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Washington State
Court of Appeals
Division Two

April 24, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ALEXANDER J. BROWN, Appellant.	No. 50003-5-II UNPUBLISHED OPINION

LEE, A.C.J. —Following a bench trial, the juvenile court convicted Alexander Brown of two counts of first degree rape of a child. Brown appeals, arguing that (1) the juvenile court abused its discretion in denying his motion to continue his trial date; (2) the juvenile court abused its discretion in denying his pretrial motion to compel the victim's counseling records; (3) he was denied effective assistance of counsel; (4) several of the juvenile court's findings of fact were unsupported by substantial evidence; (5) the State presented insufficient evidence to sustain his convictions; and (6) the cumulative errors at trial deprived Brown of a fair trial. We affirm.

FACTS

The families of Alexander Brown and J.K.[1] were very close friends. Brown often spent the night at J.K.'s family home. Likewise, J.K. and her brothers would spend the night at Brown's family home.

[1] Pursuant to this court's General Order 2011-1, we use initials for child witnesses in sex crimes.

On July 12, 2016, J.K. told her mother that Brown had "touched her private parts." Verbatim Report of Proceedings (VRP) (Jan. 25, 2017) at 269. J.K. further stated that Brown "had put his hands inside her when she was sleeping." VRP (Jan. 25, 2017) at 269. J.K. told her mother that this had happened "a bunch" of times—both at their house and at the Browns' house. VRP (Jan. 25, 2017) at 270. At the time of J.K.'s disclosure, J.K. was 9 to 10 years old and Brown was 12 to 13 years old.

J.K.'s mother reported J.K.'s disclosure to the police. Brown was subsequently charged with three counts of first degree child rape[2] based on the reported contact with J.K.[3] Trial was scheduled for January 24, 2017.

A. PRE-TRIAL MOTIONS

1. Motion to Continue Trial Date

Two weeks prior to the scheduled trial date, defense counsel moved for a continuance "based on primarily [his] trial schedule." VRP (Jan. 10, 2017) at 4. Defense counsel explained that he had multiple trials set for January, and as a result, was not going to have time "to properly prepare this case for trial" by January 24. VRP (Jan. 10, 2017) at 5. Defense counsel also stated that he no longer anticipated being available on January 24 because he would be in trial on another

[2] A person is guilty of first degree rape of a child "when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim." RCW 9A.44.073. "Sexual intercourse" is defined as "any penetration, however slight." RCW 9A.44.010(1).

[3] Brown was also charged with one count of first degree child molestation involving J.K.'s brother. That charge was dismissed after trial and is not subject to this appeal.

case. The State objected to any further continuances, arguing that this juvenile sex case had priority and that J.K. and her family were "anxious to get this moving." VRP (Jan. 10, 2017) at 7.

The juvenile court did not rule on the motion. Instead, the court set the matter over for another status conference three days later, on January 13.

On January 13, the parties appeared for the scheduled status conference. The State stated that it was still ready to proceed to trial on January 24. The juvenile court then asked defense counsel if there was "anything new and different here?" VRP (Jan. 13, 2017) at 13. Defense counsel replied, "There is much new and different. First and foremost is that the trial that I thought I was going to be in has now resolved and, furthermore, somehow that prosecutor was going to be in another trial, so, anyway, I would have been free." VRP (Jan. 13, 2017) at 13.

Defense counsel then informed the juvenile court that "yesterday during the interviews . . . we found out that [J.K.] had been in counseling, had talked to her school counselor and a private counselor about these events." VRP (Jan. 13, 2017) at 13. Defense counsel stated he needed to ask for the counseling records and proposed setting a motion to compel the records for the following Friday.

The juvenile court responded,

> So there's two issues here as I see it. There's the continuance request, and what I'm hearing [defense counsel] say today is that - -
>
> Well, you correct me if I misunderstood you, [defense counsel]. What I hear you saying today is that you're essentially withdrawing the continuance request pending the possible granting of a motion for records.

VRP (Jan. 13, 2017) at 17. Defense counsel responded, "That's fair, yes." VRP (Jan. 13, 2017) at 17. Defense counsel continued, "You're going to have to make a decision, and I think once we

make that decision, then that will impact whether or not we're seeking to continue the trial." VRP (Jan. 13, 2017) at 17.

The juvenile court ruled,

> I'm not going to continue it today. I'm going to deny the motion for a continuance, but with the understanding that, theoretically, if the Court were to grant a motion that I haven't even seen yet, then potentially there could be a need for a delay. . . .
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> . . . .
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> . . . Your motion to continue was made orally. I'm going to deny it orally subject to possible reconsideration, depending upon what happens with your motion, but I want the record to reflect that I'm doing so at this time because essentially defense counsel is knowing that the reason for the request to continue is that being his being tied up in adult criminal cases, that reason has essentially gone away at this point.

VRP (Jan. 13, 2017) at 20, 33.

