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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEPHEN ROBERT JABS, Appellant.	No. 49466-3-II UNPUBLISHED OPINION

MELNICK, J. — A jury convicted Stephen Robert Jabs of six counts of rape of a child in the first degree, four counts of child molestation in the first degree, and one count of communicating with a minor for an immoral purpose. It also found special allegations and aggravating factors.

Jabs argues the trial court abused its discretion by admitting child hearsay statements. He also argues double jeopardy violations, ineffective assistance of counsel, and a lack of jury unanimity. Jabs further argues, and the State concedes, the trial court violated his First Amendment to the United States Constitution rights by restricting his access to public social websites. Jabs also filed a statement of additional grounds (SAG) asserting a number of errors.[1] We affirm the convictions but remand to the trial court to strike the challenged sentencing condition.

[1] Jabs also asks us to deny costs if he does not prevail on appeal because the trial court deemed him indigent. Pursuant to RAP 14.2, we defer to the commissioner if the State files a cost bill and Jabs objects.

FACTS

Jabs babysat a number of children whose parents were friends with his daughters. Starting in 2006, he babysat KH and EH almost every weekend. The next year he began babysitting his granddaughter, JJ, and KH's sister, HH. Jabs also babysat KK.

In 2009, another friend of Jabs's daughters, Mandala took her children, CG and C, to parties and barbecues at Jabs's house. CG started spending the night at Jabs's house when she was six months old.

In February 2014, when CG was four, Mandala and her children began temporarily living with Jabs. During this time, Jabs told Mandala he bought KK a vibrator after he caught her using his back massager to masturbate. Two or three days after this discussion, CG told Mandala that Jabs touched her vagina. When Mandala asked CG what happened, CG said it happened at night when Jabs thought she was sleeping; Jabs moved her underwear, touched her with his fingers, and "tried to put his finger in, but it hurt really bad, and it felt like a rip, and it stung." 1 Report of Proceedings (RP) at 175. CG added it happened a second time when Jabs and CG were in Jabs's hot tub and that "it didn't hurt as bad because it was wet and warm in the water." 1 RP at 175. Mandala reported the abuse to the police the next day.

I. FORENSIC INTERVIEW OF CG

On March 18, Karen Sinclair, a child forensic interviewer, conducted a forensic interview of then four-year-old CG. After ascertaining that CG knew the difference between telling the truth and telling a lie, CG initially denied or avoided questions about abuse by Jabs and her disclosure to her mother. Sinclair asked CG if she really did not know what she told her mother about Jabs or just did not want to tell Sinclair, and CG said "I just don't want to tell you." Suppl. Clerk's Papers (CP) at 389.

However, shortly thereafter, in response to a question from Sinclair about whether CG knew places on the body that are okay to touch, CG said Jabs sometimes touched her vagina. CG said Jabs touched her vagina more than once, including at night when she slept with him on the couch. CG first said Jabs only touched the outside of her vagina, but later said he touched her on the inside of her vagina. CG also said Jabs inserted his finger in her vagina while they were in Jabs's hot tub.

After CG's interview with Sinclair, Detective Aaron Baker investigated the allegations against Jabs.

The mothers of other children Jabs babysat heard about CG's disclosure, but did not believe CG, and their children continued going to Jabs's home.

II. SEARCH OF JABS'S HOME

In September, Baker obtained a search warrant for Jabs's home. Upon executing the warrant, the police found a vibrator and lubricant. They also found pictures of the children Jabs babysat. Some photos showed the children partially or fully naked.

During the search, Baker and another detective interviewed Jabs. Jabs admitted he bought a vibrator for KK. Jabs also admitted to telling KK she could use the lubricant if the vibrator hurt. Jabs told Baker he talked to the children he babysat about sex, telling them they could get pregnant the first time they had sex. However, Jabs denied ever touching CG. The police arrested Jabs.

III. FORENSIC INTERVIEW OF KH, KK, HH, AND JJ

On September 26, Sinclair conducted forensic interviews of KK, then nine-years-old, and KH, then eight-years-old.

KK initially denied or avoided questions about Jabs; however, she eventually said Jabs gave her a purple vibrator and told her it was for her vagina. KK made this disclosure in response to Sinclair telling KK she heard Jabs's white back massager "was used somewhere [other than KK's back, stomach, and legs,] on at least someone else." CP at 427. Sinclair then asked if "there [was] ever a time when [Jabs] was around" when KK used the vibrator, and KK said Jabs used the vibrator on, but not inside, her vagina. CP at 437. KK also said Jabs would put lubricant on the vibrator so it wouldn't hurt.

KK also said she and HH did "inappropriate stuff" with Jabs in his bedroom. CP at 440. When asked what she meant, KK started crying and said if her moms found out, she would never go to Jabs's house again. KK said she, HH, and Jabs watched videos of naked adults making out or having sex and did what they saw. The first time she saw a video like that, EH showed it to her on the computer in the girls' room in Jabs's home. KK indicated she watched similar videos on the computer in Jabs's dining room on other occasions.

Sinclair told KK she needed to hear about what happened in Jabs's bedroom. KK said she and HH would "sort of do the making out thing," that "[KK] and [HH] would always be on top of [Jabs,]" and that Jabs's penis would go between their legs, but "not in" their vaginas. CP at 444. KK also said HH would be in the room with her when these acts occurred, but Jabs never had her and HH do these things at the same time. She said white stuff came out of Jabs's penis and he would always put it on either HH's or her stomach; he did not put it other places, because Jabs said it "would make you have a baby." CP at 446. KK also said she and HH put their mouths on

Jabs's penis, and that Jabs said it felt good. KK and HH would suck on Jabs's penis while he licked the outside of their vaginas, and Jabs would sometimes lick their vaginas while they were in the hot tub. KK said these acts happened more than once, and she was eight-years-old the last time it happened.

