at 1-28. This Petition follows.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

DIVISION TWO IMPROPERLY APPLIED "SUFFICIENCY OF THE EVIDENCE" STANDARDS AND ERRED IN ITS CONCLUSIONS IN THIS CREDIBILITY CASE

Below, Division Two recognized the trial court's pretrial ruling excluding the testimony from Ms. Bleuel and Ms. Climer relating the hearsay accusations identifying Mr. Micheau, and that the prosecution had promised *not* to elicit such testimony but then did. App. A at 2, 10-14. For that evidentiary error, however, and for all other guilt phase issues raised by Mr. Micheau, Division Two used the same analysis in holding that, even if there was error, reversal was not required. App. A at 10-18, 21, 21 n. 6. That analysis, however, was fatally flawed, because Division Two applied "sufficiency of the evidence" standards to non-sufficiency issues on review. Further, Division Two reached its conclusions while ignoring the bulk of the potential prejudice the errors would have caused, without taking into full consideration how crucial credibility was to the

case. The convictions were affirmed based on Division Two's apparent belief that the evidence was sufficient to convict, not based on the proper evaluation of the prejudice caused by the relevant errors.

For all of the errors, a "reasonable probability" standard of review for prejudice applies. For improper admission of evidence such as the parents' hearsay repeating LG and GG's identifying Mr. Micheau as the perpetrator here, the reviewing court asks if,"within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." *See, State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

For counsel's ineffectiveness, if any, in failing to properly preserve several of the improper statements from the parents by continuing to object, the "prejudice" prong of the analysis asks if there is a reasonable probability that, had counsel's unprofessional errors not occurred, the outcome

would have been different. *State* v. *Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011), *cert. denied sub nom Grier v. Washington*, 574 U.S. 860 (2014); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). A "reasonable probability" means *less* than a preponderance of the evidence. *Grier*, 171 Wn.2d at 42.

For the misconduct objected to below, the Court asks whether within reasonable probabilities the outcome of the trial was materially affected by the misconduct. *See State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1992).

The Court of Appeals essentially used the same analysis for all three errors in finding no such "reasonable probabilities" here. For the evidentiary error and the ineffectiveness, Division Two found no prejudice because the victims themselves had identified Mr. Micheau and said they told their parents it was him, and the officer and forensic investigator had reported the teens identifying him, too. App. A at 13-15.

Thus, Division Two held, there was already "similar testimony." App. A at 14-15. For the misconduct at issue on review, the Court of Appeals found it was not misconduct but did not address the potential prejudice below. *See* App. A at 22-23.

In reaching its conclusions about the lack of prejudice from the evidentiary error and counsel's potential ineffectiveness, however, the Court of Appeals used the standards for evaluating the "sufficiency of the evidence," not for the specific errors. It took the evidence in the light most favorable to the state and said that, because LG and GG had already identified Mr. Micheau as the perpetrator and had said they told their parents that, too, and because the sergeant and forensic questioner had repeated that LG and GG had identified him in the interviews, Division Two declared the error in admission of the parents testimony "harmless." App. A at 15. It did so for the statements it said were *not* preserved,

and for the determination whether prejudice occurred from counsel failure to preserve them. App. A at 16-18.

This Court should grant review. The "reasonable probability" evaluation for evidentiary error "does not turn on whether there is sufficient evidence to convict without the inadmissible evidence." *State v. Gower*, 179 Wn.2d 851, 857, 321 P.3d 1178 (2014). Division Two did not discuss all of the evidence in a neutral fashion to determine if admission of the evidence or counsel's ineffectiveness on that evidence caused prejudice. It focused solely on whether the testimony was "cumulative" but failed to properly examine the actual prejudice before declaiming no "reasonable probability" requiring reversal in this case. App. A at 15-19.

Further, Division Two is simply wrong that evidence has no prejudicial impact if it is cumulative. *See Jones*, *supra*. In *Jones*, the lower appellate court found no prejudice when testimony was not presented because that testimony was

"similar to others" and would have just provided corroboration. 183 Wn.2d at 336. On review, however, this Court rejected that premise and condemned the same belief Division Two applied here - that "evidence will not affect the outcome if it was cumulative[.]" 183 Wn.2d at 336.

Instead, this Court made clear in *Jones*, credibility determinations can be affected by repetitive, bolstering testimony. 183 Wn.2d at 344. Even if cumulative, repetition of evidence supporting one side from another witness can tip the balance for a reasonable juror and have an impact - even if the bulk of evidence is still on the other side. *Id.*

Similarly, in *Stotts*, Division Three reversed despite sufficient evidence to convict because witness credibility was "material" to the State's case, the inadmissible evidence was significant to that issue "either in quality or in quantity," and the evidence of guilt, while sufficient, was not overwhelming. 26 Wn. App. 2d at 175-76.

Further, Division Two did not properly evaluate the actual potential impact of the hearsay from the parents confirming the claims of the teens. The testimony amounted to prior consistent statements. *See Thomas v. French*, 99 Wn.2d 95, 103, 659 P.2d 1097 (1983). The testimony of a witness cannot be "bolstered by showing that the witness has made prior, out-of-court statements similar to and in harmony with" her testimony on the stand. *Id.* Such "prior consistent statements" are not proper because "[r]epetition generally is not a valid test of veracity." *See State v. Purdom*, 106 Wn.2d 745, 750, 725 P.2d 622 (1986). Further, the repetition and "bolstering" can have a great influence on jurors. *Id.*

Division Two's limited examination of the potential prejudice from these errors was improper and led to an improper result.

Notably, much of the parents' testimony was *not* cumulative. While it included the same claim that the teens

had named Mr. Micheau as the perpetrator, that testimony also included indications that the parents themselves suspected him even before he was named (when Ms. Bleuel specifically asked "who, Jerry?") (RP 507), *and* that they *believed* the claims (when Ms. Climer testified that she asked GG if Mr. Micheau had sexually assaulted her because the parents had just "found out" from LG "that he had improperly touched her") (RP 473-74).

Division Two's decision also conflicts with *Bertrand.* In that case, this Court held that the *Strickland* prejudice prong is *not* answered by asking "if there is sufficient evidence supporting the jury's verdict." 3 Wn. 3d at 124. Indeed, the Court noted, sufficiency of the evidence analysis is far different and requires taking the evidence in the light most favorable to the State. *Bertrand*, 3 Wn.3d at 124, 139. The Court made it clear that the reviewing court is *not* supposed to take the evidence in the light most favorable to the state in

evaluating prejudice from ineffectiveness. *Id.* Further, the Court looked at the totality of the evidence - not just that favoring the State - in making this determination. *Id.*

Here, Division Two did not look at the totality of the evidence. App. A at 15-19. It focused only on the evidence supporting the convictions, taking it in the light most favorable to the state and not discussing any of the weaknesses in the State's case. *Id.* Review should be granted because Division Two's decision is in conflict with *Bertrand*.

