IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL STEVEN THOMPSON, Appellant.	No. 41865-7-II UNPUBLISHED OPINION

Van Deren, J. — Michael Thompson appeals his convictions on two counts of second degree rape and two counts of third degree rape, asserting that (1) the trial court abused its discretion and violated his constitutional right to a fair trial by denying his continuance motion, (2) his counsel was ineffective for a number of reasons, (3) the trial court made an unconstitutional comment on the evidence pertaining to a witness's improper opinion testimony, and (4) the trial court exposed him to double jeopardy by including his third degree rape convictions on the judgment and sentence. The State concedes that the trial court erred in failing to delete reference to the third degree rape convictions. We affirm Thompson's convictions, but we accept the State's concession and we remand to the trial court to amend the judgment and sentence by deleting reference to the third degree rape convictions.

FACTS

I. CMM

During the 2009 to 2010 school year, CMM,[1] a sophomore, ADM, a freshman, and Thompson, an older student, all attended Mountain View High School in Vancouver. On March 4, 2010, Thompson and CMM had plans to "hang out" in the school auditorium at lunchtime. Report of Proceedings (RP) at 203-04. Thompson approached CMM while she was eating lunch with her friends in the cafeteria and asked, "'Are we still going to hang out?'" to which CMM responded, "'Yeah.'" RP at 203-04. CMM and Thompson left the cafeteria together and went to the auditorium.

As Thompson and CMM were "strolling" around the auditorium, Thompson asked CMM if she was dating anyone, to which she responded, "'[N]o.'" RP at 204-05. When they entered a smaller room within the auditorium, Thompson asked for a hug and CMM complied. CMM then leaned against a wall while she and Thompson were talking, and the two kissed. Thompson pulled down CMM's tank top and brassiere straps, exposing her breasts. CMM told Thompson, "'Stop, no,'" but he continued to fondle her breasts with his hands and mouth and attempted to put his hand down the back of her pants. RP at 209. CMM continued to tell Thompson to stop and attempted to push him away with her hand, to which he responded, "'Sorry, I'm not listening.'" RP at 210. CMM was eventually able to cover herself and she began walking toward

[1] RCW 10.52.100, RCW 10.97.130, RCW 13.50.050(24), and RCW 42.17.31901 protect child victims of a sexual assault. The statutes require that the name of a victim of a sexual assault who was younger than 18 years old at the time of the assault not be disclosed. RCW 10.52.100 specifically applies this proscription to "appellate proceedings," which by implication includes case captions and court opinions.

an exit leading to the cafeteria.

CMM turned back, however, because she had forgotten her "stuff." RP at 214. Thompson approached her, attempted to give her another hug, and said, "'I'm sorry again for not listening.'" RP at 214. CMM did not want a hug and instead patted him on the back, but Thompson turned her around and managed to put his hands down the front of her jeans. In attempting to remove his hands from her pants, CMM dropped to her knees, lost her balance, and rolled onto her back. At the same time, she kept her hand on Thompson's wrist, trying to pull his hand out of her pants. Thompson told CMM that it would be easier if she took her belt off, to which she responded, "'That's why it's not coming off.'" RP at 214-15. Thompson digitally penetrated her vagina while his shoulder was on top of her. CMM told Thompson to "'[s]top'" and "'[g]et off of me,'" to which he responded, "'If I stop, what do I get?'" RP at 215. CMM responded, "'Nothing. Now, just stop,'" and Thompson eventually let her get up. RP at 215.

CMM left the auditorium and ran to her friend Kyle Cox, who observed that CMM "wasn't herself." RP at 63. CMM asked Cox whether if a girl told him "no," he would keep going, and she began to cry. CMM told Cox what had happened during lunch, and told him that she was "sore" and "kind of scared." RP at 64.

When CMM returned home that evening, her stepmother noticed that she was "really quiet" and, when she asked what was wrong, CMM became "teary-eyed." RP at 69. CMM eventually told her stepmother that she had been sexually assaulted at school and began "sobbing." RP at 71.

The next day, CMM reported the incident to the school principal. She also reported the incident to Kelly Eldred, the school security officer, and officer Ron Stevens of the Vancouver

Police Department. That same day, CMM went to the hospital and was examined by Irene Sheppard, a registered nurse and certified sexual assault trauma examiner. At the hospital, CMM was wearing the same brassiere she wore during the incident with Thompson, and Brian Schaffer of the Vancouver Police Department collected the brassiere in a paper bag. CMM told Sheppard what had happened the day before,[2] and Sheppard testified that CMM was "shaking" and "quite traumatized." RP at 127. Sheppard testified that she did not conduct a "rape kit" on CMM because she had showered and there had been no penile penetration, but she examined CMM's vagina which "looked good" and Sheppard "didn't see any overt scratching." RP at 128-29.