During the interview, KK said she had been in the interview room before. Sinclair did not know it at the time, but KK was referring a prior false accusation of sexual abuse she had made against her mom's ex-boyfriend.

On the way home from her interview with Sinclair, KK told her mother for the first time about Jabs abusing her.

KH also initially denied or avoided questions about abuse by Jabs. CP at 460-536. However, after Sinclair asked if Jabs used his white back massager, KH eventually disclosed he used it on the outside of her vagina; she said he did the same thing to KK, HH, and JJ. KH said Jabs used the back massager on the children's vaginas when they told him their vaginas were sore.

KH also said she saw Jabs's penis when she, HH, and JJ sucked on it while Jabs slept on the couch. KH knew Jabs was sleeping because "if [her] teeth were rubbing on him, he would have w[oken] up, but he didn't." CP at 558. When asked if anything came out of Jabs's penis when they sucked on it, KH said no. Sinclair asked how they knew when to stop sucking, and KH said they stopped when they were "tired of shaking [their] heads up and down." KH said the girls sucked on Jabs's penis more than once. KH thought she was four-years-old when these incidents happened.

KH told Sinclair that Jabs was awake when HH and JJ sucked on his penis while they were in the hot tub. She added that Jabs kept on telling HH to stop.

Sinclair also interviewed HH and JJ, but they did not accuse Jabs of sexually abusing them.

IV. CHARGING

The State charged Jabs with six counts of rape of a child in the first degree, four counts of child molestation in the first degree, and two counts of communicating with a minor for an immoral purpose.[2] The named victims were CG, KH, HH, JJ, and KK. The State also charged Jabs with special allegations and aggravating factors.

V. CHILD HEARSAY HEARING[3]

Pretrial, the trial court held a hearing to determine the admissibility of statements made by CG and KK to their mothers, and made by CG, KH, and KK to Sinclair.

CG, KH, and KK testified regarding a variety of topics to demonstrate their competence, including their names, birth dates, mothers' names, the difference between the truth and a lie, and details about Jabs's home and the incidents of abuse. CG, KH, and KK gave substantially the same testimony as provided in their disclosures to Sinclair.

Sinclair testified and opined that her forensic interview methods did not result in any false disclosures.

Jabs's expert witness, Mark Whitehill, a licensed psychologist, opined that Sinclair's questioning likely tainted CG's, KH's, and KK's statements, making them unreliable. Whitehill said Sinclair engaged in repeated questioning, and displayed dogged persistence that came close to badgering. Whitehill opined that Sinclair's technique interjected facts into the interview, RP at 596, and that CG, KH, and KK denied any abuse until after Sinclair introduced outside

[2] The trial court dismissed one of the communicating charges.

[3] The court held the hearing pursuant to pursuant to RCW 9A.44.120 and *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

information. However, Whitehill also opined that Sinclair's interview technique of using narrow, leading questions at the end of the interviews was appropriate.

At the conclusion of the child hearsay hearing, the trial court addressed the children's competency on the record. The parties agreed the children were competent and available to testify at trial. The court did not enter specific findings on the *Allen*[4] factors.

The trial court analyzed each *Ryan* factor, as discussed later in this opinion, and concluded that the hearsay statements were reliable and admissible. The trial court's written findings of fact stated that CG's, KH's, and KK's statements either satisfied each *Ryan* factor or, when not satisfied, that the factors did not weigh against the reliability of the statements. The court found there was no evidence of a motive for the children to lie or of any untruthful character. It found that CG disclosed to multiple people and the disclosure to her mother was spontaneous. Further, the lack of spontaneity in KH's and KK's interviews with Sinclair did not weigh against reliability nor did the timing of the disclosures or past assertions of fact. When cross-examined, the children did not show a lack of knowledge. Finally, the court found that the chance of faulty recollection was remote, and that imprecise recollection at times did not detract from reliability.

The trial court was not convinced by Whitehill's opinion that the children's statements were tainted by unduly suggestive or leading questioning or by badgering. Additionally, the court found inconsistencies in the children's statements did not detract from reliability, because without some inconsistency "the statements might seem contrived [ ] or premeditated." CP at 302.

[4] *State v. Allen*, 70 Wn.2d 690, 424 P.2d 1021 (1967).

VI. PRETRIAL ORDER ON PHOTOGRAPHS

The trial court denied Jabs's pretrial motion to preclude photos seized by the police from Jabs's home. Jabs argued the photos depicting nude or partially nude children were irrelevant when viewed in context of other normal family photos and, in the alternative, that the photos were unduly prejudicial if admitted out of context of the thousands of other photos seized. The court concluded the photos were admissible to show opportunity because they showed Jabs at home with the children. They also could impeach the child victims' hearsay denial that they were nude in Jabs's home. The court said Jabs could offer other photos seized to provide context for the nude or partially nude photos of children.

VII. TRIAL TESTIMONY AND EXHIBITS

At trial, Baker, CG, KK, KH, HH, JJ, and Jabs provided relevant testimony as follows.

Baker testified that Jabs said he bought KK a vibrator, and offered lubricant to KK if the vibrator felt uncomfortable. Baker told the jury about the photos recovered from Jabs's home, depicting nude or partially nude children. He also told the jury that the police seized thousands of photos and reviewed all of them. The majority of the photos depicted normal family activity, and none of the photos was sexually explicit.