The juvenile court set a hearing on the anticipated motion to compel the counseling records for the following week. Before adjourning, the court heard testimony from J.K.'s mother regarding the counseling sessions. J.K.'s mother testified that nothing in the counseling records would reveal any information other than what was already provided during the defense interview. J.K.'s mother also testified that J.K. was "extremely anxious" about testifying at trial and that this anxiety was affecting J.K.'s sleep and schooling. VRP (Jan. 13, 2016) at 22.

2. Motion to Compel Counseling Records

On January 18, Brown filed a consolidated motion to compel J.K.'s counseling records, or in the alternative, for an in camera review of the records. The motion stated that during the defense

interview on January 12, J.K. made several inconsistent statements and provided new details of the incident.

The motion also stated that

> JKK indicated during the interview that she was seeing a counselor that was referred by the Child Advocacy Center on a regular basis. The counselor . . . conducted play therapy with JKK and apparently elicited additional information about the molests. Clearly, there are additional statements by JKK that have not been turned over to the defense.

CP at 19. Defense counsel did not file an affidavit in support of the motion detailing such facts.

In the motion to compel, defense counsel acknowledged that RCW 70.125.065 of the Washington Uniform Healthcare Information Act (WUHIA) requires at least fourteen days' notice be given to the healthcare provider and patient. Defense requested a continuance of the scheduled January 24 trial date in order to comply with this deadline. .

At the motion to compel hearing, the State argued that defense counsel had failed to comply with the procedural requirements of RCW 70.125.065—the statute addressing records maintained by a community sexual assault program.. Specifically, the State argued that defense counsel had failed to provide the court with a supporting affidavit. The State also argued that the defense motion failed substantively. According to the State, defense counsel failed to state with particularity what inconsistent statements J.K. had made, which could warrant disclosure of the counseling records.

In response, defense counsel argued that as he read RCW 70.125.065, he was not required to set forth specific statements that were inconsistent. He argued that stating J.K. had made

inconsistent statements was sufficient to show why defense expected the counseling records to be relevant.

The juvenile court denied the defense motion to compel J.K.'s counseling records. The court found that defense counsel did not comply with the procedural requirements of RCW 70.125.065, as the motion was unsupported by an affidavit stating the specific reasons defense sought the counseling records. The court also found that defense counsel had failed to provide sufficient advanced notice pursuant to RCW 70.02.060.[4] The court ruled that it was not appropriate to continue the trial date in order to allow defense counsel to comply with this procedural requirement, especially in light of RCW 10.46.085.[5]

The juvenile court also found that the defense motion to compel failed substantively. The court ruled that defense failed to provide an adequate basis for the claim that J.K.'s counseling records contained evidence material to the defense's case, "as a general request based on vague and speculative assumptions is insufficient." CP at 40.

[4] "Before service of a discovery request or compulsory process on a health care provider for health care information, an attorney shall provide advance notice to the health care provider and the patient or the patient's attorney involved through service of process or first-class mail, indicating the health care provider from whom the information is sought, what health care information is sought, and the date by which a protective order must be obtained to prevent the health care provider from complying. Such date shall give the patient and health care provider adequate time to seek a protective order, but in no event be less than fourteen days." RCW 70.02.060(1).

[5] Under RCW 10.46.085, neither the defendant nor the prosecuting attorney may agree to continue the scheduled trial date in a sex offense case where the alleged victim is under the age of 18 years old, unless "the court within its discretion finds that there are substantial and compelling reasons for a continuance of the trial date and that the benefit of the postponement outweighs the detriment to the victim."

B. RELEVANT PORTIONS OF TRIAL

1. Testimony of Michelle Breland

Michelle Breland, the pediatric nurse who physically examined J.K. following J.K.'s disclosure, testified at trial. Breland testified that J.K.'s genital examination revealed that J.K. was "Tanner Stage III," meaning J.K. was

> probably a little more physically developed than some of her peers. . . .
>
> [W]hat happens with [this] kind of the puberty is the hymen becomes what we call estrogeneated, and so it - - the tissue grows and it proliferates. And she had lots of tissue and the edges were kind of scalloped on - - on itself, but at five o'clock she had an area where I was concerned that it looked a little different and it might - - rather than being that normal scallop it might represent a healed injury.

VRP (Jan. 26, 2017) at 377. Breland then testified that she could not say definitively whether or not the scallop on J.K. was a healed injury.

2. Testimony of J.K.

J.K. testified that when Brown visited her house, "He would touch [her] private parts." VRP (Jan. 24, 2017) at 51. J.K. also testified that she refers to her private parts as "[o]ne and two" and that her number one "goes pee." VRP (Jan. 24, 2017) at 51. According to J.K., for approximately two years, Brown would pull her pants down when he was over at her house, put blankets over her head, "and then he would use, I think three fingers, and then he, um, would touch me in number one." VRP (Jan. 24, 2017) at 53. J.K. testified that Brown's fingers went inside of her "number one area." VRP (Jan. 24, 2017) at 53. J.K. described the pain from the contact as "[m]aybe like getting stung by a bee." VRP (Jan. 24, 2017) at 53.