II. ADM

In the fall or winter of 2009, Thompson invited ADM over to his house to watch a movie. Thompson picked ADM up, brought her to his house, and then told her that no one else was home.[3] As they began to watch a movie, Thompson began kissing ADM and attempting to pull her pants down, but she tried to push him away and repeatedly told him, "'Stop'" and "'No.'" RP at 166. Thompson then pulled ADM off the couch and onto the floor, taking her pants off as well as his own. He pinned her legs down with his legs and held her arms down above her head with one hand and penetrated her vagina with his penis for approximately five to ten minutes. Thompson eventually released ADM and drove her home.

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[2] Although multiple witnesses testified that CMM's recitation of events to them included substantially the same content as her testimony at trial, the defense presented one witness, Stephanie Hollada, who testified to the contrary. Hollada, CMM's former friend and a student at Mountain View High School, testified that, in March of 2010, CMM approached her at school and told her that "[CMM] and [Thompson] were in the auditorium and that she tried to come on to him, and he pushed her away." RP at 433.

[3] But Thompson's father testified, "'I was there every evening. There is no way that [ADM] would have been in that house alone with my son without me being there.'" RP at 470.

ADM did not initially report the incident because she was afraid that Thompson would hurt her. But after CMM reported the March 2010 incident, ADM told her boyfriend, Roman Enlund, "'[I]t happened to me, too.'" RP at 169. Enlund then asked Thompson at school whether he "had done it," to which Thompson replied, "'Yeah.'" RP at 287. Enlund attempted to "go after" Thompson, but a teacher stopped him. RP at 287. Enlund was eventually expelled from school as a result of the incident, and when the school asked him why he had attempted to fight with Thompson, he disclosed what ADM had told him regarding the 2009 incident and the school reported it to the police.

III. Charges and Trial Relating to Both Victims

In April 2010, the State charged Thompson with second degree rape for the incident with CMM. In October, the State by an amended information charged Thompson with two counts of second degree rape or, in the alternative, two counts of third degree rape, naming both CMM and ADM as victims. In January 2011, the State filed third and fourth amended informations, removing the language "or in the alternative" regarding the third degree rape counts.

On January 20, Thompson unsuccessfully moved to continue his January 24 trial date. Thompson's counsel asserted that he was not prepared for trial because he had been unable to interview two witnesses, explaining, "These witnesses may have material testimony that would either contradict or impeach one or both complaining witnesses." Clerk's Papers (CP) at 10.

At trial, defense counsel sought to admit Enlund's juvenile adjudications for theft and burglary. The State argued that the adjudications were generally not admissible under ER 609(d). The court determined that the convictions would be admissible if they were adult convictions and, thus, it was within its discretion to admit them. When the trial court asked defense counsel to

support the request to admit the adjudications, defense counsel withdrew his request.

John Visser, a private investigator working for Thompson, testified that CMM's brassiere could have been submitted for deoxyribonucleic acid (DNA) testing. During voir dire examination of Visser, the State indicated that the brassiere was in Vancouver police custody, and defense counsel stated, "[W]e didn't know where the bra[ssiere] went until just now." RP at 374. On cross-examination, the State asked Visser about whether he could have asked that the brassiere be tested, to which he replied, "I could've inquired, if I would've been asked by the defense to do that." RP at 408. Defense counsel did not object to this line of questioning.

The jury found Thompson guilty of all four counts of rape, and the trial court sentenced him to 130 months in prison. The judgment and sentence included the two third degree rape convictions. Thompson appeals.

ANALYSIS

I. Motion to Continue

Thompson argues that the trial court abused its discretion and violated his constitutional right to a fair trial when it denied his continuance motion. We disagree.

A. Standard of Review

We review a trial court's ruling on a continuance motion for an abuse of discretion. *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). A trial court abuses its discretion if its decision is manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Downing*, 151 Wn.2d at 272. "In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure." *Downing*, 151 Wn.2d at 273 (citing RCW 10.46.080,

CrR 3.3(f)). But the trial court "must also compare any detriment to a child victim that might be caused by a continuance with the compelling reasons for continuing the trial." *Downing*, 151 Wn.2d at 273 (citing RCW 10.46.085).[4]

B. No Abuse of Discretion

Thompson argued that he needed a continuance so he could contact and interview additional witnesses. First, Thompson claimed that he had not had time to interview a witness whom CMM had reported was also raped by Thompson. The witness later reported to officers that Thompson had not raped her, and Thompson sought to offer the witness's testimony to impeach CMM. But the State told the trial court that it was not going to offer evidence that Thompson assaulted the proposed witness. Thus, the trial court determined that the evidence would serve only as impeachment on a collateral matter and, thus, the testimony would not be admissible at trial.