The trial court granted Jabs's motion to admit two full photo albums. The trial court set aside an hour for the jury to review the photo albums to gain a clearer understanding of the context from which the police selected photos of nude or partially nude children. The judge also permitted Randall Karstetter, Jabs's witness, to give testimony on the quantity of photos seized, and allowed him to opine on the nature of a sample of the photos.

KK and KH testified substantially similar to their disclosures to Sinclair. HH and JJ again denied that Jabs abused them or any of the other children.

Jabs testified that he never observed any of the children sucking on his penis. When asked if the children sucked on his penis, Jabs responded "'not to [his] knowledge.'" 19 RP at 3333. Jabs also testified that, if the children sucked on his penis multiple times, he slept through it multiple times. He sleeps soundly.

Jabs admitted he bought KK a vibrator. He said KK asked him what the vibrator was, and he told her it "[did] the same thing as the back massager." 19 RP at 3352, 3354, 3395. Jabs further testified he saw KK looking at pornography on his computer, and talked to her about sex. Jabs also testified that he told KK and the other children about "the facts of sex" in response to one of the children saying that a woman could not get pregnant until she was a certain age. 19 RP at 3340. Jabs admitted to talking to the girls about sex when they were between the ages of seven and nine. He felt discussing topics of a sexual nature with a seven year old was acceptable.

VII. JURY INSTRUCTIONS

Jabs proceeded to trial. The court instructed the jury:

> In alleging that the defendant committed rape of a child in the first degree as charged in Counts I and II, the State relies upon evidence regarding a single act constituting each count of the alleged crime. To convict the defendant on any count, you must unanimously agree that this specific act was proved.
>
> The State alleges that the defendant committed acts of rape of a child in the first degree, and child molestation in the first degree, in Counts III, IV, V, VI, VII, VIII, IX, and X on multiple occasions. To convict the defendant of rape of a child in the first degree or child molestation in the first degree, one particular act of rape of a child in the first degree or child molestation in the first degree must be proved beyond a reasonable doubt as to each respective count, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the alleged acts of rape of a child in the first degree or child molestation in the first degree.

CP at 256 (Instr. 8).

The court also instructed the jury that: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP at 255 (Instr. 7).

The first paragraph is a modification of WPIC 4.26,[5] and the second paragraph is a modified *Petrich*[6] instruction (WPIC 4.25). Defense counsel argued the communicating charge should be included in the instruction. The trial court disagreed because the State elected an ongoing course of conduct in support of that charge. The court instructed the jury that, to convict, the State had to prove beyond a reasonable doubt that Jabs communicated with KK, a minor, for immoral purposes between November 30, 2008, and September 29, 2014, and the act occurred in Washington. The trial court also instructed the jury that the communication could be by words or conduct, and that the immoral purposes had to be of a sexual nature.

IX. CLOSING ARGUMENT

During closing argument, the State elected separate and distinct acts for each count. As we explain in more detail below, the State gave a detailed description of the underlying act that supported each count and to which victim each count pertained. The prosecutor grouped the counts by victim.

The State also invited the jury to consider different acts that constituted "an overall behavior" of communicating, including giving KK a vibrator, talking to KK about masturbation, showing KK pornographic videos, and talking to KK about sex. 20 RP at 3526. Specifically the prosecutor said:

[5] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTION: CRIMINAL 4.26, at 115 (3r ed. 2008).

[6] *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

> Count XI, this is the Communicating With a Minor For Immoral Purposes, and this is more of a span of time. This is more of an overall behavior. This is the talking to the seven or eight or nine year old about sex, about using condoms, about keeping your legs together, about the myth that you won't get pregnant the first time you have sex, that conversation he had with [KK] in the hot tub. It also includes the videos that she describes him showing her. It also includes the vibrator. All of this behavior is Communicating With a Minor For Immoral Purposes.
>
> And you don't have to . . . find that, yes, he had the sex talk; yes, he showed her videos; yes, he gave her a vibrator. The point is, this is all an overarching behavior, and he is communicating to her about things like masturbation, which, obviously, are sexual in nature. And when we're talking about a man who's over 40 years older than this seven, eight, nine year old, I think we can all agree that that's an immoral purpose.

20 RP at 3525-26.

During closing argument, the prosecutor made a number of statements Jabs now challenges. Jabs did not object during the prosecutor's closing argument.

X. VERDICT AND SENTENCE

The jury convicted Jabs on all counts. The jury also convicted Jabs on all aggravating factors. The court sentenced Jabs to an exceptional sentence above the standard range. The court also ordered that Jabs could not join or peruse any public social websites.

Jabs appeals.

ANALYSIS

I. CHILD HEARSAY STATEMENTS

A. Legal Principles

Jabs argues the trial court abused its discretion in admitting child hearsay statements of CG, KH, and KK to Sinclair because their hearsay statements were not reliable. We disagree.

"RCW 9A.44.120 governs the admissibility of out-of-court statements made by putative child victims of sexual abuse." *State v. Brousseau*, 172 Wn.2d 331, 351 259 P.3d 209 (2011). RCW 9A.44.120 provides that statements of a child under the age of ten describing acts of, or

attempts at, "sexual conduct performed with or on the child" are admissible in criminal proceedings, if the trial court concludes, after a hearing, "that the time, content, and circumstances of the statement provide sufficient indicia of reliability[,]" and the child "[t]estifies at the proceedings."