J.K. later testified that Brown had touched her one night when she spent at Brown's house. She was laying on the living room floor when Brown "touch[ed] [J.K.] in [her] number one" and that she "think[s]" he inserted his fingers because "every time that he would it would hurt." VRP (Jan. 24, 2017) at 73.

C. FINDINGS OF FACTS

After trial, the juvenile court entered the following findings of fact, among others:

> VI.
>
> On at least one occasion while the respondent was spending the night at J.K.'s "new" house, the respondent entered J.K.'s bedroom while she was asleep. J.K. has her own bedroom in the "new" house. The respondent put a blanket over J.K.'s head, pulled her pants down, and inserted his fingers into her vagina. J.K. woke up and moved, at which time the respondent took his hands out of her vagina, quickly tried to hide by her dresser, and then ran out of her bedroom. J.K. was able to witness the respondent leaving her room and positively identified him as the person who put his fingers in her vagina. J.K. felt pain during the time the respondent had his fingers in her vagina and described it at [sic] feeling like she was "stung by a bee." The respondent did not say anything to J.K. during the touching.
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> VII.
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> On at least one occasion while J.K. was spending the night at the respondent's house, J.K. was sleeping on the floor. While she was sleeping, the respondent quietly approached J.K., pulled down her pants, and inserted his fingers into her vagina. When J.K. moved, the respondent walked away. J.K. felt pain during the time the respondent had his fingers in her vagina.
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> . . . .
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> XVI.
>
> . . . The genital examination revealed that J.K. had a deep hymenal scallop at 5 o'clock which Ms. Breland attributed to either a result of healed trauma or a normal variant. . . .
>
> . . . .

XXI.

The court finds beyond a reasonable doubt that the respondent inserted his fingers into J.K's bare vagina on two different occasions at two different locations. The court does not find that a third incident occurred between April 21, 2015, and July 24, 2016."

CP at 60, 63, 65.

The juvenile court found Brown guilty of two counts of first degree rape of a child, finding that Brown had sexual intercourse with J.K. by inserting his fingers into her vagina on two separate occasions. The court also found Brown not guilty of one count of first degree rape of a child.

Brown appeals.

ANALYSIS

A. DENIAL OF MOTION TO CONTINUE

Brown argues that the juvenile court abused its discretion in denying his motion to continue the scheduled trial date "in order to permit reasonable and necessary investigation." Br. of Appellant at 19. We disagree.

1. Standard of Review

The decision to grant or deny a motion for continuance of the trial date rests within the sound discretion of the trial court. *State v. Tatum*, 74 Wn. App. 81, 86, 871 P.2d 1123, *review denied*, 125 Wn.2d 1002 (1994). We will not disturb such a ruling absent a showing that the trial court either failed to exercise its discretion or manifestly abused its discretion. *Id.* A trial court's decision is manifestly unreasonable if exercised on untenable grounds or for untenable reasons. *State v. Barnes*, 58 Wn. App. 465, 471, 794 P.2d 52 (1990), *aff'd*, 117 Wn.2d 701, 818 P.2d 1088 (1991).

Further, where the appellant alleges that the trial court's denial of a motion for continuance deprived him or her of the constitutional right to compulsory process, we will reverse only upon a showing that the accused was prejudiced by the denial or that the result of the trial would likely have been different if the trial court had granted the continuance. *Tatum*, 74 Wn. App. at 86. This determination "must be [based on] the circumstances present in the particular case." *Id*. (quoting *State v. Eller*, 84 Wn.2d 90, 96, 524 P.2d 242 (1974)).

2. The Juvenile Court did not Abuse its Discretion

Brown argues that it was manifestly unreasonable for the juvenile court to find that his need "to complete discovery and present necessary witnesses and evidence on his own behalf" was not a compelling reason to continue the trial date. Brown argues that "[d]ecisions which violate an accused person's rights to counsel or due process of law are manifestly unreasonable." Br. of Appellant at 30. We disagree because the defense motion to continue was not based on a need to complete discovery, and even if it were, Brown fails to show that he was prejudiced by the denial.

When exercising its discretion to grant or deny a continuance, trial courts may consider a number of factors, including surprise, due process, materiality, diligence of the parties, and maintenance of orderly procedure. *State v. Downing*, 151 Wn.2d 265, 273, 87 P.3d 1169 (2004). However, in a juvenile sex case, the court must compare the compelling reasons for continuing the trial with the potential detriment to a child victim that the continuance might cause. *Id*.; RCW 10.46.085.

Here, the record shows that Brown made three continuance requests in the two weeks preceding his scheduled trial date. The first continuance request was orally made on January 10, based on the fact that Brown's defense counsel had three other pending trials scheduled, which he asserted would impair his ability "to properly prepare this case for trial" by January 24. VRP (Jan. 10, 2017) at 5. Defense counsel also asserted that a continuance was necessary because he was unavailable on the scheduled trial date due to a trial in another case.