Thompson next contended that he sought to contact CMM's former boyfriend, who Thompson claimed would testify that CMM's father caught CMM and the former boyfriend having sex and that the father kicked him out of the house. Thompson argued that this testimony would show that CMM "has a lot of anger," but when asked by the trial court, "[W]hat's the ex-

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[4] RCW 10.46.085 provides:

> When a defendant is charged with a crime which constitutes a violation of RCW 9A.64.020 or chapter 9.68, 9.68A, or 9A.44 RCW, and the alleged victim of the crime is a person under the age of eighteen years, neither the defendant nor the prosecuting attorney may agree to extend the originally scheduled trial date 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. The court may consider the testimony of lay witnesses and of expert witnesses, if available, regarding the impact of the continuance on the victim.

boyfriend got to do with anything?" Thompson responded, "We don't know yet. We haven't been able to get him." RP (Jan. 20, 2011) at 12-13. The trial court confirmed, "So you can't represent to me what he has to say," and asked for Thompson's next argument. RP (Jan. 20, 2011) at 13.

Finally, Thompson's counsel stated that he needed to contact Stephanie Hollada, a potential witness he had learned about that same morning from Thompson's brother. But the trial court confirmed that defense counsel had the witness's contact information and told him that "your investigator needs to get right on it." RP (Jan. 20, 2011) at 16. The trial court denied Thompson's continuance motion based on contacting Hollada because it determined that he had the ability to contact her in time for trial. Moreover, Thompson was, in fact, able to secure Hollada's presence at trial.

The trial court denied Thompson's continuance motion, noting that each proposed witness pertained to CMM's case, which case was filed in April of the previous year but did not pertain to ADM's case, which was filed significantly later, and Thompson's counsel claimed to be prepared on that matter. Moreover, the trial court made specific findings on the record with respect to each proposed witness. It found that (1) testimony of the witness whom Thompson wanted to use to impeach CMM would not be admissible at trial because the issue about whether Thompson assaulted her pertained to a collateral matter; (2) Thompson was unable to specify the content of the former boyfriend's testimony; and (3) Hollada could be contacted in time for trial. We cannot say that the trial court's ruling denying a continuance based on Thompson's desire to find and contact these witnesses was manifestly unreasonable, based on untenable grounds, or made for untenable reasons. Thus, Thompson fails to show that the trial court abused its discretion in

denying his continuance motion. *Downing*, 151 Wn.2d at 272.

C. Fair Trial

Thompson also argues that he was deprived of his constitutional right to a fair trial when the trial court denied his continuance motion. We disagree.

Washington courts have consistently held that "'failure to grant a continuance may deprive a defendant of a fair trial and due process of law, within the circumstances of a particular case.'" *Downing*, 151 Wn.2d at 274 (quoting *State v. Williams*, 84 Wn.2d 853, 855, 529 P.2d 1088 (1975)). In addition, "a denial of a request for a continuance may violate a defendant's right to compulsory process if the denial prevents the defendant from presenting a witness material to his defense." *Downing*, 151 Wn.2d at 274–75. Nevertheless,

> even where the denial of a motion for continuance is alleged to have deprived a criminal defendant of his or her constitutional right to compulsory process, the decision to deny a continuance will be reversed only on a showing that the accused was prejudiced by the denial and/or that the result of the trial would likely have been different had the continuance not been denied.

State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994).

Here, the trial court concluded, and we agree, that Thompson failed to make a sufficient showing to support a continuance, as explained above. Moreover, Hollada, the only witness whom defense counsel alleged could provide certain, admissible testimony, actually testified at trial. Accordingly, Thompson has failed to show that he was prejudiced and, thus, has failed to show that he was deprived of his right to a fair trial. *Tatum*, 74 Wn. App. at 86.

II. Ineffective Assistance of Counsel

Thompson next argues that his counsel was ineffective because he failed to (1) interview the abovementioned proposed witnesses; (2) offer Enlund's juvenile adjudications for impeachment; (3) be aware of the location of CMM's brassiere until after trial began and failed to

object to particular questioning regarding the defense's ability to submit the brassiere for DNA testing; and (4) object to the testimony of Sheppard, the nurse who Thompson alleges improperly commented on CMM's credibility. We disagree.