We review a trial court's determination that child hearsay statements were reliable for abuse of discretion. *State v. Borboa*, 157 Wn.2d 108, 121, 135 P.3d 469 (2006). "A trial court abuses its discretion 'only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.'" *Borboa*, 157 Wn.2d at 121 (quoting *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003)). Trial courts are "necessarily vested with considerable discretion in evaluating the indicia of reliability" in a child victim's hearsay statements. *C.J.*, 148 Wn.2d at 686.

In determining the reliability of child hearsay statements, the trial court considers nine factors. *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). They are

> (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; [] (5) the timing of the declaration and the relationship between the declarant and the witness[; . . . (6)] the statement contains no express assertion about past fact[; (7)] cross-examination could not show the declarant's lack of knowledge[; (8)] the possibility of the declarant's faulty recollection is remote[;] and [(9)] the circumstances surrounding the statement . . . are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

Ryan, 103 Wn.2d at 175-76. "No single *Ryan* factor is decisive and the reliability assessment is based on an overall evaluation of the factors." *State v. Kennealy*, 151 Wn. App. 861, 881, 214 P.3d 200 (2009).

A trial court does not abuse its discretion where it follows the requirements of RCW 9A.44.120 and the *Ryan* factors in concluding that a child's hearsay statements are reliable. *C.J.*, 148 Wn.2d at 686. "The abuse of discretion standard, as applied in child hearsay cases, . . . acknowledges the obvious, that the trial court is the only court that sees the children and listens to them and to the other witnesses in such a case." *State v. Swan*, 114 Wn.2d 613, 667, 790 P.2d 610 (1990).

B. Finding of Facts

Jabs assigned error to the conclusion that CG's, KH's, and KK's statements to Sinclair were reliable. Jabs did not assign error to any of the trial court's findings on the *Ryan* factors in his opening brief. However, in the body of his brief, Jabs argued the court erred in its findings on *Ryan* factors two, four, five, and nine. Although the State argues Jabs has not preserved the issue on appeal, we address this issue on the merits.

1. Undisputed Findings

Jabs does not challenge the trial court's findings that the first, third, sixth, seventh, and eighth *Ryan* factors were met. We accept these findings as verities. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). The court concluded that the factors favored reliability and admission, except factor six, which was neutral.

2. Challenged Findings

Jabs argues the court erred in making findings on the general character of the children (factor two), on the spontaneity of the statements to Sinclair (factor four), on the timing of the statements to Sinclair and the relationship between the children and Sinclair (factor five), and that the circumstances surrounding the statements to Sinclair do not show the children misrepresented Jabs's involvement (factor nine).

We review whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). We review challenges to conclusions of law de novo. *Homan*, 181 Wn.2d at 106.

Our review of the record on these contested findings of fact demonstrate that substantial evidence supports the court's findings of fact. Further, the conclusions of law flow from the supported findings of fact. The trial court examined all nine *Ryan* factors. It correctly applied the law and, because no one factor is determinative, determined that the factors favored reliability. The trial court did not abuse its discretion. We uphold the admission of the child hearsay statements.

II. DOUBLE JEOPARDY

Jabs argues the jury instructions violated his double jeopardy rights because they did not require the jury to convict him of separate and distinct acts, and the jury could have convicted him multiple times for the same act. We disagree.

"We review double jeopardy claims de novo." *State v. Wilkins*, 200 Wn. App. 794, 805, 403 P.3d 890 (2017), *review denied*, 190 Wn.2d 1004 (2018). "'The constitutional guaranty against double jeopardy protects a defendant . . . against multiple punishments for the same offense.'" *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011) (quoting *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991)); U.S. CONST. amend. V; WASH. CONST. art. I, § 9. However, if each of a defendant's convictions "arises from a separate and distinct act," the offenses are factually different, and there is no double jeopardy violation. *State v. Fuentes*, 179 Wn.2d 808, 824, 318 P.3d 257 (2014).

Jury instructions may result in a double jeopardy violation if they allow a jury to convict a defendant on multiple counts based on a single act. *Fuentes,* 179 Wn.2d at 824. Such instructions create the potential for multiple punishments for the same offense. *Mutch,* 171 Wn.2d at 663.

To determine whether a double jeopardy violation actually occurred, we consider whether "the evidence, arguments, and instructions" made it "'*manifestly apparent* to the jury'" that the State sought a single punishment for each offense, "and that each count was based on a separate act." *Mutch,* 171 Wn.2d at 664 (quoting *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)).

In *Mutch*, a "separate crime instruction . . . fail[ed] to 'inform[] the jury that each 'crime' required proof of a different act.'" 171 Wn.2d at 663 (quoting *State v. Borsheim*, 140 Wn. App. 357, 367, 165 P.3d 417 (2007)). The jury instruction stated:

> [A] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Mutch, 171 Wn.2d at 662. In *Mutch*, none of the instructions "expressly stated that the jury must find that each charged count represents an act distinct from all other charged counts." 171 Wn.2d at 662. However, the court concluded no double jeopardy violation occurred because "despite deficient jury instructions, it [wa]s nevertheless manifestly apparent that the jury found [the defendant] guilty of five separate acts of rape to support five separate convictions." *Mutch,* 171 Wn.2d at 665. The victim testified to five separate rapes. These incidents corresponded to the "to convict" instructions. The State discussed all five episodes in its closing arguments and elected those incidents upon which it relied for each count. The defendant did not argue insufficient evidence as to the number of events but argued the victim lacked credibility on the issue of consent. *Mutch,* 171 Wn.2d at 665.