When the parties appeared before the juvenile court three days later, defense counsel explained that his original reasons for seeking a continuance had disappeared. Specifically, one of defense counsel's other cases set for trial had resolved, and therefore, counsel no longer had a scheduling conflict.

On appeal, Brown asserts that his trial counsel then "renewed the motion to continue" in order to move for production of J.K.'s counseling records. Br. of Appellant at 19. The record does not support this assertion. Instead, the record shows that defense counsel asked the juvenile court to set a motion to compel J.K.'s counseling records, and if the court were to grant the motion to compel, then this would give the parties "a chance to address those issues before the trial and determine whether or not we need to continue the trial." VRP (Jan. 13, 2017) at 13-14. Defense counsel informed the juvenile court that if the court were to grant the anticipated motion to compel, "then that [would] impact whether or not we're seeking to continue the trial." VRP (Jan. 13, 2017) at 17. This exchange between defense counsel and the juvenile court does not support Brown's argument that his trial counsel "requested a continuance for additional investigation and trial preparation." Br. of Appellant at 19.

When the juvenile court denied Brown's first motion to continue,[6] the court ruled that Brown's first continuance request was based upon his counsel's trial schedule, and "that reason has essentially gone away at this point." VRP (Jan. 13, 2017) at 33. Given that Brown's first continuance request was based on his counsel's scheduling conflicts, it was not manifestly unreasonable for the court to deny his continuance request when defense counsel's scheduling conflicts were no longer present.

Brown's second continuance request was hypothetical, as it was contingent upon the juvenile court's grant of a motion to compel that he had yet to file.[7] Given that the juvenile court ultimately denied his motion to compel J.K.'s counseling records, Brown never actually moved for a continuance in order to review those records in preparation for trial. Therefore, we cannot find that the juvenile court abused its discretion by not continuing the trial date when there was no motion to continue.

[6] On appeal, the State argues that the juvenile court never denied Brown's motion to continue because Brown withdrew his motion. Though at one point, defense counsel did inform the court that he was essentially withdrawing the motion to continue based on his scheduling conflicts, the juvenile court did in fact deny his motion. The juvenile court specifically ruled, "Your motion to continue was made orally. I'm going to deny it orally subject to possible reconsideration . . . but I want the record to reflect that I'm doing so at this time because essentially defense counsel is knowing that the reason for the request to continue is that being his being tied up in adult criminal cases, that reason has essentially gone away at this point." VRP (Jan. 13, 2017) at 33. Therefore, the State's argument that the juvenile court never denied the defense motion to continue is not supported by the record.

[7] Defense counsel told the juvenile court, "If you grant the motion to compel, then obviously we're not going to get the records in time to respond to use in a meaningful way on the 24th, but at least that gives us a chance to address those issues before the trial and determine whether or not we need to continue the trial. VRP (Jan. 13, 2017) at 14.

Brown's third continuance request was made in his motion to compel J.K.'s counseling records. There, Brown acknowledged that under the WUHIA, he was required to provide the healthcare provider and patient with 14 days' notice so that they may be heard on the issue. Brown requested a continuance of the trial date in order to comply with this statutory notice requirement.

In its written order, the juvenile court denied the continuance request made in order to comply with the statute. The court ruled that in light of RCW 10.46.085, which requires the court to consider the impact of continuance on the child victim, a continuance was not appropriate here. CP at 40. Specifically, the juvenile court considered J.K.'s mother's sworn testimony that the counseling records did not contain any new information and that J.K. was extremely anxious about the upcoming trial.

As to the 14-day notice requirement, the juvenile court ruled that defense counsel created the problem by waiting to interview J.K. and her mother until less than two weeks before trial. The juvenile court reached this determination after considering the reasons for the delay and weighing the impact of continuance on J.K., which it was statutorily required to consider under RCW 10.46.085. Thus, the juvenile court's denial of this continuance request was not based on untenable reasons or untenable grounds.

We hold that the juvenile court did not fail to exercise its discretion, nor did it manifestly abuse its discretion, in denying Brown's various requests to continue his trial date.

3. Brown Fails to Demonstrate Resulting Prejudice

Even if Brown was able to show that the juvenile court's denial of his motion to continue impaired his rights to counsel and due process, he fails to show any resulting prejudice. Brown

argues that the requested records "were critical in this case because they illustrate the evolution of J.K.'s recollections." Br. of Appellant at 27. He further argues that it "was highly likely that J.K. made statements that are inconsistent with prior and subsequent statements that she has made." Br. of Appellant at 28. However, neither in his motion to compel, nor on appeal, does Brown identify what inconsistent statements J.K. made.

Brown's argument on appeal is that J.K.'s counseling records would likely have revealed additional inconsistencies. However, in making this argument, Brown fails to explain how further evidence of inconsistent statements would have affected the trial outcome. Thus, Brown has failed to show he was prejudiced by denial of access to J.K.'s counseling records. *Tatum*, 74 Wn. App. at 86. Therefore, we hold that even if Brown showed denial of his continuance request was a manifest abuse of discretion, there was no resulting prejudice, and his challenge fails.