A. Standard of Review

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 that defense counsel's objectively deficient performance prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). Performance is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334–35. Prejudice results if the outcome of the trial would have been different had defense counsel not rendered deficient performance. *McFarland*, 127 Wn.2d at 337.

We give great deference to trial counsel's performance and begin our analysis with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *McFarland*, 127 Wn.2d at 335. A claim that trial counsel provided ineffective assistance does not survive if trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77–78, 917 P.2d 563 (1996). To rebut the strong presumption that counsel's performance was effective, "the defendant bears the burden of establishing the absence of any '*conceivable* legitimate tactic explaining counsel's performance.'" *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (emphasis in original) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

"The decision of when or whether to object is a classic example of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Thus, we presume "that the failure to

object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption." *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Madison*, 53 Wn. App. at 763. "To prove that failure to object rendered counsel ineffective, [the p]etitioner must show that not objecting fell below prevailing professional norms, that the proposed objection would likely have been sustained, and that the result of the trial would have been different if the evidence had not been admitted." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (footnotes omitted). Similarly, where a defendant claims ineffective assistance of counsel for failure to make a particular motion, "[a]bsent an affirmative showing that the motion probably would have been granted, there is no showing of actual prejudice." *McFarland*, 127 Wn.2d at 337 n.4.

B. Securing Witnesses for Trial

First, Thompson appears to argue that his trial counsel was unprepared because he failed to interview the proposed witnesses who Thompson identified as necessary to his case but whom had not been contacted at the beginning of the trial. But because Thompson was not prejudiced by his inability to interview the first two people, whose proposed testimony was either inadmissible or unknown, and because Hollada actually testified at trial, Thompson has failed to show that he was prejudiced by counsel's failure to interview these witnesses. Accordingly, this claim fails. *McFarland*, 127 Wn.2d at 334–35.

C. Enlund's Juvenile Adjudications

Thompson next asserts that his trial counsel was ineffective because he failed to offer

Enlund's juvenile adjudications to impeach Enlund's testimony. But Thompson's counsel moved for admission of Enlund's juvenile adjudications for theft and burglary but, when pressed namto explain why the trial court should exercise its discretion under ER 609(d) to admit juvenile adjudications, counsel withdrew his request.

Thompson first argues that his trial counsel was unprepared because his counsel did not know what adjudications appeared on Enlund's record. But during defense counsel's argument to admit the adjudications, he specifically questioned Enlund about particular adjudications and Enlund confirmed that they had, in fact, occurred. Accordingly, Thompson's argument is based on a misreading of the record and this claim also fails.

Thompson further argues that because Enlund was the only witness to testify that Thompson admitted that he committed the crime against ADM, "[t]here is absolutely no tactical reason not to try to impeach him with juvenile adjudications of crimes of dishonesty." Br. of Appellant at 14. But the State argues, and we agree, that by impeaching Thompson with the juvenile adjudications defense counsel may have risked drawing the jury's attention to Enlund's testimony. Accordingly, Thompson has failed to show "the absence of any 'conceivable legitimate tactic explaining counsel's performance'" and, thus, he has failed to show that his counsel's performance was deficient. *Grier*, 171 Wn.2d at 42 (emphasis omitted) (quoting *Reichenbach*, 153 Wn.2d at 130).

In addition, even if Thompson could establish that his counsel's performance was deficient, Thompson has failed to show that he was prejudiced because he fails to demonstrate that his motion to admit the adjudications likely would have been granted. *McFarland*, 127 Wn.2d at 337 n.4. ER 609(d) provides:

> Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

During argument on Thompson's attempt to admit Enlund's adjudications, the trial court asked defense counsel why Enlund's testimony was material to the case,[5] and counsel responded that Enlund "was repeating complaints of alleged victims, that they were harmed." RP at 300. The record indicates that the parties were referring to the following exchange that occurred during Enlund's testimony before the argument on Thompson's motion to admit the adjudications:

> [THE STATE:] [L]ast year, did you hear something, an allegation related to the defendant?
> [ENLUND:] Yes, ma'am.
> [THE STATE:] And what had you heard?
> [ENLUND:] I had heard that . . . Thompson had raped [CMM] and—
> [THE STATE:] Okay.
> [DEFENSE COUNSEL:] . . . [O]bject[ion]. It's hearsay, but . . .
> THE COURT: Objection sustained. Disregard the answer.

RP at 282.