In *Fuentes*, the challenged jury instructions for two counts of child molestation specified each conviction required a separate and distinct act; however, they did not specify that the child rape count must be based on a separate and distinct act from the counts of child molestation. 179 Wn.2d at 823. The court concluded it was "manifestly apparent that the convictions were based on separate acts because [in closing argument] the prosecution made a point to clearly distinguish between the acts that would constitute rape of a child and those that would constitute child molestation." *Fuentes*, 179 Wn.2d at 825. "[T]he prosecutor clearly used 'rape' and 'child molestation' to describe separate and distinct acts." *Fuentes*, 179 Wn.2d at 825. The prosecutor also divided the elected acts "into two categories—the acts involving penetration, which constituted rape, and the other inappropriate acts, which constituted molestation." *Fuentes*, 179 Wn.2d at 825.

Here, the State concedes that the jury instructions given did not clearly distinguish the acts jurors could consider for each count against Jabs. We accept the State's concession.

However, as Jabs conceded at oral argument, in closing argument, the State elected an underlying act for each count of child rape and child molestation. This election made it manifestly apparent to the jury that it must unanimously find one act per count. But Jabs argues that we should conclude that the election was insufficient to protect his double jeopardy rights based on *State v. Kier*, 164 Wn.2d 798, 808, 811, 814, 194 P.3d 212 (2008).

In *Kier*, the court held that assault and robbery in the first degree merge when assault is the charge that elevated the robbery charge to robbery in the first degree. 164 Wn.2d at 801-02. There, a single carjacking gave rise to the charges of assault and robbery in the first degree. *Kier*, 164 Wn.2d at 805. Both charges involved two victims and, during closing argument, the prosecutor elected "the driver [of the carjacked vehicle] as the victim of the robbery and the passenger as the

victim of the assault." *Kier*, 164 Wn.2d at 805. The court rejected the State's argument "that the assault and robbery convictions [did] not merge because these crimes were committed against separate victims." *Kier,* 164 Wn.2d at 814. The court concluded that the prosecutor's election of a victim was unclear because "evidence presented to the jury identified [both the victims] as victims of the robbery," and that an ambiguous verdict resulted. *Kier,* 164 Wn.2d at 812-13.

The facts in *Kier* are distinguishable from the facts presently before us. In *Kier*, the court considered whether two offenses that arose from the same act merge. Here, Jabs conceded at oral argument that the child rape and child molestation charges do not merge, and that *Kier* was "not directly analogous." Wash. Court of Appeals oral argument, *State v. Jabs,* No. 46466-3-II (April 3, 2018), at 9 min., 38 sec. through 9 min., 40 sec. (on file with court). In this case, the charges arise from separate acts with separate victims. The State elected a separate and distinct criminal act for each count. Unlike in *Kier*, where the assault and robbery arose from one occurrence, each of the acts of sexual assault for each victim occurred at different points in time.

It was manifestly apparent in this case what acts supported each count. The State provided a detailed description of each act that supported each count. The State argued the counts by victim. The State argued the two counts of child rape involving CG were based on Jabs penetrating CG's vagina on the couch, and Jabs penetrating CG's vagina in the hot tub, respectively. The State argued the child rape and child molestation involving KH were based KH's oral-genital contact with Jabs on the couch, and Jabs using the back massager on KH, respectively. The State argued the child rape and child molestation involving HH were based on HH's oral-genital contact with Jabs on the couch, and Jabs putting his penis on HH in his bedroom, respectively. The State argued the child rape and child molestation involving JJ were based on JJ's oral-genital contact with Jabs on the couch, and on Jabs using the back massager on JJ, respectively. The State argued the child

rape and child molestation involving KK were based on KK's oral-genital contact with Jabs in the bedroom, and on Jabs putting his penis on KK in the bedroom, respectively.

The State's election during closing argument, along with the jury instructions, made it manifestly apparent that each count was based on a separate and distinct act. No double jeopardy violation occurred.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Jabs argues his defense counsel at trial was ineffective for failing to request a lack of volition jury instruction. He asserts substantial evidence supported Jabs's claim that he was asleep when KH, HH, and JJ sucked on his penis while he was on the couch.[7] We disagree.

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on an ineffective assistance of counsel claim, the defendant must show both that defense counsel's representation was deficient and that the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32–33, 246 P.3d 1260 (2011). If a defendant fails to prove either prong, the claim fails. *State v. Lord*, 117 Wn.2d 829, 884, 822 P.2d 177 (1991).

Representation is deficient if after considering all the circumstances, it "falls 'below an objective standard of reasonableness.'" *Grier*, 171 Wn.2d at 33(quoting *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have differed. *Grier*, 171 Wn.2d at 34.

[7] Jabs argues his conviction for rape of KK was also based on oral-genital contact on the couch, but the prosecution elected the act of oral-genital contact in Jabs's bedroom to support that conviction. No evidence supports a claim that Jabs was asleep during the incidents in the bedroom.

We begin with a strong presumption that counsel's representation was effective. *Grier*, 171 Wn.2d at 33. To demonstrate deficient performance the defendant must show that, based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). Trial counsel has wide latitude in the choice of tactics. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 736, 16 P.3d 1 (2001). Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

Defense counsel's failure to request a jury instruction on an affirmative defense can be strategic. *State v. Coristine*, 177 Wn.2d 370, 379, 300 P.3d 400 (2013); *State v. Frost*, 160 Wn.2d 765, 775, 161 P.3d 361 (2007). In raising an affirmative defense, the defendant admits the charged "act, but pleads an excuse." *State v. Riker*, 123 Wn.2d 351, 367-68, 869 P.2d 43 (1994). If a decision to forgo an affirmative defense could be based on a reasonable determination that the defense is inconsistent with the defense's theory that the act did not occur, counsel's decision is strategic. *See Frost*, 160 Wn.2d at 775. Lack of volition is an "affirmative defense" to child rape, which a defendant must prove by "a preponderance of the evidence." *State v. Deer*, 175 Wn.2d 725, 740-41, 287 P.3d 539 (2012).