B. DENIAL OF MOTION TO COMPEL

Brown contends that the juvenile court abused its discretion in denying his motion to compel J.K.'s counseling records, or for an in-camera review of the records in the alternative, because (1) the records were material to the defense, and (2) his counsel was not provided sufficient time to comply with the statutory notice requirement. We disagree.

1. Standard of Review

We review the decision on a motion to compel a victim's counseling records for abuse of discretion. *State v. Grenning*, 169 Wn.2d 47, 57, 234 P.3d 169 (2010) ("Generally, we review trial court evidentiary decisions, including decisions on discovery, for abuse of discretion."). The decision to hold an in camera hearing in order to determine the scope of discovery of confidential

records also is within the discretion of the trial court. *State v. Diemel*, 81 Wn. App. 464, 467, 914 P.2d 779, *review denied*, 130 Wn.2d 1008 (1996). Therefore, we will only disturb the trial court's determination if we find that the trial court abused its discretion in making its determination. *Id*. at 469.

A court abuses its discretion if its decision is manifestly unreasonable by falling "outside the range of acceptable choices, given the facts and the applicable legal standard." *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)). A court may also abuse its discretion if its decision is based on untenable reasons, meaning, "[B]ased on an incorrect standard or the facts do not meet the requirements of the correct standard." *Id*.

2. The Juvenile Court did not Abuse its Discretion

Brown argues that the juvenile court abused its discretion because (1) the records sought were discoverable pursuant to CrR 4.7(d),[8] and (2) the court's denial based on procedural grounds was untenable. We disagree.

a. Materiality of Evidence

Brown contends that J.K.'s counseling records were discoverable under CrR 4.7(d) because they illustrated "the evolution of J.K.'s recollections." Br. of Appellant at 27. We hold that this argument fails.

[8] CrR 4.7(d) provides that "[u]pon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant."

In order to obtain discovery or in camera review of privileged records, the defendant must first show that the records sought are material. *Diemel*, 81 Wn. App. at 468. This showing is not made merely by a "claim that privileged files might lead to other evidence or may contain information critical to the defense." *Id*. at 469. In *Diemel*, the defendant in a third degree rape case sought the counseling records of the alleged victim. *Id*. at 465-66. The defendant argued that the records were material to his defense because (1) the alleged victim may have discussed her drinking during the incident with her counselor, (2) the alleged victim had confided in others that she was previously in an abusive relationship, which would have explained her subsequent behavior, and (3) the alleged victim might have discussed with her counselor whether or not the sex between her and the defendant was consensual. *Id*. at 466.

Even though the defendant in *Diemel* cited to specific ways the records might support his defense, the court still found that he had failed to make the requisite showing that the counseling records sought contained information useful to the defense. *Id*. at 469. In reviewing the supporting affidavit, the *Diemel* court found that it "reveal[ed] considerable speculation and little factual basis or foundation." *Id*. The fact that the alleged victim might have discussed consent with her counselor was insufficient to justify the intrusion into her protected medical records. *Id*. The *Diemel* court held that "[a] claim that privileged files might lead to other evidence or may contain information critical to the defense is not sufficient to compel a court to make an in camera inspection." *Id*.

Here, Brown provided even less factual basis or foundation to support his motion to compel J.K.'s counseling records than in *Diemel*. Brown's reason for requesting the records was that "[t]here [was] a high likelihood that JKK made statements that are inconsistent with prior and subsequent statements that she has made." CP at 23. Brown based this assertion on the fact that J.K. had not been consistent in her previous statements. Brown provided no detail as to what inconsistencies J.K. had made or how those inconsistencies supported his theory of the case. As in *Diemel*, Brown's claim that J.K.'s discussions with her counselor might lead to other evidence or contain information critical to the defense was speculative and insufficient to compel the disclosure of J.K.'s protected medical records.

Brown further argues that it was "highly likely" that J.K. made inconsistent statements to her counselor because J.K. "had not been consistent in her previous statements nor in her subsequent testimony." Br. of Appellant at 28. Not only does Brown fail to explain with any particularity what inconsistent statements supported his motion, but his reliance on J.K.'s subsequent trial testimony is misplaced. Given that J.K. testified after Brown filed the motion to compel J.K.'s counseling records, any inconsistency in her trial testimony could not have possibly supported the motion Brown filed prior to trial. Thus, J.K.'s subsequent trial testimony could not have supported Brown's motion to compel and does not show how the juvenile court abused its discretion in denying his motion.

Because Brown failed to show how J.K.'s records were material, the juvenile court's denial of Brown's motion was not outside the range of acceptable choices given the applicable legal standard and facts. We hold that the juvenile court did not abuse its discretion in denying Brown's motion to compel J.K.'s counseling records.

b. Procedural Hurdles

Brown argues that the juvenile court's denial of his motion based on the requirements of RCW 70.125.065[9] was untenable because J.K.'s counselors were not part of a community-based social service agency. Brown argues that this statute was inapplicable because "the record fails to support the conclusion that [the] counselor or therapist J.K. consulted was part of a covered social service agency." Br. of Appellant at 32.