The decision also fails to properly evaluate prejudice in light of the importance of credibility here. As this Court has noted, reasonable jurors evaluating evidence "may draw different reasonable inferences from the evidence presented at trial[.]" *Bertrand,* 3 Wn.2d at 140. Jurors are tasked with judging credibility and weighing evidence, drawing such inferences as they see fit. *Id.* The State's case depended solely on credibility. There was no physical evidence. There

were weaknesses in the states case, including that lack, the timing of the disclosures years later, and the circumstances of the girls being in trouble and trying to get out when the disclosures occurred. A reasonable juror could well have been affected by the additional bolstering testimony of the parents repeating the claims that LG and GG had said Mr. Micheau had sexually assaulted them.

Division Two's decision shows it believed that Mr. Micheau was required to show that the errors below "more likely than not **altered the outcome**," or that without those errors he would not have been convicted, but that is not correct. The Court declared itself "not persuaded" that there was a reasonable probability "*that a reasonable jury would not have still found Micheau guilty*," relying on LG and GG's testimony and the strange declaration that "identity" was not "central to the defense." App. A at 18-19 (emphasis added).

That is not the standard and Division Two mistakes the

nature of the evidence in the case. Whether a reasonable jury could have found Mr. Micheau guilty is a *sufficiency* question. "Overwhelming evidence" of guilt only exists if there is so much untainted evidence that no reasonable juror would have failed to convict even absent the error. *See*, *e.g.*, *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). But there is not "overwhelming evidence" of guilt here.

The State's case depended entirely upon credibility. The question here is not whether a reasonable jury could still have convicted but whether by less than a preponderance, had the improperly admitted evidence not been admitted or counsel's ineffectiveness regarding that evidence not occurred, a reasonable juror could have had a reasonable doubt about guilt. Here, where credibility was the issue below, and the improperly admitted evidence directly bolstered the credibility of the accusers and the State's case, it would easily have tipped the balance in the State's favor in

this close case.

Finally, the Court should grant review on the issue of the misconduct in rebuttal closing. The prosecutor first reminded jurors that both teens had said they were being truthful when they said Mr. Micheau had sexually assaulted them. RP 650. The prosecutor told jurors they were asked if they had disclosed because they were "trying to tell the truth or . . . trying to make something up" to get their phones, "[t]hey said, we were being truthful, we were telling the truth. **If you find their testimony credible on this point, then there is no reasonable doubt**." RP 650 (emphasis added). After counsel objected on misstating the burden the court overruled but told jurors the parties' arguments were not evidence of the law, the prosecutor repeated, "**[s]o there would be no reasonable doubt on this point**. All right?" RP 651 (emphasis added).

Division Two interpreted this as a permissible response

to the attack on the teens' credibility, saying it was focused only on whether they had made the allegations to get back their phones. App. A at 22-24. The context was not just that saying that the teens had denied caring about their phones it was that they said *they were telling the truth when they claimed Mr. Micheau had sexually assaulted them* and were not just making it up to get back their phones. This Court should grant review to address this serious misconduct, objected to below, and should find it requires reversal and remand for a new trial.

E. CONCLUSION

The convictions here were not supported by any physical evidence but were based solely on the credibility of claims which were raised years after the alleged incidents, when the accusers, now teens, were in trouble at school at home, had lost their phone privileges, were skipping school and lying about it to their parents, and were fighting with their

mom trying to get their phones back. Division Two used the wrong standards in determining that there was not a "reasonable probability" any of the errors here had an effect on the outcome of the case, even though all of those errors went directly to the only issue of credibility. Its decision conflicts with *Bertrand* and *Jones.* It also erred in finding no misconduct below. This Court should grant review.

DATED this 28th day of August, 2025.

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Filed
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Court of Appeals
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July 29, 2025

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JERRY LEE MICHEAU, Appellant.	No. 58463-8-II UNPUBLISHED OPINION

CHE, J. — Jerry Lee Micheau appeals his convictions and sentence for two counts of first degree child molestation.

Micheau, a family friend and "uncle" to the children, sexually assaulted LG and GG when they were in elementary school. Several years later, LG and GG disclosed the sexual assaults to their mother and her girlfriend.

In motions in limine, the prosecutor agreed he would elicit disclosure testimony identifying Micheau only from LG, GG, and two professional witnesses. But during trial, after LG and GG testified, the prosecutor sought testimony through the sisters' mother and their mother's girlfriend about the disclosures, including that LG and GG identified Micheau as the person who touched them. Relevant to this appeal, their mother and her girlfriend collectively mentioned LG and GG's identification of Micheau four times. While the trial court sustained Micheau's objection to the girlfriend's first mention of LG's identification of Micheau, the trial court overruled the second objection under the "excited utterances" exception to hearsay.

Micheau did not raise additional objections to the mother's or her girlfriend's subsequent testimony regarding the girls' disclosure to them, which Micheau now challenges on appeal.

During closing arguments, the prosecutor discussed the definition of sexual contact and stated that, if the jury found LG and GG's testimony credible regarding the context of the disclosures, "then there is no reasonable doubt," among other statements. The jury found Micheau guilty of two counts of first degree child molestation. At sentencing, the trial court found Micheau indigent but ordered him to pay community custody supervision fees. The trial court also ordered Micheau to obtain a mental health assessment and treatment.

Micheau appeals arguing that (1) reversal is required because the trial court erroneously admitted statements under the excited utterances hearsay exception, (2) his counsel provided ineffective assistance by failing to object to some of the testimony following the "excited utterance," (3) the prosecutor committed misconduct by misleading the trial court regarding testimony to be elicited about the disclosures to the mother and girlfriend, (4) during closing argument, the prosecutor misstated and minimized the State's burden of proof and misstated the law and facts, and Micheau's counsel provided ineffective assistance by failing to object such statements, and (5) cumulative error compels a new trial. Further, Micheau argues the conditions requiring payment of community custody supervision fees and ordering Micheau to undergo mental health evaluation and treatment should be stricken.

We hold that (1) while evidentiary error occurred related to one of the challenged identification instances, such error was harmless and Micheau failed to preserve for review any challenge related to the other instances, (2) Micheau fails to show ineffective assistance of counsel related to the challenged testimonies, (3) Micheau fails to show that the prosecutor's

actions related to the identification testimonies amounted to misconduct, (4) Micheau fails to show that the prosecutor's statements in closing arguments were misconduct and, thus, fails to show ineffective assistance of counsel too, and (5) the cumulative error doctrine does not apply. We also hold that the condition requiring community custody supervision fees be stricken and the mental health evaluation and treatment condition should be stricken unless the trial court makes the requisite findings.

Accordingly, we affirm Micheau's convictions but remand for the trial court to strike the community custody supervision fees and consider whether to order the mental health evaluation and treatment condition according to statutory requirements.

FACTS

Background

High-schoolers LG and GG knew Micheau[1] for most of their lives as a family friend and "uncle." 5 Rep. of Proc. (Mar. 1, 2023) (5 RP) at 412. When LG and GG were of elementary school age, they experienced homelessness along with their younger brother, mother—Stacy Bleuel, and their mother's girlfriend—Trina Climer. During this time, the family would occasionally stay at Micheau's one-bedroom apartment.