Here, the decision to forego a lack of volition instruction was purely tactical. Jabs's counsel did not perform deficiently. In this context, a jury instruction on the affirmative defense of lack of volition was inconsistent with the defense theory denying that any of the alleged acts occurred.

In raising the affirmative defense of lack of volition, Jabs would have admitted the sexual assault on the couch occurred. *Riker*, 123 Wn.2d at 367-68. However, Jabs was able to elicit evidence that those acts never occurred. Defense counsel explicitly referred to the children's

accounts of Jabs sleeping during the couch incident as inconsistent and contradictory to the defense theory that it never happened.

By raising the affirmative defense, Jabs also would have taken on the burden of proving that he was asleep when the children sucked on his penis, but that the other incidents did not occur. This strategy would have weakened Jabs's denial on the other counts. Jabs's counsel made a reasonable tactical decision and was not deficient.

IV. UNANIMITY INSTRUCTION

Jabs argues the trial court violated his constitutional right to juror unanimity on the charge of communicating with a minor for an immoral purpose by denying his request for a *Petrich* instruction on that count. He argues that the State elected several distinct acts to support the count, and the jury was not unanimous as to any one act. We disagree.

"Criminal defendants have a right to a unanimous jury verdict in Washington." *State v. Armstrong*, 188 Wn.2d 333, 340, 394 P.3d 373 (2017); WASH. CONST. art. I, § 21. We review such constitutional issues de novo. *State v. Jorgenson*, 179 Wn.2d 145, 150, 312 P.3d 960 (2013).

The *Petrich* rule ensures juror unanimity when the prosecution alleges several acts in support of a single count charged against a defendant. *State v. Craven*, 69 Wn. App. 581, 587, 849 P.2d 681 (1993). The prosecution must elect the underlying act, or the court must instruct the jury that it must unanimously agree on a single criminal act underlying the conviction. *Petrich*, 101 Wn.2d at 572. "Where there is neither an election nor a unanimity instruction in a multiple acts case, omission of the unanimity instruction is presumed to result in prejudice." *State v. Coleman*, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007). "The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged." *Coleman*, 159 Wn.2d at 512.

Where a prosecutor elects a continuing course of conduct for a particular count, the *Petrich* rule is inapplicable. *Craven*, 69 Wn. App. at 587-88. "Evidence that multiple acts were intended to secure the same objective supports a finding that the defendant's conduct was a continuing course of conduct." *State v. Rodriquez*, 187 Wn. App. 922, 937, 352 P.3d 200 (2015). "Courts also consider whether the conduct occurred at different times and places or against different victims." *Rodriquez*, 187 Wn. App. at 937.

However, "'one continuing offense' must be distinguished from 'several distinct acts,' each of which could be the basis for a criminal charge." *State v. Barrington*, 52 Wn. App. 478, 480, 761 P.2d 632 (1988) (quoting *Petrich*, 101 Wn.2d at 571). "'To determine whether one continuing offense may be charged, the facts must be evaluated in a commonsense manner.'" *Barrington*, 52 Wn. App. at 480 (quoting *Petrich*, 101 Wn.2d at 571).

RCW 9.68A.090(1) prohibits communication with a minor for an immoral purpose. Communication under RCW 9.68A.090 may involve either a course of conduct or spoken words. *State v. Falco*, 59 Wn. App. 354, 358, 796 P.2d 796 (1990)); *State v. Schimmelpfennig*, 92 Wn.2d 95, 100-01, 594 P.2d 442 (1979). As such, a continuing course of conduct can support one count of communication with a minor for immoral purposes. *Barrington*, 52 Wn. App. at 482 (communicating conviction where a defendant promoted prostitution of one minor during a 3-month period); *State v. Gooden*, 51 Wn. App. 615, 620, 754 P.2d 1000 (1988) (communicating conviction where a defendant promoted prostitution of two minors during a 10-day period)). The trial court does not violate the defendant's rights to a unanimous jury verdict by omitting a *Petrich* instruction if the prosecutor elects a continuing course of conduct underlying a count of communication with a minor for immoral purposes. *Petrich*, 101 Wn.2d at 571.

Here, Jabs objected to the exclusion of the communicating with a minor count from the modified *Petrich* instruction given. The trial court ruled it did not need to be included because the State elected "an ongoing course of conduct" to support that count. 20 RP at 3453.[8]

In closing argument, the State invited the jury to consider different acts that constituted "an overall behavior" of communicating, including giving KK a vibrator, talking to KK about masturbation, showing KK pornographic videos, and talking to KK about sex. 20 RP at 3526.

We conclude that a series of acts by Jabs were intended to serve a single objective. In evaluating them in a commonsense manner, the communication charge involved one continuing course of conduct.

V. RESTRICTED ACCESS TO SOCIAL WEBSITES AS A SENTENCING CONDITION

Jabs argues the court violated his First Amendment rights by restricting his access to public social websites as a sentencing condition. Jabs relies on *Packingham v. North Carolina*, ___ U.S. ___, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017), where a statute making it a felony for registered sex offenders to access certain websites was held to facially violate the First Amendment. The State concedes the trial court erred in prohibiting Jabs from accessing social websites as a sentencing condition, and concedes the sentencing condition should be stricken.