Here, the juvenile court never entered a finding that the J.K.'s counselor or school therapist met the definition of "a community-based social service agency that is qualified to provide and provides core services to victims of sexual assault." RCW 70.125.030(1); CP at 39-40. And there is nothing in the record that shows J.K.'s counselors were part of a community-based social service agency or qualified to provide core services to victims of sexual assault.[10] But the juvenile court

[9] Under RCW 70.125.065, "Records maintained by a community sexual assault program and underserved populations provider shall not be made available to any defense attorney as part of discovery in a sexual assault case unless: (1) A written pretrial motion is made by the defendant to the court stating that the defendant is requesting discovery of the community sexual assault program or underserved populations provider records; (2) The written motion is accompanied by an affidavit or affidavits setting forth specifically the reasons why the defendant is requesting discovery of the community sexual assault program or underserved populations provider records."

[10] The only potential reference relating to the applicability of RCW 70.125.065 was in a footnote in Brown's motion saying the statute "is not involved in this instant case, because the hospital and therapist are private entities." CP at 22.

applied RCW 70.125.065 to Brown's motion because both parties relied on this statutory scheme during oral argument.[11] In its oral ruling, the juvenile court found, "There doesn't appear to be any dispute here that the statutory scheme [RCW Title 70] does apply to this case, so I'm applying that statutory scheme to this motion, to this situation." VRP (Jan. 20, 2017) at 50-51.

Even if RCW 70.125.065 was inapplicable here, this would not make the juvenile court's ruling untenable. The juvenile court denied Brown's motion based on the affidavit requirement of RCW 70.125.065, as well as the notice requirement of the WUHIA. Brown does not dispute that he was bound by the WUHIA's notice requirement and that he could not meet this deadline. Thus, even if the juvenile court's reliance on RCW 70.125.065 was error, the juvenile court properly relied on the WUHIA.

Therefore, even if the record did show that J.K.'s counselor and therapist did not work for community-based social service agencies, the juvenile court's ruling was still tenable based on the application of WUHIA. Further, as discussed in Section B.2.a. above, the juvenile court had substantive reasons to deny Brown's motion. As a result, the juvenile court's ruling denying Brown's motion to compel J.K.'s counseling records was not based on untenable grounds or

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[11] Though Brown now argues that RCW 70.125.065 was inapplicable here because the counseling records sought were not from "a community-based social service agency," we hold that Brown waived such challenge because his argument at the motion hearing was based on RCW 70.125.065. At oral argument, Brown never objected to the applicability of RCW 70.125.065, but instead argued that he had complied with the statute. Therefore, we hold any challenge to the applicability of RCW 70.125.065 waived. *In re Copland*, 176 Wn. App. 432, 442, 309 P.3d 626 (2013), *review denied*, 182 Wn.2d 1009 (2015) (finding the invited error doctrine applicable where petitioner "affirmatively assented to the error, materially contributed to it, or benefited from it.") (quoting *State v. Momah*, 167 Wn.2d 140, 154, 217 P.3d 321 (2009), *cert. denied*, 562 U.S. 837 (2010)).

reasons. Accordingly, we reject Brown's claim that the juvenile court's misapplication of RCW 70.125.065 compels reversal.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Even though Brown argues that RCW 70.125.065 was inapplicable to his records request, he nonetheless contends that his trial counsel was ineffective for failing to comply with the statute's procedural requirements. Br. of Appellant at 36-37. We disagree.

1. Legal Principles

An ineffective assistance of counsel claim presents a mixed question of law and fact, which we review de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). The Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution guarantees the accused the right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014).

In determining whether a criminal defendant received ineffective assistance of counsel is a two-pronged inquiry. *Id*. First, the defendant must show that counsel's performance was deficient, and second, the defendant must show that this deficient performance prejudiced the defense. *Id*. at 32-33. Counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail, the defendant must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). A defendant can rebut this presumption by showing that there is no conceivable legitimate tactic or strategy for counsel's performance. *Grier*, 171 Wn.2d at 33.

2. Counsel Was Not Ineffective

Brown argues that (1) there was no "conceivable tactical reason" for his counsel to not provide an affidavit in support of his motion to compel J.K.'s counseling records; and (2) "counsel had a duty to seek an order shortening" the 14-day notice requirement. Br. of Appellant at 37-38. Brown's briefing provides a conceivable tactical reason to not file a supporting affidavit—counsel believed the procedural requirements of RCW 70.125.065 did not apply to his motion. Brown's motion to compel was based solely upon CrR 4.7 and the Sixth and Fourteenth Amendments of the U.S. Constitution and their Washington counterparts. CrR 4.7 is a general discovery rule and does not contain an affidavit requirement. Brown fails to explain how his trial counsel's failure to comply with the procedural requirements of RCW 70.125.065 fell below an objective standard of reasonableness. Therefore, we hold that Brown has not made a showing that his counsel's performance was deficient.