Then, during subsequent argument about admission of Enlund's juvenile adjudications, the trial court reminded counsel that "[y]ou objected and I didn't let [Enlund] say that." RP at 301. We hold that the trial court was unlikely to allow admission of Enlund's adjudications because it determined that the testimony Thompson sought to discredit relating to what either victim told him was inadmissible. And because it was well within his counsel's discretion in selecting trial

[5] In the context of ER 609(d), we read the trial court's inquiry into whether the testimony was "material" as a determination of whether the admission of the adjudications was "necessary for a fair determination of the issue of guilt or innocence." ER 609(d).

tactics to not emphasize Enlund's testimony about what Thompson told him when confronted, Thompson fails to show that he was prejudiced by his counsel's failure to pursue impeachment of Enlund with the juvenile adjudications. *McFarland*, 127 Wn.2d at 337 n.4.

D. CMM's Brassiere

Thompson next contends that his trial counsel was ineffective because he was not aware of the location of CMM's brassiere until after trial began and because he failed to object to particular questioning regarding the defense's ability to submit the brassiere for DNA testing. We again disagree.

Before trial, the State took CMM's brassiere into evidence but did not submit it for DNA testing. Sheppard, the nurse who examined CMM, wrote in her report that Schaffer took the brassiere into evidence, and both defense counsel and an investigator working on Thompson's case, John Visser, possessed copies of that report. At trial, defense counsel sought to elicit testimony from Visser that he would have submitted the brassiere for DNA testing for saliva if he had been the State's investigator. The State objected, and during voir dire examination of the witness, the following exchange took place:

> THE COURT: Okay. So the point here is the police properly seized an item that could have had DNA on it and never submitted it. That's the whole point, right?
> [DEFENSE COUNSEL]: Except where's the bra?
> THE COURT: Okay. And you already got that in evidence from the nurse and I assume from the police officer, right? Did you elicit testimony from anybody in the police—
> [DEFENSE COUNSEL]: Well, we didn't know where the bra[ssiere] went until just now.

RP at 373-74.

Thompson first argues that his counsel was ineffective because he "did not know where

the bra[ssiere] was until well into the defense case at trial." Br. of Appellant at 14. But the State argues, and we agree, that the location of the brassiere was "not germane to [defense counsel's] trial strategy" because "[h]is strategy was to impugn the State for not having the bra[ssiere] tested for saliva, not to have the bra[ssiere] tested himself." Br. of Resp't at 20.

At trial, Thompson's counsel indicated that the State's failure to test the brassiere for DNA constituted a gap in their investigation, and incorporated the theory into his closing argument: "And you heard—you remember Sheppard saying the bra[ssiere] was returned to police for DNA sampling. The police didn't do that." RP at 522. But although the State's failure to test the brassiere was part of defense counsel's trial strategy, there is no indication that Thompson was prejudiced by counsel's failure to have the brassiere tested, nor does Thompson allege that he was prejudiced.

Moreover, Thompson does not contend that the brassiere contained DNA evidence from another suspect such that testing the brassiere could have revealed exculpatory evidence. Rather, at best, DNA testing would have merely revealed the absence of DNA on the brassiere, not affirmative evidence that Thompson did not rape CMM. Moreover, if defense counsel had had the brassiere tested, Thompson ran the risk that his DNA would appear on it. Accordingly, because testing the brassiere could have led only to neutral or detrimental results for Thompson's case, we hold that Thompson has failed to demonstrate that his counsel's alleged lack of knowledge regarding the brassiere's location prejudiced him. *McFarland*, 127 Wn.2d at 334–35.

Thompson also argues that his counsel was ineffective for failing to object when the State questioned Visser regarding his ability to have the brassiere tested for DNA. Because Thompson's ineffective assistance of counsel claim assigns error to his counsel's failure to object,

in order to prevail, Thompson must show that the trial court likely would have sustained his objection. *Davis*, 152 Wn.2d at 714. Accordingly, we must first determine whether the prosecutor's questioning was improper.

Over the State's objection, the trial court permitted defense counsel to ask, "[C]ould a brassiere be submitted for DNA testing?" RP at 390. And Visser replied, "Yes, it could be submitted." RP at 391. On cross-examination, the State questioned Visser regarding his ability to have the brassiere tested:

> [THE STATE:] Would it have been possible for you to submit the bra[ssiere] for DNA testing?
> [VISSER:] No.
> [THE STATE:] Would it have been possible for you to have asked for the bra[ssiere] to be submitted for testing?
> [VISSER:] I could've inquired, if I would've been asked by the defense to do that.
> . . . .
> [THE STATE:] You did not—you did not do that, correct?
> [VISSER:] I didn't know about that. I wasn't asked to do that. No.