We accept the State's concession, and remand with instructions to strike the challenged sentencing condition.

[8] Instead, the court instructed the jury that, to convict, the State must prove, beyond a reasonable doubt, Jabs communicated with KK, a minor, for immoral purposes between November 30, 2008, and September 29, 2014, and the act occurred in Washington.

VI. SAG CLAIMS

A. Competency of Child Witnesses

Jabs asserts the trial court abused its discretion in ruling that CG, KK, and KH were competent. Jabs asserts CG was incompetent because she did not understand the obligation to speak the truth when Sinclair interviewed her. He next asserts the court abused its discretion because CG, KH, and KK gave too broad of a timespan for the alleged abuse for the court to determine the second *Allen* factor. Last, Jabs contends the court abused its discretion because Sinclair's allegedly suggestive and leading questions, corrupted CG's, KH's, and KK's memories. We disagree.

Witness competency hinges on whether the witness, at the time of testifying had the capacity to accurately perceive, had the capacity to accurately recall, and had the capacity to accurately relate. *State v. S.J.W.*, 170 Wn.2d 92, 99-100, 239 P.3d 568 (2010). A competency determination is "relevant only to [a child witness's] ability to testify *at trial* and not the admissibility of [the child's] out of court statements." *Borboa*, 157 Wn.2d at 120 (emphasis added). Even "where the court is reviewing a pretrial competency determination, the inquiry is always whether the child is competent to testify *at trial*." *Brousseau*, 172 Wn.2d at 341 n.5.

Every person is presumed competent to testify, including children. *Brousseau*, 172 Wn.2d at 341. "A child's competency is now determined by the trial judge within the framework of RCW 5.60.050, while the *Allen* factors serve to inform the judge's determination." *S.J.W.*, 170 Wn.2d at 100. The challenging party has the burden of proving incompetence of a witness "by a preponderance of evidence," usually with evidence indicating the child is incapable of receiving just impressions of the facts, or incapable of relating facts truly. *Brousseau*, 172 Wn.2d at 341;

RCW 5.60.050. "[R]ecitation of the *Allen* factors, without more, [will] not constitute a sufficient offer of proof of incompetency." *Brousseau*, 172 Wn.2d at 345

The "bar for competency is low." *Brousseau*, 172 Wn.2d at 347. Inconsistencies in a child's testimony do not necessarily call into question witness competency. *State v. Carlson*, 61 Wn. App. 865, 874, 812 P.2d 536 (1991). Inconsistencies generally relate to the witness's credibility and the weight to give his or her testimony, not competence. *Carlson*, 61 Wn. App. at 874.

While criminal defendants have a constitutional due process right to be convicted on competent evidence, we give "significant deference to the trial judge's competency determination," and "disturb such a ruling only upon a finding of manifest abuse of discretion." *Brousseau*, 172 Wn.2d at 340. This standard of review is especially applicable to child witnesses because "[t]he competency of a youthful witness is not easily reflected in a written record, and [an appellate court] must rely on the trial judge who sees the witness, notices the witness's manner, and considers his or her capacity and intelligence." *State v. Woods*, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005). "There is probably no area of law where it is more necessary to place great reliance on the trial court's judgment than in assessing the competency of a child witness.'" *Woods*, 154 Wn.2d at 617.

Here, the trial court found CG, KH, and KK were competent to testify at trial after conducting a child hearsay hearing under RCW 9A.44.120. Jabs concurred with the court's assessment that CG, KH, and KK were competent. Additionally, at the child hearsay hearing, CG,

KH, and KK testified regarding a variety of topics illustrating competence, including the children's names, birth dates, mothers' names, the difference between the truth and a lie, and details about Jabs's house and the incidents of abuse.

The court did not abuse its discretion in finding these child witnesses were competent.

B. Communicating with a Minor for Immoral Purposes

Jabs asserts the statute prohibiting communication with a minor for immoral purposes, RCW 9.68A.090, is unconstitutionally vague as applied to his conduct. Jabs seems to also assert that insufficient evidence supports his conviction under RCW 9.68A.090. We disagree.

Jabs contends his discussions with KK about sex were "informative," that he only bought KK a vibrator so she would stop masturbating with his back massager, and denies that he ever showed KK pornography.

We construe Jabs's assertion on this point as a claim that the jury instruction defining "immoral purposes" was unconstitutionally vague because it failed to provide an ascertainable standard by which the jury could evaluate the alleged misconduct.

"The vagueness standard . . . [asks] whether persons of common intelligence and understanding have fair notice of the conduct prohibited, and ascertainable standards by which to guide their conduct." *Schimmelpfennig*, 92 Wn.2d at 102. "[W]hen ["immoral purposes"] is read in context with RCW 9.68A, it clearly provides persons of common intelligence and understanding with fair notice of and ascertainable standards of the conduct sought to be prohibited." *State v. Danforth*, 56 Wn. App. 133, 136, 782 P.2d 1091 (1989), *overruled on other grounds in State v. McNallie*, 120 Wn.2d 925, 846 P.2d 1358 (1993).

To the extent Jabs asserts the jury based his conviction on conduct that was not carried out with immoral purpose, his argument is without merit. *State v. Gladden*, 116 Wn. App. 561, 566, 66 P.3d 1095 (2003).