Also, even if defense counsel was deficient in failing to provide a supporting affidavit, Brown fails to show how this deficient performance resulted in prejudice. Instead, Brown merely argues, "To the extent that [Brown] was prejudiced by the juvenile court's rejecdtion [sic] of the motion to compel because of this failure, he has been substantially prejudice [sic] by the error." Br. of Appellant at 38.

Brown also fails to explain how the supporting affidavit would have supported defense counsel's assertion that J.K. had made inconsistent statements during a defense interview. Thus, Brown fails to show how the affidavit would have provided the particularity necessary for the court to conclude that the evidence sought was material.

As to the 14-day notice requirement, Brown fails to cite to any support showing that counsel has an affirmative duty (or legal basis) to request an order shortening time when he was unable to comply with the statutory deadline. The record shows that Brown's trial counsel specifically requested a continuance in order to comply with the statutory deadline. Brown provides no authority to support his contention that seeking an order to continue, instead of an order shortening the statutory timeline, fell below an objective standard of reasonableness.[12] "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171, *cert. denied*, 439 U.S. 870 (1978) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). Brown, therefore, fails to show that defense counsel's failure to seek such an order fell below an objective standard of reasonableness.

[12] Even if a motion to shorten time had been made, the juvenile court would likely have denied Brown's motion because he failed to provide an adequate basis for his claim that J.K.'s counseling records contained evidence material to his defense. *See* Section B.2.a. above. *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995) (holding that an ineffective assistance of counsel claim based on trial counsel's failure to make a motion requires a showing that the trial court would likely have granted the motion if made).

Also, as with his first claim to ineffective assistance of counsel, Brown fails to show that his counsel's failure to seek an order shortening time prejudiced him. Brown does not provide any argument showing a reasonable probability that but for his counsel's failure to request this particular order, the result here would have been different.

Therefore, we hold that Brown has failed to show his trial counsel's performance was deficient or that he was prejudiced by deficient performance. Accordingly, we reject Brown's ineffective assistance of counsel claim.

D. CHALLENGED FINDINGS OF FACT

Brown assigns error to four of the juvenile court's findings of fact following trial, claiming they are not supported by the record. The State concedes that the first challenged finding is not supported by substantial evidence. We agree that the first challenged finding is not supported by substantial evidence, but hold that such error was harmless. Also, we hold that the other three challenged findings are supported by substantial evidence.

1. Standard of Review

We review challenged findings of fact following a bench trial for substantial evidence. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). Substantial evidence is "evidence sufficient to persuade a fair-minded, rational person of the truth of the finding." *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), *abrogated by* 551 U.S. 249 (2007)). Unchallenged findings of fact are verities on appeal. *State v. Bonds*, 174 Wn. App. 553, 562, 299 P.3d 663, *review denied*, 178 Wn.2d 1011 (2013). The party challenging the findings as unsupported by substantial evidence bears the

burden to show that substantial evidence does not support the lower court's findings. *State v. A.N.J.*, 168 Wn.2d 91, 107, 225 P.3d 956 (2010).

Findings of fact that contain errors are subject to harmless error analysis. *State v. Banks*, 149 Wn.2d 38, 43-46, 65 P.3d 1198 (2003). An error is harmless if it appears beyond a reasonable doubt that the challenged error would not have changed the result. *Id*. at 44.

2. Finding XVI

Brown challenges the portion of finding of fact XVI stating that "[t]he genital examination revealed that J.K. had a deep hymenal scallop at 5 o'clock . . . ." Br. of Appellant at 41. Brown is correct that this finding is unsupported by substantial evidence. At no point did Breland testify that the genital examination of J.K. revealed a "deep" scallop. Instead, she testified that the area "looked a little different" and could potentially represent a healed injury. VRP (Jan. 26, 2017) at 377.

However, Brown fails to provide any argument that absent this error, the trial result would have been different. Instead, he asks us to strike the portion of the juvenile court's finding that the scallop was "deep." Given that the juvenile court found that the cause of the scallop variant was "impossible to determine," the record does not show that the trial result would have been different absent this characterization. CP at 63.

The juvenile court found that "J.K. was telling the truth when she disclosed to her mother that the respondent had been touching her private parts." CP at 65. Thus, it appears beyond a reasonable doubt that even without the finding of a "deep scallop," the trial result would have been the same. CP at 65. Therefore, we hold that the juvenile court's mischaracterization of Breland's finding as a "deep" scallop was harmless error.

3. Findings of Fact VI, VII, and XXI

Brown argues that findings of fact VI, VII, and XXI all lack evidentiary support because J.K.'s testimony regarding Brown's contact with her was "inconsistent and contradictory." Br. of Appellant at 43. We hold that the challenged findings are supported by substantial evidence.

Brown challenges findings of fact VI, VII, and XXI solely by describing the inconsistencies throughout J.K.'s trial testimony. For example, Brown draws this court's attention to J.K.'s testimony that Brown inserted three fingers inside of her, even though J.K. later testified that she could not feel Brown's fingers go inside of her.