When LG was between seven and nine years old, Micheau touched LG in a way that made her scared and uncomfortable. LG and Micheau were alone in Micheau's apartment, sleeping in his bed, when LG woke up to Micheau grabbing and squeezing her vagina over her clothes.

[1] Micheau was born in 1970. Ex. 1. Neither LG nor GG were married to Micheau.

Micheau also inappropriately touched GG when she was between eight and ten years old. GG awoke from sleep to find Micheau rubbing her stomach. She then felt his fingers approach the waistband of her clothes and rub his hand back and forth a "couple of times" over her stomach and pants. 5 RP at 424. Micheau's fingers went underneath the waist of her pants, which were sitting below her belly button on her hips, and "brushed his fingers just beneath the pant line." 5 RP at 427. GG felt "frozen" and did not know what to do so she turned onto her side and went back to sleep. 5 RP at 422.

Several years later, LG and GG skipped school and had their phones taken away. LG began crying in front of Bleuel who "could tell [LGs crying] wasn't about the phone." 5 RP at 506. When Bleuel asked LG what was going on, LG said she had been touched by Micheau. 5 RP at 506-07. When Climer came home, GG confirmed to Climer that Micheau also touched her. Both LG and GG later met with Keri Arnold, a child forensic interviewer, and Sergeant Kelly Custis. LG and GG and disclosed to them in forensic interviews that Micheau had sexually assaulted them.

Procedural Facts

The State charged Micheau by amended information with two counts of first degree child molestation occurring between January 1, 2013, and November 20, 2018. CP at 6-7, 106-07.

Both Micheau and the State filed motions in limine. CP at 38-49, 56-57. In the State's motion, it asked the trial court to admit LG and GG's disclosures and described the anticipated testimony as including LG and GG's disclosures to Bleuel and Climer. Micheau moved for any hearsay evidence to be excluded and argued specifically that any testimony regarding the disclosures should be limited to the fact that the disclosures of sexual assault occurred.

On February 23, 2023, the court heard argument on the motions in limine. Related to the anticipated identification testimony, the trial court asked the prosecutor whether the only statement of identity was in the forensic interview, and the State responded:

> That's really the only one that I would be going into. I mean, in regards to kind of how -- how there was a statement of identity with [Bleuel], I think that's debatable if [Bleuel] raises it, but then child says, yeah, this was the person, whether that is a statement of identification or not, either way, I'm not really planning on admitting it through them anyway.

1 RP (Feb. 23, 2023) at 32-33.

The court issued an order on February 27, granting the defense's motion to limit the identification testimony "subject to judicial review of caselaw. State may ask, 'Did [alleged victim] make a disclosure of sexual assault?' State may not ask witnesses other than LG and GG about the identity of the [alleged] perpetrator." Clerk's Papers (CP) at 84 (alterations in original). Also on February 27, the court revisited the State's motion addressing disclosure testimony. After performing additional research on the topic and upon considering the "four disclosures that the State is seeking and whether identification comes in," the trial court determined that a statement of identification was admissible under ER 801(d)(1)(iii) and granted the State's request to admit identification disclosure statements from the forensic interviews.[2]

2 RP (Feb. 27, 2023) (2 RP) at 131, 134-135; CP at 95-96.

The following exchange then occurred:

> [TRIAL COURT]: Any issue with only asking that of the two -- regarding the two –

[2] ER 801(d)(1)(iii) provides that a statement is not "hearsay" if the declarant testified at trial, the declarant is subject to cross examination concerning the statement, and the statement is "one of identification of a person made after perceiving the person."

[PROSECUTOR]: Yeah.

[TRIAL COURT]: -- disclosures that actually identify him?

[PROSECUTOR]: Yeah. It would be asked to Sergeant Custis and [] Arnold.

[TRIAL COURT]: Okay.

[PROSECUTOR]: But not the other two adults.

2 RP at 135. In a second order dated February 28, the trial court granted the State's motion to admit LG and GG's statements identifying Micheau to others in their forensic interviews and Micheau agreed that the State could inquire of Arnold and Sgt. Custis as to who LG and GG identified in their forensic interviews.

Trial

Witnesses testified consistently with the facts above. Additionally, LG, GG, Climer, and Bleuel each testified regarding LG and GG's disclosures to Climer and Bleuel.[3]

LG testified that, a year prior to trial, she told Bleuel that someone had touched her. LG told Bleuel that "[Micheau] had touched me. I said that something had happened with [Micheau]." 5 RP at 397. GG then testified that, once LG told Climer, she disclosed to Climer that Micheau had touched her too.

Climer testified that, on the date of the disclosures, she arrived home and saw Bleuel and LG crying. Climer later testified, "then I asked them what was the matter, and [LG] said, '[Micheau].'" 5 RP at 472. Micheau's counsel raised a hearsay objection, and the trial court sustained the objection.

[3] LG testified first, then GG, Climer, and Bleuel testified respectively.

Climer testified that both Bleuel and LG were crying and that LG "couldn't even talk. She was crying . . . so bad." 5 RP at 472. The prosecutor then asked Climer what LG said, and Climer stated, "All she said was, '[Micheau].'" 5 RP at 472. Micheau's counsel again objected on the basis of hearsay. This time, the trial court overruled the objection after the prosecutor asserted that he laid foundation for excited utterance.

Climer then repeated that "[LG] said [Micheau] had touched her," and testified that, when she went to speak with GG, Climer asked her "if [Micheau] had ever touched her inappropriately." 5 RP at 473. Micheau's counsel did not object to either statement.

When Bleuel testified next, she described finding LG crying and, upon asking LG what was going on, LG told Bleuel that somebody touched her. Bleuel then stated, "I said, 'By who? [Micheau]?'" 5 RP at 506-07. Micheau's counsel did not object. Bleuel then testified that, after Climer came in and saw Bleuel and LG crying, Climer asked "What's the matter?" and LG "just looked up and said, '[Micheau].'" 5 RP at 507. Micheau's counsel did not object.

During the State's closing arguments, the following statements occurred:

> [PROSECUTOR]: So what that leaves is whether or not there was sexual contact between [] Micheau and [GG] and [LG]. So sexual contact is separately defined within your Jury Instructions. And it says that it's "Any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party."
>
> [argument regarding "any touching"] . . . .
>
> Next part, sexual or other intimate parts. Now, this is not defined within your Jury Instructions. So think about common sense and experience, what do these things mean to you? . . . What are the intimate parts of the human body? And we talked about people might have individual sensitivities and things like that. And G.[G.] certainly said that she was uncomfortable when this touching occurred. But largely, it's areas covered by clothing.