RP at 408-09. Defense counsel did not object to this line of questioning.

Thompson appears to argue that he was prejudiced because his counsel's failure to object allowed the State to shift the burden of proof to the defendant. But the State argues, and we agree, that the State introduced the testimony not to imply that the burden was on Thompson to have the brassiere tested, but instead to damage Visser's credibility as an investigator.

On direct examination, Visser testified, "I'm familiar with the investigation [in this case]." RP at 392. On cross-examination, the State asked Visser whether he was aware that the brassiere had been collected by the police, and he replied, "That's entirely not true. I didn't know what happened to the physical evidence in this case." RP at 407. The State then asked, "You didn't

know that it had been collected from the hospital?" to which Visser responded that Thompson's attorney had informed him of that fact in December 2010. RP at 407. The State then asked, "But you had all of the hospital records as well as the police reports from the beginning of your involvement in the case, correct?" to which Visser responded, "Correct." RP at 407. Only after this questioning did the State question Visser regarding whether he could have asked that the brassiere be tested. Thus, the State elicited the testimony for the purpose of calling into question Visser's credibility as an investigator because Visser indicated that he was unaware of the physical evidence in the case despite the fact that he had access to the relevant records.

Because the State's questioning did not improperly shift the burden of proof to the defendant but, rather, was part of the State's attempt to discredit a witness, we hold that Thompson has failed to show that the trial court likely would have sustained an objection to the questioning. *Davis*, 152 Wn.2d at 714. Accordingly, Thompson has failed to show that he was prejudiced and, thus, his ineffective assistance of counsel claim fails.[6]

E. Sheppard's Testimony

Thompson next argues that Sheppard, the nurse who examined CMM, provided improper opinion testimony at trial. Thompson claims that his counsel was ineffective for failing to object to the testimony and that the trial court's admission of the testimony constitutes reversible error

[6] Although Thompson indicates that the prosecutor engaged in misconduct by shifting the burden of proof, he does not assign error to the alleged misconduct; rather, he frames his argument in terms of an ineffective assistance of counsel claim. We note that, because Thompson failed to object to the alleged misconduct at trial, to prevail on a claim for prosecutorial misconduct, Thompson would have been required to show that the prosecutor's misconduct was "so flagrant and ill-intentioned" that it caused an "enduring and resulting prejudice" incurable by a jury instruction. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). Thompson has failed to even allege that the prosecutor's conduct rises to this standard; accordingly, we decline to address the issue further.

that can be raised for the first time on appeal.

"The general rule is that no witness, lay or expert, may 'testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.'" *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (quoting *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)). In addition, "[b]ecause issues of credibility are reserved strictly for the trier of fact, testimony regarding the credibility of a key witness may also be improper." *Heatley*, 70 Wn. App. at 577. "However, testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *Heatley*, 70 Wn. App. at 578.

When a defendant seeks to raise an issue alleging an improper comment on the evidence as a manifest error that can be raised for the first time on appeal under RAP 2.5(a)(3), the error must have "caused actual prejudice or practical and identifiable consequences." *State v. Montgomery*, 163 Wn.2d 577, 595, 183 P.3d 267 (2008). In addition, the defendant must identify a "nearly explicit statement by the witness that the witness believed the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow." *State v. Kirkman*, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). And "[i]mportant to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed." *Montgomery*, 163 Wn.2d at 595.

At trial, the State asked Sheppard whether CMM told her about the incident that brought her to the emergency room. Sheppard responded:

> She told me about being at school. And she related that she was at school the day before, that she had been approached by a young man, an older student. I believe

> she was a ninth or tenth grader, and this was someone who was much older, I think a senior, that approached her in the dark of the auditorium area of the school; and that he forced himself on her; [it] was what I deem as sort of cheeky or sort of hitting on her a bit by asking her if she had a boyfriend, if she was dating, things like that; and that he forced himself on her in terms of trying to kiss her.

RP at 125-26.

The State also inquired about CMM's demeanor during the examination, and Sheppard answered:

> She started the exam. She was fairly calm. I was rather impressed that she seemed—she was very well dressed as far as—she—for a teenager of her age. I was pleased that she seemed very—well, she presented herself very well and that she seemed to be a reasonable young woman. And quickly she started shaking, started crying, obviously was quite traumatized.

RP at 127.