Despite detailing the various alleged inconsistent statements throughout J.K.'s testimony, Brown fails to provide any legal authority to support his argument. Specifically, Brown fails to provide any legal authority stating that a witness's inconsistent trial testimony renders any finding based on that witness's testimony unsupported by substantial evidence. Br. of Appellant at 42-45. Instead, he merely argues that because J.K.'s testimony was inconsistent at points, the juvenile court's findings are not supported by substantial evidence. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that

counsel, after diligent search, has found none." *DeHeer*, 60 Wn.2d at 126. Therefore, we reject Brown's argument on this basis.

Also, the trier of fact is free to believe or disbelieve a witness, as credibility determinations are left solely for the trier of fact. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). We will not review a lower court's credibility determinations. *Id.*

Here, J.K. testified that Brown had been touching her "private parts" for "almost two years." VRP (Jan. 24, 2017) at 52. She testified that this happened one time at her house and one time at Brown's house. J.K. then testified in detail about the time Brown touched her in her house. J.K. testified that Brown "would put [her] pants down to [her] ankles," "then he would put blankets over [her] head," and "then he would use, I think three fingers, and then he, um, would touch me in number one." VRP (Jan. 24, 2017) at 52-53. J.K. further testified that Brown's fingers went inside her number one area and hurt. When asked to describe the pain she felt, J.K. testified, "Honestly, I don't know. Maybe like getting stung by a bee." VRP (Jan. 24, 2017) at 53. She also testified that her number one area was the area that "goes pee." VRP (Jan. 24, 2017) at 51.

Later, J.K. testified that Brown touched her on another occasion when she spent the night at Brown's house. Specifically, J.K. testified that she was laying on the living room floor at night. She then testified that Brown "touch[ed] [J.K.] in [her] number one" and that she thought he inserted his fingers because "every time that he would it would hurt." VRP (Jan. 24, 2017) at 73.

J.K.'s testimony provided substantial evidence to support findings of fact VI, VII, and XXI. As outlined above, J.K. testified in detail as to two incidents where Brown inserted his fingers into her vagina. She testified that the contact hurt and happened both at her house and Brown's house. This testimony was sufficient to persuade a fair-minded, rational person of the truth that Brown inserted his fingers into J.K.'s vagina on two separate occasions. Therefore, we hold that Brown's challenge to findings of fact VI, VII, and XXI fails.

E. SUFFICIENCY OF THE EVIDENCE

Brown argues that "the absence of critical findings regarding the allegations" precluded the juvenile court from finding that the State had proved the allegations beyond a reasonable doubt. Br. of Appellant at 46. We disagree.

1. Standard of Review

We review a challenge to the sufficiency of the evidence de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). To determine whether the State presented sufficient evidence to support a conviction, we consider " 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime *beyond* a reasonable doubt.' " *Id.* (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. *Homan*, 181 Wn.2d at 106. Such inferences are interpreted in favor of the State and " 'most strongly against the defendant.' " *Id.* (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). We defer to the trier of

fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Ague-Masters*, 138 Wn. App. 86, 102, 156 P.3d 265 (2007).

2. The Evidence was Sufficient

Again, Brown relies on the alleged inconsistencies in J.K.'s testimony to argue that there is insufficient evidence to support his conviction. However, again, the juvenile court's credibility determinations are not reviewable on appeal. *Camarillo*, 115 Wn.2d at 71. The juvenile court found J.K. to be a credible witness, and thus, believed her testimony detailing the two incidents where she claimed that Brown inserted his fingers into her vagina. CP at 64. In viewing the evidence in the light most favorable to the State, any rational trier of fact could find that Brown had sexual intercourse with J.K., and thus, was guilty of two counts first degree rape of a child. RCW 9A.44.073.

F. CUMULATIVE ERROR

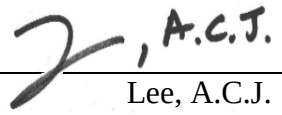
Brown argues that he is entitled to a new trial based on the cumulative error of (1) the denial of his pretrial motions to compel and continue the trial date and (2) the trial court's error in characterizing the results of the gynecological exam. We disagree.

Under the cumulative error doctrine, reversal may be warranted even if each individual error would otherwise be considered harmless. *State v. Russell*, 125 Wn.2d 24, 93, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995). Brown has failed to show the juvenile court abused its discretion in denying his motion to continue the trial and his motion to compel J.K.'s counseling records. As to the juvenile court's characterization of J.K.'s gynecological exam results, the juvenile court's factual findings following trial could not have deprived Brown of a fair trial

because they were entered after the trial concluded. Therefore, we reject Brown's claim that the cumulative errors in his case compel reversal.

We affirm.

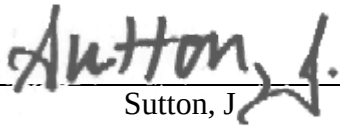
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Lee, A.C.J.

We concur:

Worswick, .J.



Sutton, J.