> Her testimony was he was underneath her clothing. He was rubbing along the waist. His fingers were going underneath the pant line, below the belly button. If you think about a female wearing a bikini swimsuit, this is going underneath the bikini bottom.
>
> [MICHEAU]: Objection.
>
> [THE COURT]: Overruled.
>
> [PROSECUTOR]: All right.
>
> So that's an intimate part.
>
> Next part, gratifying sexual desires. Think about [GG's] description. She said he was touching and rubbing back and forth. It was repeated. Fingers underneath the pant line. What was the context? The context as it was at night, no one else was around, it was in Mr. Micheau's bed, they were cuddling.
>
> What other reason would Mr. Micheau have to touch [GG], in this way, in this context, other than it being sexual? Other than it being done to gratify his sexual desire? I submit to you that all of the elements of Count I have been proven beyond a reasonable doubt.

7 RP (Mar. 6, 2023) (7 RP) at 628-30.

Regarding LG, the prosecutor then described how "she woke up to [] Micheau with his hands grabbing and squeezing her vagina . . . it happens at night, no one else is around, it's in the bed, it's preceded and followed by cuddling. What other reason would he have to touch [LGs] vagina in this way, except for it being sexual? It's done for the purposes of gratifying sexual desire." 7 RP at 630-31.

Micheau's counsel began closing arguments by stating, "[t]he girls didn't offer disclosure, they took another swing at getting their phones back. [LG] was taking another swing at getting her phone back and [GG] backs her up. That's what we have here." 7 RP at 636-37.

During rebuttal, the prosecutor then stated:

> I want to talk about this question that's sort of been interwoven throughout the course of trial. Did [LG] and [GG] disclose to their mom because they were telling the truth about what really happened to them, or were they disclosing to their mom something false to try to get their cell phones back? The question is whether this is reasonable doubt. And I submit to you it absolutely is not for numerous reasons, and let's go through some of those.
>
> So think about their testimony, right? [LG] and [GG] were asked this question on the stand. You know, "What is the ultimate purpose of you telling your mom? Was it because you were trying to tell the truth or were you trying to make something up to get your phone." They said, we were being truthful; we were telling the truth.
>
> If you find their testimony credible on this point, then there is no reasonable doubt.
>
> [MICHEAU]: Objection, misstates the burden and …
>
> [THE COURT]: Overruled. But I will advise the jury to read their instructions and decide this case based on the instructions that were given to you. Also, I'll remind you that the attorneys' comments are argument only and not evidence or the law.
>
> Go ahead, [State].
>
> [PROSECUTOR]: So there would be no reasonable doubt on this point. All right?
>
> So let's think about [Bleuel's] testimony. She testified that before [LG] disclosed, there was a moment where she broke down, she was shaking, she became very emotional. She knew as a mother – she had seen [LG] cry before – and she knew something was wrong. Something was really wrong. It wasn't about the cell phones anymore. If you find [Bleuel's] testimony credible on this point, then there's no reasonable doubt as to this phone theory.

7 RP at 650-51.

The jury found Micheau guilty of two counts of first degree child molestation.[4] CP at 130-31.

[4] Under the former applicable statute, a person was guilty of first degree child molestation if they had, or knowingly caused another person under the age of eighteen to have, sexual contact with

In a pre-sentence investigation ("PSI") completed by the Department of Corrections ("DOC"), the DOC identified both sexual deviancy and mental health issues requiring attention to reduce Micheau's re-offense risk. CP at 148. The DOC recommended that Micheau should obtain a psychosexual evaluation as well as a mental health assessment and follow all treatment recommendations. CP at 149.

At sentencing, the trial court found Micheau indigent as defined in RCW 10.101.010(3)(a)-(d) and waived certain legal financial obligations due to indigency. The trial court sentenced Micheau to an indeterminate sentence of 67 months to life, with both counts running concurrently. The trial court also imposed various conditions including psychosexual evaluation and several other conditions in an Appendix H. CP at 186. In Appendix H, the trial court ordered Micheau to "[o]btain mental health treatment assessment, and follow through with all recommendations of the provider, including taking medications as prescribed." CP at 195. The trial court also ordered him to "[p]ay supervision fees as determined by the [DOC]." CP at 194.

Micheau appeals.

ANALYSIS

I. IDENTIFICATION TESTIMONY

Micheau brings evidentiary challenges, a claim of ineffective assistance of counsel, and a claim of prosecutorial misconduct relating to four instances where Climer and Bleuel testified that LG and GG identified Micheau as the person who touched them.

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someone who was less than twelve years old and they were at least thirty-six months older than the victim. Former RCW 9A.44.083(1).

A. *The Four Hearsay Instances Micheau Challenges*

Because Micheau's challenges relate to four instances in Climer and Bleuel's testimonies and our analysis below depends on the instance at issue, we first define the four challenged instances.

The first three instances occurred during Climer's testimony when describing her walking into the home after LG disclosed the sexual assault to Bleuel:

> [CLIMER]: I walked in and [LG and Bleuel] were both crying.
>
> . . . .
>
> [CLIMER]: [LG] was crying, like, so bad.
>
> [PROSECUTOR]: Okay. What did she say?
>
> [CLIMER]: All she said was, "**[Micheau].**" And then --
>
> [Micheau objects based on hearsay and the trial court overrules the objection under the excited utterances exception. Then Climer asks the prosecutor to repeat his question as she forgot where she was.] . . . .
>
> [PROSECUTOR]: So during this time period, you're coming home. You see that LG is crying. What did she say?
>
> [CLIMER]: She said **[Micheau]** had touched her. . .
>
> . . . .
>
> [CLIMER]: I went upstairs after [talking with Bleuel about LG's disclosure] and talked to GG and asked her if **[Micheau]** had ever touched her inappropriately, because we just found out from LG that he had been touching her.
>
> . . . .
>
> [PROSECUTOR] Did she confirm that she also was touched?
>
> [CLIMER]: She did, but she didn't tell me what he did.

5 RP at 472-473 (emphasis added to show the first, second, and third challenged instances, respectively).

The fourth instance occurred during Bleuel's testimony regarding the same events:

> [BLEUEL]: [LG] said that she had been touched by somebody . . . I said, "By who? **[Micheau]?**" Because - - and she said, "Yeah," . . .

5 RP at 506-07 (emphasis added).

B. *Hearsay*

Micheau first argues that the trial court abused its discretion in admitting all four instances as they constituted hearsay and did not meet the excited utterances hearsay exception.

i. *Legal Principles*

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). An abuse of discretion occurs when the trial court either adopts a view that no reasonable person would take, bases its decision on facts unsupported in the record, or applies an incorrect legal standard in making its determination. *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012). If a trial court abuses its discretion, we then review the error for prejudice to determine whether it was reasonably probable, absent the error, that the outcome of the trial would have been materially affected. *State v. Barry*, 183 Wn.2d 297, 303, 352 P.3d 161 (2015).

An out-of-court statement offered into evidence to prove the truth of the matter asserted, otherwise known as "hearsay," is inadmissible unless an exception applies. ER 801(c); ER 802. One recognized exception exists when a statement is an "excited utterance," "relating to a startling event or condition made while the declarant was under the stress of excitement caused

by the event or condition." ER 803(a)(2); *State v. Carte*, 27 Wn. App. 2d 861, 883, 534 P.3d 378 (2023).