Sheppard discussed that she had CMM use a position called a "frog squat" during the exam, and when asked to elaborate, Sheppard testified:

> Instead of using the stirrups on her because she was so very upset, it is somewhat more comfortable for a young girl, especially if she's not very experienced in the ways of the world and things like that that it's easier to just bring them up—and I do this a lot with the pediatric cases where they actually lay down with—on their back with their knees dropped open and their little feet up a little bit. It's a little bit more of a secure positioning for them, especially if they're really traumatized. And she was.

RP at 128-29.

Thompson first claims that Sheppard's statement that CMM told Sheppard that Thompson approached CMM in "'what I deem as sort of . . . cheeky or sort of hitting on [her] a bit by asking her if she had a boyfriend'" was improper. Br. of Appellant at 15-16 (quoting RP at 126). But that statement was Sheppard's impression of the description of events as CMM recounted them to her; it was not Sheppard's opinion as to either CMM's credibility or Thompson's guilt or

innocence. Thus, we hold that the testimony was not improper. *Heatley*, 70 Wn. App. at 577.

Second, Thompson claims that Sheppard's comment that CMM "'seemed to be a reasonable young woman'" was improper. Br. of Appellant at 15-16 (quoting RP at 127). But Sheppard's statement, when read in context, does not pertain to CMM's credibility; rather, the statement served to contrast CMM's initially calm or "reasonable" demeanor with her demeanor when she was asked to describe the incident. Again, we hold that the statement was not improper opinion testimony.

Finally, Thompson claims that it was improper for Sheppard to state that CMM was "'not very experienced in the ways of the world.'" Br. of Appellant at 15 (quoting RP at 128). But when read in context, the record indicates that Sheppard's comment regarding experience "in the ways of the world" pertained to young girls in general, and was not a comment that CMM specifically did not possess such experience. Moreover, even if the statement could be read as opinion testimony regarding CMM's sexual experience, such testimony does not pertain to her credibility because her sexual experience was not at issue at trial. Accordingly, we hold that it was not improper opinion testimony. *Heatley*, 70 Wn. App. at 577.

Because Thompson has failed to demonstrate that Sheppard provided improper opinion testimony, we hold that the alleged testimony does not constitute the type of "explicit statement by the witness that the witness believed the accusing victim" that is required before the issue can be raised for the first time on appeal. *Kirkman*, 159 Wn.2d at 936. And even assuming any of the statements were improper, the trial court instructed the jury that "[y]ou are the sole judges of the credibility of each witness and the value or weight to be given the testimony of each witness." RP at 487. Thompson has failed to present any evidence that the jury was unfairly influenced, and

"we should presume the jury followed the court's instructions absent evidence to the contrary." *Montgomery*, 163 Wn.2d at 596. Accordingly, Sheppard's comments did not constitute a manifest error requiring reversal.

Thompson also argues that his counsel was ineffective for failing to object to Sheppard's testimony. But to prevail on an ineffective assistance of counsel claim for failure to object at trial, Thompson must show that had his counsel objected to Sheppard's testimony, the trial court would have sustained his objection. *Davis*, 152 Wn.2d at 714. Because Sheppard did not provide improper opinion testimony, we hold that Thompson has failed to show that if an objection had been made to the testimony, the trial court likely would have sustained it. Accordingly, we hold that Thompson's ineffective assistance of counsel claim also fails.[7]

III. Comment on the Evidence

Thompson next contends that the trial court made an impermissible comment on the evidence when responding to Sheppard's apology for commenting on CMM's credibility, in violation of article IV, section 16 of the Washington Constitution. We disagree.

Article IV, section 16 of our constitution provides that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." "A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement." *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). In addition, "[t]he touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value

[7] Thompson also argues that his conviction should be reversed under the cumulative error doctrine because "[c]ounsel's failures as enumerated above denied Thompson a fair trial." Br. of Appellant at 16. But because Thompson's counsel was not ineffective, Thompson's cumulative error claim also fails.

of the testimony of a witness has been communicated to the jury." *Lane*, 125 Wn.2d at 838.

At trial, the State asked Sheppard whether her findings as a result of CMM's medical examination were consistent with what CMM reported, to which Sheppard responded, "Absolutely, yeah." RP at 129-30. When asked to explain her answer, Sheppard replied, "It was her physical and her emotional appearance and just the details of the actual victimization that struck me as being very, very credible." RP at 130. Thompson objected and the following exchange took place:

> THE COURT: Ladies and gentlemen, witnesses cannot comment on the credibility of other people. Disregard that statement.
> [SHEPPARD]: Excuse me.
> THE COURT: It's all right.
> [SHEPPARD]: I know better.
> THE COURT: Go ahead.