Here, the court instructed the jury that "immoral purposes" means "immoral purposes of a sexual nature." CP at 273 (Instr. 24). *McNallie*, 120 Wn.2d at 933, upheld an identically worded instruction. There, the court held that the communication statute "prohibits communication with children for the predatory purpose of *promoting their exposure* to and involvement in sexual misconduct." *McNallie*, 120 Wn.2d at 933 (emphasis added). *McNallie* "expressly rejected a detailed delineation of the requisite misconduct and led to a holding that 'sexual misconduct' was a sufficient context for the 'immoral purposes' contemplated by the communications with a minor statute." 120 Wn.2d at 932–33. Thus, the jury instruction defining "immoral purposes" was not unconstitutional vague.

Additionally, to the extent Jabs argues that there is insufficient evidence to support the communication conviction, the record shows sufficient evidence exists.

Evidence is sufficient when, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980). "[W]hen the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant." *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977), *overruled on other grounds by State v. Lyons*, 174 Wn.2d 354, 365, 275 P.3d 314 (2012). A claim of insufficiency "admits the truth of the State's evidence and all

inferences that can reasonably be drawn therefrom." *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). We do not review credibility determinations, and we defer to the trier of fact on issues of conflicting testimony and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004).

Sufficient evidence supported Jabs conviction for communicating with KK, a minor for immoral purposes. The jury had to find that there was communication constituting an ongoing course of conduct by Jabs with KK of a sexual nature. Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found Jabs was guilty beyond a reasonable doubt.

C. Admission of Photos

Jabs challenges the trial court's evidentiary rulings admitting photos of the children and of Jabs's home.[9] He claims the photos were irrelevant to the charged crimes, had negligible probative value, and were unduly prejudicial. Jabs also asserts he was tried on matters extraneous to the charged offenses when the photos were admitted. We disagree.

We review a trial court's admissibility of evidence determinations for an abuse of discretion. *State v. Cayetano–Jaimes*, 190 Wn. App. 286, 295, 359 P.3d 919 (2015). A trial court abuses its discretion when its evidentiary ruling is manifestly unreasonable or based on untenable grounds. *Cayetano–Jaimes*, 190 Wn. App. at 295. "Allegations that a ruling violated the defendant's right to a fair trial does not change the standard of review." *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192, 1196 (2013).

[9] Jabs never specifies which photos he is basing this assertion on.

Here, Jabs moved to exclude all photos seized in the search of his house as irrelevant when viewed in context and, in the alternative, as unduly prejudicial if admitted out of context. The court denied the motion and concluded the State offered the photos either to show opportunity, or to impeach the child victim's hearsay statements about nudity in Jabs's home. The court also concluded "the photos [we]re relevant for a variety of purposes[,]" and that Jabs could offer photos other than those proffered by the State for context. 6 RP at 932.

At trial, Baker testified about the photos depicting rooms in the home and children who were partially clothed or naked. Baker testified that there were thousands of photos taken from Jabs's home, that the police reviewed all the photos, that the majority depicted normal family activity, and that none were sexually explicit.

Additionally, the trial court granted Jabs's motion to admit two full photo albums. The trial court set aside an hour for the jury to review the photo albums so it could gain a clearer understanding of the context from which the police selected photos of nude or partially nude young girls. The judge also permitted Randall Karstetter, Jabs's witness, to give testimony on the quantity of photos reviewed by the police, and allowed him to opine on the nature of a sample of the photos.

Because the trial court did not abuse its discretion, Jabs's argument fails.

D. Prosecutorial Misconduct

Jabs argues the prosecutor improperly offered personal opinions on the veracity of witnesses and misled the jury by misstating the evidence during cross-examination and closing argument. We disagree.

Prosecutorial misconduct is grounds for reversal if the defendant shows the prosecuting attorney's conduct was both "improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Generally,

a prosecutor's improper comments are prejudicial only where "'there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.'" *Thorgerson*, 172 Wn.2d at 442–43 (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

When the defendant fails to object to the challenged portions of the prosecutor's argument, he "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." *Emery*, 174 Wn.2d at 760–61. The defendant must show that no curative instruction would have eliminated the prejudicial effect, and "the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the verdict.'" *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455).

A prosecutor has wide latitude to comment on a witness's credibility in closing argument. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). The prosecutor also may argue reasonable inferences from the evidence regarding the credibility of a witness. *Thorgerson*, 172 Wn.2d at 448. For example, a prosecutor may argue the jury should believe one witness over another because one witness's version of the events is more credible based on the evidence presented. *Thorgerson*, 172 Wn.2d at 448. However, "[i]mproper vouching occurs when the prosecutor expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness." *Thorgerson*, 172 Wn.2d at 443.

Here, Jabs did not object during the prosecutor's closing argument. None of the challenged statements during closing argument were flagrant or ill-intentioned, and the defendant fails to make any showing that a curative instruction would not have eliminated any prejudicial effect. Jabs's prosecutorial misconduct challenge fails.

E. Cumulative Error

Jabs argues that, cumulatively, effects of the errors at trial were so prejudicial that they denied him his right to a fair trial. We disagree.

"Under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant [his] right to a fair trial, even if each error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). Cumulative error does not apply where the errors are few and have little or no effect on the outcome of the trial. *Venegas*, 155 Wn. App. at 520.

Because the trial court did not err, we conclude that Jabs is not entitled to relief under the cumulative error doctrine.

We affirm the convictions but remand to the trial court to strike the challenged sentencing condition.

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.

Melnick, J.

We concur:

Maxa, C.J.

Lee, J.