A party seeking to admit a statement under the excited utterance exception must show (1) the occurrence of a startling event or condition, (2) the declarant made the statement under the stress of excitement of the startling event or condition, and (3) the statement related to the starting event or condition. *Id.* "The crucial question with regard to excited utterances is whether the statement was made while the declarant was still under the influence of the event to the extent that his statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." *Id.* at 885 (quoting *State v. Sellers*, 39 Wn. App. 799, 804, 695 P.2d 1014 (1985)).

ii. *The Trial Court Erred in Admitting the First Instance Under the Excited Utterances Exception; However, Any Error Was Harmless*

Micheau argues that the trial court abused its discretion when it admitted as an excited utterance the first instance where Climer testified that LG identified Micheau. The State concedes that the trial court abused its discretion in admitting this portion of Climer's testimony, but argues that the error was nevertheless harmless. We accept the State's concession regarding Climer's testimony in this instance and agree with the State that the trial court's error related to this instance was not prejudicial.

In *State v. Ramirez-Estevez*, this court held disclosures of rapes made two to three years after they occurred did not qualify as excited utterances because of the prolonged delay between

the traumatic events and the recount of them.[5] 164 Wn. App. 284, 292, 263 P.3d 1257 (2011), *review denied*, 173 Wn.2d 1030 (2012). In doing so, we acknowledged that an excited utterance's startling event or condition does not need to be the "principal act" underlying the case, the passage of time alone is not dispositive to whether a statement qualifies, and subsequent startling events may recreate the stress from an original trauma and cause spontaneous exclamation. *Id.* at 291-92. However, we also explained how "at this much later point, the reliability of an excited utterance close in time to the underlying traumatic event is no longer a predominant reliability factor, and there has been considerable time for other factors to have intervened." *Id.* at 292.

Here, it is uncontroverted that recalling the sexual assault was highly upsetting and distressing to LG. However, the four-or-more year separation between the traumatic event and LG's disclosure to Climer raises the same reliability concerns at the center of our decision in *Ramirez-Estevez*. Because of this great delay, we accept the State's concession that LG's statement to Climer regarding the sexual assault did not constitute one made under the stress of the startling event and, thus, did not qualify under this hearsay exception. *See Id.*

Next, we consider whether it was reasonably probable, absent the error, that the outcome of the trial would have been materially affected. *See Barry*, 183 Wn.2d at 303. The "'[a]dmission of testimony that is otherwise excludable is not prejudicial error where similar testimony was admitted earlier without objection.'" *Ramirez-Estevez*, 164 Wn. App. at 293 (quoting *Ashley v. Hall*, 138 Wn.2d 151, 159, 978 P.2d 1055 (1999)).

[5] Ultimately, we held that, while the statements were inadmissible hearsay, their admission was harmless error. *Ramirez-Estevez*, 164 Wn. App. at 294.

Here, Micheau fails to show that, absent the error in admitting Climer's statements in this first instance, the outcome of Micheau's trial would have been materially affected. Before Climer testified, LG had already testified that Micheau inappropriately touched her and specifically identified him as the perpetrator. LG testified that she disclosed to her mother that Micheau had touched her and Micheau had a chance to cross examine her about this identification. Later in trial, Sergeant Custis and Arnold testified, without objection, that LG disclosed to them that Micheau had sexually assaulted her. Given the admission of LG's prior testimony, disclosing that she had told her mother it was Micheau who touched her inappropriately, coupled with Sergeant Custis and Arnold's subsequent testimony, the error regarding admitting Climer's statement was harmless. *See id.*

We hold that, while the trial court abused its discretion in admitting Climer's statement under the excited utterances hearsay exception, such error was harmless given LG's own testimony and the evidence presented.

iii. *Micheau Fails to Preserve Evidentiary Error Related to the Other Three Instances*

Micheau additionally argues that the trial court abused its discretion by admitting additional testimony by Climer and by Bleuel under the "excited utterances" exception to hearsay despite Micheau not making specific objection to these other three instances. *See* Br. of Appellant at 42-44, 49. The State contends that Micheau failed to preserve for review any such error when Micheau did not object at trial. We agree with the State that Micheau failed to preserve for review any evidentiary errors related to these other portions of testimony and, thus, decline to consider the merits of Micheau's arguments.

We may refuse to review a claim of error not raised in the trial court. RAP 2.5(a). To provide the trial court with an "opportunity to prevent or cure error," a party may assign an evidentiary error on appeal based only on a specific ground made below. *State v. Kirkman*, 159 Wn.2d 918, 926, 115 P.3d 125 (2007).

For these other three instances in Climer and Bleuel's testimonies that Micheau challenges, Micheau did not object. Thus, Micheau failed to preserve for appellate review the issue whether the trial court abused its discretion in admitting any of these portions of testimony. *See id*.

Micheau asserts that we should nevertheless address the merits of his claims by contending that "[a]ppellate review is not precluded if it would be a useless endeavor to object as the court had already overruled an earlier objection on the same grounds." Br. of Appellant at 43. As support for this assertion, Micheau cites to *State v. Cantabrana*, 83 Wn. App. 204, 921 P.2d 572 (1996). However, this case is inapposite. At issue in *Cantabrana* were two jury instructions that failed to inform the jury of the relevant legal standard. *Id.* at 208. Despite Cantabrana only objecting to one of the jury instructions at the trial court, we rejected both and remanded for a new trial because both instructions suffered from the same defect. *Id.* at 208-09. In doing so, we stated that Cantabrana's "objection should have alerted the judge to the defect in both instructions." *Id.* And our rules provide an exception for manifest constitutional errors. *See* RAP 2.5(a)(3); *see also State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009) (unpreserved claims of error involving jury instructions can qualify as manifest constitutional errors). Notably, Micheau makes no such argument that an exception applies here. And even if

we assume without deciding that error occurred regarding these three instances, any error was harmless for the same reasons discussed above in the first instance.

Because Micheau failed to preserve for review the other three instances of challenged testimony, we decline to consider the merits of these additional issues.

C. *Ineffective Assistance of Counsel*

Alternatively, Micheau argues that his counsel was ineffective in failing to object to instances two through four described above. We disagree that Micheau's counsel was constitutionally ineffective because Micheau fails to show prejudice related to these instances.

Both the Sixth Amendment to the United State Constitution and article 1, section 22 of the Washington Constitution guarantee defendants effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). However, we give "great deference to trial counsel's performance and begin[] the analysis with a strong presumption that counsel was effective." *State v. Crow*, 8 Wn. App. 2d 480, 507, 438 P.3d 541 (2019).

To demonstrate that counsel's performance was constitutionally ineffective, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *State v. Bertrand*, 3 Wn.3d 116, 128, 546 P.3d 1020 (2024). A defendant demonstrates deficient performance by showing that counsel's performance "fell below an objective standard of reasonableness based on consideration of all the circumstances." *Crow*, 8 Wn. App. 2d at 507.