RP at 130.

Thompson contends that the court's statement, "'It's all right,'" could lead the jury to believe that "it was okay to vouch for the credibility of the witness." Br. of Appellant at 18 (quoting RP at 130). But the comment "it's all right," read in context with Sheppard's statement, "Excuse me," clearly indicates that the trial court was accepting Sheppard's apology for making a comment as to CMM's credibility when she "kn[e]w better," not that the court thought that such a statement was "all right." RP at 130. Moreover, immediately preceding the alleged comment, the trial court sustained Thompson's objection to the testimony and provided a limiting instruction, indicating the trial court's express disapproval of the testimony. Accordingly, Thompson's claim is without merit.

IV. Double Jeopardy

Finally, Thompson claims that the trial court erroneously sentenced him on all four counts of rape and, thus, he argues that his convictions for third degree rape "should be vacated on double jeopardy grounds." Br. of Appellant at 19. The State contends that Thompson was not sentenced on all four counts, but concedes that it was a double jeopardy violation to include the additional counts on the judgment and sentence, and agrees that we should remand to the trial court to vacate the third degree rape convictions. We agree.

"Double jeopardy violations are questions of law, which we review de novo." *State v. Fuller*, 169 Wn. App. 797, 832, 282 P.3d 126 (2012). The double jeopardy clause of our constitution "prohibits the imposition of multiple punishments for the same criminal conduct." *State v. Turner*, 169 Wn.2d 448, 465-66, 238 P.3d 461 (2010); Wash. Const. art. I, § 9.

"For purposes of double jeopardy, a conviction, even without an accompanying sentence, can constitute punishment." *Fuller*, 169 Wn. App. at 832. Thus, "[a] trial court may violate a defendant's right to be free from double jeopardy if it enters multiple convictions for a single offense, even if it imposes only one sentence." *Fuller*, 169 Wn. App. at 832. Accordingly, where a jury finds a defendant guilty on separate counts for the same crime, the trial court "'should enter a judgment on the greater offense only and sentence the defendant on that charge without reference to the verdict on the lesser offense.'" *Fuller*, 169 Wn. App. at 833 (emphasis omitted) (internal quotation marks omitted) (quoting *Turner*, 169 Wn.2d at 463). "[A] trial court does not violate double jeopardy if (1) it enters a judgment and sentence on only one conviction; (2) its judgment and sentence . . . does not include any reference to any lesser convictions; and (3) it does not reference any lesser convictions at sentencing." *Fuller*, 169 Wn. App. at 834 (citing *Turner*, 169 Wn.2d at 464-65).

Here, the jury found Thompson guilty of both second and third degree rape with respect to both victims, and the trial court sentenced him to 130 months in prison. The trial court listed all four convictions[8] on Thompson's judgment and sentence. Thus, we hold that the trial court's inclusion of the lesser offenses on Thompson's judgment and sentence constituted a double jeopardy violation. *Fuller*, 169 Wn. App. at 832; *Turner*, 169 Wn.2d at 463. Accordingly, we remand to the trial court with directions to amend the judgment and sentence to reflect only the second degree rape convictions.

Thompson contends that the trial court nevertheless violated his right to be free of double jeopardy by sentencing him on all four convictions. But although the judgment and sentence improperly listed all four convictions, the record makes clear that the trial court sentenced Thompson only on the second degree rape convictions. Under the provision for "confinement," the judgment and sentence listed 110 months for the second degree rape conviction as to CMM, 130 months for the second degree rape conviction as to ADM, and listed "merged" for the third degree rape convictions. CP at 46. In addition, under the "confinement" provision for "[s]ex [o]ffenses only," the judgment and sentence listed all four counts, but only provided sentences for the second degree rape convictions, leaving blank the spaces next to the counts related to the third degree rape convictions. CP at 46-47. Finally, at Thompson's sentencing hearing, the court referenced only the convictions for second degree rape. Accordingly, we hold that the trial court properly sentenced Thompson only on the second degree rape convictions, the greater offenses and, thus, his actual sentence did not constitute a double jeopardy violation. *Fuller*, 169 Wn. App. at 834; *Turner*, 169 Wn.2d at 463.

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[8] Counts one and two were for second and third degree rape, respectively, as to CMM. Counts three and four were for second and third degree rape, respectively, as to ADM.

We affirm Thompson's second degree rape convictions but remand to the trial court for vacation of Thompson's third degree rape convictions.

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 pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Bridgewater, J.P.T.