A defendant demonstrates prejudice by showing that "'there is a reasonable probability, that, but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Bertrand*, 3 Wn.3d at 129 (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177

(2009)). This "'reasonable probability' standard is 'lower than a preponderance standard'" but requires a defendant to affirmatively show prejudice amounting to more than just a "conceivable effect on the outcome." *Id.* (quoting *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017)). Such prejudice exists if there is "'a probability sufficient to undermine [our] confidence in the outcome.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Because a defendant must establish both deficient performance and prejudicial effect, our inquiry ends if the defendant fails to show either deficient performance or prejudice. *State v. Case*, 13 Wn. App. 2d 657, 673, 466 P.3d 799 (2020); *see also Bertrand*, 3 Wn.3d at 128.

Micheau argues that his counsel performed deficiently by failing to object to Climer's second and third statements regarding LG identifying Micheau and Bleuel's similar statement. However, Micheau fails to demonstrate that, but for his counsel not objecting to the challenged statements, there is a reasonable probability that the outcome of the trial would have been different. *See Bertrand*, 3 Wn.3d at 129.

By the time Climer and Bleuel made the challenged statements, both LG and GG had already testified that Micheau had inappropriately touched them. LG and GG also testified to disclosing such, including identifying Micheau as being the perpetrator, to Climer and Bleuel and Micheau had a chance to cross examine LG and GG about these disclosures. Further, after Climer and Bleuel testified, Sergeant Custis and Arnold stated, without objection, that both LG and GG disclosed to them that Micheau had sexually assaulted them.

Therefore, even if Micheau's counsel performed deficiently in failing to object to Climer and Bleuel's statements that LG and GG had identified Micheau as the person who touched

them, our confidence in the outcome is not undermined by any possible error here. *See id*. While Climer and Bleuel's statements could have affected the weight of LG and GG's testimony, we are not persuaded that there is a reasonable probability that a reasonable jury would not have still found Micheau guilty considering that both LG and GG already testified about their disclosures to Climer and Bleuel and Micheau's identity was not central to the defense's theory at trial.

Because Micheau fails to show that, but for his counsel's failure to object to these instances, there is a reasonable probability that the outcome of his trial would have been different, Micheau fails to show prejudice and, thus, we hold that his claim fails. *Case*, 13 Wn. App. 2d at 673.

D. *Prosecutorial Misconduct*

Micheau argues that the prosecutor engaged in serious, flagrant and ill-intentioned misconduct by not moving to admit the identifications prior to trial, failing to mention "excited utterances" prior to trial, and repeatedly assuring the trial court and Micheau that he was not going to elicit the identifications through Climer and Bleuel. Br. of Appellant at 49-50. We disagree.

To prevail on a claim of prosecutorial misconduct, "'the defendant bears the burden of proving that the prosecutor's conduct was both improper and prejudicial.'" *State v. Gouley*, 19 Wn. App. 2d 185, 200, 494 P.3d 458 (2021) (quoting *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012)); *see also State v. Mak*, 105 Wn.2d 692, 726, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986). We consider the challenge conduct "'in the context of the whole argument, the issues of the case, the evidence addressed in argument, and the instructions given to the jury.'"

Gouley, 19 Wn. App. 2d at 200 (quoting *State v. Scherf*, 192 Wn.2d 350, 394, 429 P.3d 776 (2018)).

We employ one of two tests to determine whether reversal is required due to prosecutorial misconduct. *Id*. If the defendant objected to the prosecutor's remarks, the defendant must show that (1) the remarks were improper, and (2) there is a substantial likelihood the misconduct affected the verdict. *Id*. If the defendant did not object below—as occurred here—the defendant waives the prosecutorial misconduct claim unless they can show "(1) that comments were improper, (2) that the prosecutor's comments were both flagrant and ill-intentioned, (3) that the effect of the improper comments could not have been obviated by a curative instruction, and (4) a substantial likelihood the misconduct affected the verdict." *Id.* at 201.

In considering whether the defendant has overcome waiver when they did not object, we "'focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.'" *Id.* (quoting *Emery*, 174 Wn.2d at 762). If the defendant fails to show that any improper remarks were incurable, their claim "'necessarily fails, and our analysis need go no further.'" *Id.* (quoting *Emery*, 174 Wn.2d at 762).

Here, before trial, the prosecutor represented to the trial court that they were not planning on admitting LG and GG's identification of Micheau through Climer and Bleuel nor asking them about LG and GG's disclosures. Nevertheless, during the State's direct examination of Climer and Bleuel, both testified to LG and GG disclosing that they had been touched inappropriately by Micheau.

However, even if the prosecutor's comments and conduct were improper, flagrant and ill-intentioned, the effect of any improper comments could have been obviated by a curative instruction and Micheau cannot show a substantial likelihood any misconduct affected the verdict. An instruction to disregard Climer and Bleuel's identification testimony would have cured any prejudice from their testimony. Micheau makes no persuasive showing that a curative instruction could not have obviated any prejudicial effect on the jury.[6] *Id*. And, as discussed above, we are not even persuaded that there is a reasonable probability, much less a substantial one, that the contested testimony impacted the outcome of Micheau's case. The contested testimony by Bleuel and Climer essentially repeated LG and GG's previously testimonies which were not objected to: telling the jury about their disclosures to their mother and her girlfriend and identifying Micheau. Micheau had an opportunity to cross examine LG and GG about these disclosures.

We hold that, because Micheau fails to meet his burden of showing how such actions amounted to flagrant and ill-intentioned misconduct, his claim fails.

II. CLOSING ARGUMENTS

Micheau argues that the prosecutor committed reversible misconduct (1) by misstating and minimizing the State's burden of proof and (2) misstating the law and facts related to the element of "sexual contact." Br. of Appellant at 1.

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[6] Micheau alternatively argues that "[i]f [we] find[] that the serious prejudice caused by the prosecutor's misconduct could have been cured, [we] should find that counsel's failure to expend that effort" amounted to ineffective assistance of counsel. Br. of Appellant at 56. However, for the same reasons that we hold that Micheau's ineffective assistance of counsel claim above fails, Micheau's claim here also fails because Micheau fails to show that, but for his counsel's failure to object to the same challenged testimony, there is a reasonable probability that the outcome would have been different. *Bertrand*, 3 Wn.3d at 129.

A. *The Prosecutor Did Not Impermissibly Misstate the Burden of Proof or Presumption of Innocence*

Micheau argues that the prosecutor committed misconduct through misstating and minimizing the State's burden when he "declar[ed] that jurors would have 'no reasonable doubt' if they found LG and GG credible when they said they were telling the truth." Br. of Appellant at 20. We disagree.

In a criminal case, the State bears the burden of proving every element of the crime beyond a reasonable doubt. *State v. Restvedt*, 26 Wn. App. 2d 102, 127, 527 P.3d 171 (2023). Prosecutors enjoy "'wide latitude' in closing argument, but their argument must be based on the evidence and must not misstate the applicable law." *State v. Crossguns*, 199 Wn.2d 282, 296-97, 505 P.3d 529 (2022) (quoting *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 713, 286 P.3d 673 (2012). This wide latitude includes that ability "to argue reasonable inferences from the evidence" so long as they do not shift the burden of proof onto the defendant. *State v. Thorgerson*, 172 Wn.2d 438, 453, 172 P.3d 43 (2011). It is also improper for the prosecution to make arguments that misstate the State's burden. *Crossguns*, 199 Wn.2d at 297. Likewise, a prosecutor commits misconduct if they "ask the jury to decide who was telling the truth." *Id*.

"Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Azevedo*, 31 Wn. App. 2d 70, 78, 547 P.3d 287 (2024) (quoting *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003)).

Micheau challenges an argument made by the State on rebuttal. For context, Micheau began his closing argument by proposing his theory that LG and GG's disclosure was "another swing at getting their phones back." 7 RP at 637.

During rebuttal, the prosecutor discussed "this question that's sort of been interwoven throughout the course of trial. Did [LG] and [GG] disclose to their mom because they were telling the truth about what really happened to them, or were they disclosing to their mom something false to try to get their cell phones back?" 7 RP at 650. The prosecutor described how the two teens testified that they "were being truthful; [they] were telling the truth" when asked if they disclosed the sexual assaults to tell the truth or make something up to get back their phones. 7 RP at 650.

The prosecutor then stated, "If you find their testimony credible on this point, then there is no reasonable doubt." 7 RP at 650. Micheau objected. The trial court overruled the objection and reminded the jury that the attorney comments were argument only, not evidence, and to decide the case based upon the jury instructions.

After Micheau objected, the prosecutor discussed Bleuel testifying that she knew something was wrong, beyond [LG] just wanting her cell phone back. The prosecutor repeated, in a more narrow way, "[I]f you find her testimony credible *on this point*, then there's no reasonable doubt as to *this phone theory*." 7 RP at 651 (emphasis added).

Considering Micheau's closing argument and the context surrounding the prosecutor's statement, the prosecutor did not impermissibly ask the jury to decide whether Micheau was guilty based on who was telling the truth. Instead, the prosecutor's use of "on this point" and later clarifying that his statements related to "this phone theory" infers that the prosecutor was

limiting their argument as a response to Micheau's attack on the witnesses' credibility and defense theory of the case.

Because Micheau fails to show that the prosecutor's statement constituted misconduct, we hold that his claim here fails.

B. *The Prosecutor Did Not Misstate the Facts or Law*

Micheau argues that the prosecutor committed flagrant, ill-intentioned and prejudicial misconduct by repeatedly misstating the law and also misleading the jury regarding evidence in the case. We disagree.

To convict Micheau of first degree child molestation, the State had to prove, beyond a reasonable doubt, that Micheau had, or knowingly caused another person under the age of 18 to have, "sexual contact" with a child under 12 years old, not married to Micheau, and that Micheau was at least 36 months older than the victim. Former RCW 9A.44.083(1) (1994). "Sexual contact" is defined by statute as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."[7] RCW 9A.44.010(13).

First, Micheau argues that the prosecutor misstated the law regarding the definition of an "intimate part" by "urg[ing] jurors to apply a far [broader] definition" and "to use their 'common sense' and personal sensitivities." Br. of Appellant at 28-29. Micheau also asserts that the

[7] The legislature has amended this statute two times since Micheau committed the crimes; however, the changes have not affected the language of this definition—they have only changed its placement. *Compare* LAWS OF 2007, ch. 20, § 3, *with* LAWS OF 2020, ch. 312, § 707, and LAWS OF 2023, ch. 470, § 3007. Thus, we cite to the current version.

prosecutor misstated crucial facts related to "intimate parts" and that the prosecutor improperly compared the facts to wearing a bikini. Br. of Appellant at 29-30.

Contact is "intimate," falling within the meaning of the statute, "'if the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper.'" *State v. Harstad*, 153 Wn. App. 10, 21, 218 P.3d 624 (2009) (quoting *State v. Jackson*, 145 Wn. App. 814, 819, 187 P.3d 321 (2008)). Whether an area apart from genitalia and breasts are "intimate" is a question for the jury. *Jackson*, 145 Wn. App. at 819.

During closing arguments, the prosecutor read the definition of "sexual contact" as provided in the jury instructions. 7 RP at 628. The prosecutor then stated:

> Next part, sexual or other intimate parts. Now, this is not defined within your Jury Instructions. So think about common sense and experience, what do these things mean to you? . . . What are the intimate parts of the human body? And we talked about people might have individual sensitivities and things like that. And G.[G.] certainly said that she was uncomfortable when this touching occurred. But largely, it's areas covered by clothing.
>
> Her testimony was [Micheau] was underneath her clothing. He was rubbing along the waist. His fingers were going underneath the pant line, below the belly button. If you think about a female wearing a bikini swimsuit, this is going underneath the bikini bottom.

7 RP at 628-30. Micheau objected and the trial court overruled the objection. RP at 630. The prosecutor then concluded, unobjected to, "So that's an intimate part." 7 RP at 630.

From the context of the prosecutor's statements, the prosecutor did not misstate the law but instead encouraged the jurors, as the triers of fact, to assess whether the areas LG and GG described as having been touched would put a person of common intelligence on notice that, under the circumstances, the parts touched were intimate. *See Harstad*, 153 Wn. App. at 21;

Jackson, 145 Wn. App. at 819. Additionally, the prosecutor's analogy to a bikini did not misstate the facts of the case beyond the prosecutor's wide latitude to make reasonable inferences based on the case's facts. *See Thorgerson*, 172 Wn.2d at 453. The prosecutor's recital of GG's testimony mirrors those presented at trial.[8] Micheau fails to show misconduct.[9]

Micheau also argues that the prosecutor misstated the law by arguing that the State had not met its burden in proving "sexual gratification." Br. of Appellant at 31-32.

During closing, the prosecutor also discussed "gratifying sexual desires." 7 RP at 630. First, the prosecutor described how [GG] "said he was touching and rubbing back and forth. It was repeated. Fingers underneath the pant line . . . it was at night, no one else was around, it was in [] Micheau's bed, they were cuddling." 7 RP at 630. The prosecutor then stated, "What other reason would [] Micheau have to touch [GG], in this way, in this context, other than it being sexual? Other than it being done to gratify his sexual desire?" 7 RP at 630.

[8] Micheau contends that analogizing to a bikini misrepresented any evidence presented at trial because a bikini is "by definition very, very small, often barely covering the vaginal area with a small triangle." Br. of Appellant at 30. However, this characteristic of what a bikini is fails to acknowledge the fact that bikinis come in all shapes and sizes and other definitions reflect a much broader definition of what such a suit can include. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 215 (2002) ("a women's abbreviated two-piece bathing suit.").

[9] As an alternative argument to his claim that the prosecutor committed misconduct here, Micheau argues that he was denied ineffective assistance of counsel due to his attorney's failure to object to the prosecutor's statements. However, because the prosecutor's statements did not amount to misconduct, Micheau fails to show how any objection by his attorney to them would have been sustained and, thus, Micheau's alternative claim of ineffective assistance of counsel here fails. *See State v. Vazquez*, 198 Wn.2d 239, 248, 494 P.3d 424 (2021) ("If a defendant centers their claim of ineffective assistance of counsel on their attorney's failure to object, then 'the defendant must show that the objection would likely have succeeded.'") (quoting *State v. Crow*, 8 Wn. App. 2d 480, 508, 438 P.3d 541, *review denied*, 193 Wn.2d 1038 (2019).

Regarding LG, the prosecutor then described how "her testimony was she woke up to [] Micheau with his hands grabbing and squeezing her vagina . . . it happens at night, no one else is around, it's in the bed, it's preceded and followed by cuddling." 7 RP at 631. The prosecutor then stated, "What other reason would he have to touch [LG's] vagina in this way, except for it being sexual?" 7 RP at 631.

Contrary to Micheau's characterization, the prosecutor's statements here were not misconduct but reasonable arguments made based on the evidence presented at trial. The rhetorical questions were posed after describing facts presented through the testimony of LG and GG and the argument overall respected the jury's role of determining the State met its burden, beyond a reasonable doubt, to show sexual contact occurred.

We hold that Micheau fails to establish that any of these statements exceeded a prosecutor's "wide latitude" in making arguments in closing and, thus, his claims of prosecutorial misconduct at closing fail.

III. CUMULATIVE ERROR

Micheau argues that, even if the errors above were insignificant on their own to establish prejudice, together the cumulative effect of the errors deprived Micheau of a fair trial. We disagree.

We apply the cumulative error doctrine when a combination of trial errors denies the accused of a fair trial, "'even where any one of the errors, taken individually, would be harmless.'" *State v. Azevedo*, 31 Wn. App. 2d 70, 85, 547 P.3d 287 (2024) (quoting *In re Pers. Restraint of Cross*, 180 Wash.2d 664, 690, 327 P.3d 660 (2014)). Reversal is required if, under the totality of the circumstances, a defendant shows that the accumulation of errors substantially

prejudiced them and denied them a fair trial. *Id*. However, where the errors are few and have little or no effect on the outcome of the trial, the doctrine does not apply. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006).

Here, any errors did not substantially prejudice Micheau and did not deny Micheau a fair trial. Nonprejudicial evidentiary error did occur one time when the trial court admitted the first instance where Climer discussed LG's disclosure. And, even if we assumed Micheau's counsel performed deficiently in failing to object to Climer and Bleuel's statements and the prosecutor's actions regarding those same statements amounted to misconduct, all possible errors relate to the same evidence and, as we discussed above, such evidence had little effect, if any, on the outcome of Micheau's trial. Therefore, we hold the Micheau's cumulative error claim fails and the doctrine does not apply. *See id*.

IV. COSTS OF COMMUNITY CUSTODY SUPERVISION

Micheau argues that, due to a change in the statute governing community custody supervision fees, the trial court erred in imposing a condition to pay such fees. The State agrees that the fees should be stricken. We agree.

Micheau brings a direct appeal following the trial court's imposition of "supervision fees as determined by the [DOC]" as a part of Micheau's judgment and sentence. CP at 186, 194, 209. The trial court used to have the authority to impose such fees under former RCW 9.94A.703(2)(d) (2018). However, effective July 1, 2022, community custody supervision fees are no longer authorized for any defendant as per a legislative amendment. *State v. Bogdanov*, 27 Wn. App. 2d 603, 630, 532 P.3d 1035, *review denied*, 2 Wn.3d 1008 (2023); *State v.*

Wemhoff, 24 Wn. App. 2d 198, 199, 519 P.3d 297 (2022). And the amendment applies prospectively to cases on direct appeal such as here. *See Bogdanov*, 27 Wn. App. 2d at 630.

Because the amendment applies to Micheau's case, we agree and remand for the trial court to strike the community custody provision imposing the supervision fees.

V. MENTAL HEALTH EVALUATION

Micheau argues that trial court did not have the authority to require mental health evaluation and treatment in Micheau's judgment and sentence because the trial court neither found that there were reasonable grounds to believe Micheau was mentally ill nor found that any mental illness "most likely influenced the offense." Br. of Appellant 61, 63. We agree.

We review crime-related community custody conditions for an abuse of discretion. *State v. Brooks*, 142 Wn. App. 842, 850, 176 P.3d 549. An abuse of discretion occurs when the trial court bases its decision on untenable grounds "including those that are contrary to law." *Id.* at 850.

Under the Sentencing Reform Act of 1981, a trial court may order a defendant whose sentence included community placement or supervision to obtain a mental health evaluation and participate in treatment so long as the trial court complies with certain procedures. *Id.* at 851; *see also State v. Jones*, 118 Wn. App. 199, 209, 76 P.3d 258 (2003). The trial court must find (1) "that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025" and (2) that the mental health "condition [was] likely to have influenced the offense."[10] RCW 9.94B.080; *Brooks*, 142 Wn. App. at 851.

[10] RCW 71.24.025 defines "[m]entally ill persons" as people who either have an "[a]cutely mentally ill" condition, have a "[c]hronically mentally ill" condition, are "[s]eriously disturbed," or are a child and are "severely emotionally disturbed." (3), (13), (42), (51), (52).

Here, the trial court ordered Micheau to obtain a mental health evaluation and treatment but made no finding that Micheau was mentally ill with a condition that influenced his offenses. CP at 195. Because this finding was required in order for the trial court to require a mental health evaluation and treatment, the trial court exceeded its authority and abused its discretion in imposing the condition without meeting the statutory requirements. *See Brooks*, 142 Wn. App. at 851.

The State agrees with Micheau that, if the court's intention was to order the condition, remand is warranted for the trial court to make the requisite findings. However, the State instead contends that including such condition was a clerical error in which the trial court inadvertently failed to strike the condition from Appendix H.

"A clerical mistake is one that, when amended, would correctly convey the intention of the court based on other evidence." *State v. Davis,* 160 Wn. App. 471, 478, 248 P.3d 121 (2011).

Here, it is not clear from the record that the trial court did not intent to order Micheau to undergo a mental health evaluation. The recommendation that Micheau obtain both a psychosexual and mental health evaluations and treatments were listed in the PSI, which the trial court stated it read in its oral ruling. While the trial court did not mention the mental health evaluation condition in its oral ruling, the court stated it did not make any changes to the proposed judgment and sentence, except removing a duplicate entry for the 67 months of confinement, and specifically signed Appendix H. With this uncertainty regarding the trial court's intentions, it is not clear that the condition was merely inadvertently added and a clerical mistake. *See Davis*, 160 Wn. App. at 478.

Because it is unclear whether the court intended to order the condition and yet the order did not comply with the statutory requirements, we remand for the trial court to strike the mental health evaluation and treatment condition unless it determines that it can presently and lawfully comply with RCW 9.94B.080's requirements. *See Jones*, 118 Wn. App. at 211.

CONCLUSION

We affirm Micheau's convictions but remand for the trial court to (1) strike the costs of community supervision and (2) consider whether to order a mental health evaluation and treatment according to the statutory requirements.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Che, J.

We concur:

Glasgow, J.

Veljacic, A.C.J.

RUSSELL SELK LAW OFFICE

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