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Washington State
Court of Appeals
Division Two

March 8, 2016

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>JUAN JOSE FRANCISCO GUEVARA,<br><br>Appellant. | No. 47373-9-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

LEE, J. — Juan Jose Francisco Guevara was convicted of first degree child molestation, and the jury found the aggravating circumstance of abusing his position of trust. Guevara appeals his conviction and sentence, arguing that (1) the State failed to present evidence that Guevara was not married to and at least 36 months older than the victim, C.M.C.[1]; (2) the State committed prosecutorial misconduct by (a) improperly shifting the burden to Guevara and (b) arguing facts not contained in the record; (3) the cumulative effect of the prosecutorial misconduct requires reversal; (4) he received ineffective assistance of counsel when (a) counsel failed to object to the sexual assault nurse examiner's testimony, (b) counsel elicited additional allegations of abuse beyond those offered by the State, and (c) counsel failed to object to the prosecutorial misconduct; (5) the jury's aggravating circumstance finding was invalid because it was based on factors

[1] We use initials to protect the witness's identity. General Order 2011-1 of Division II, In Re The Use Of Initials Or Pseudonyms For Child Witnesses In Sex Crime Cases, available at: http://www.courts.wa.gov/appellate_trial_courts/

inherent in the charged crime; and (6) the sentencing court erred by imposing legal financial obligations (LFOs) without conducting an individualized inquiry into Guevara's current or future ability to pay.

We disagree and affirm Guevara's conviction. However, the State concedes that the trial court erred by imposing LFOs without an individualized inquiry into Guevara's circumstances and asks that the discretionary LFOs be stricken. We accept the State' concession and remand for the trial court to strike Guevara's discretionary LFOs.

## FACTS

In 2010, Guevara was in a romantic relationship with Veronica Nunez. When Guevara and Nunez started their relationship, Nunez had two children: a daughter, C.M.C., who was approximately seven years old, and a son. Eventually, Guevara and Nunez began living together with Nunez's children and Guevara's son. In 2013, C.M.C. told Nunez that Guevara had been molesting her. Nunez reported the allegation to the Aberdeen Police Department. Lisa Wahl, a sexual assault nurse examiner, met with C.M.C, conducted a medical history, and performed a physical examination. C.M.C. also met with Tom Taylor, a forensic interviewer.

The State charged Guevara with one count of first degree child molestation between January 1, 2013 and June 17, 2013 based on five of the alleged instances. The State also alleged that Guevara used his position of trust to facilitate the charged offense as defined by RCW 9.94A.535(3)(n). At a pretrial proceeding, the State sought to admit evidence of "uncharged incidents between [Guevara] and [C.M.C.]" "prior to the time period charged." Clerk's Papers (CP) at 16, 18. Guevara objected, arguing that it was "an attempt to try to show propensity."

Verbatim Report of Proceedings (VRP) at 8-9. The trial court ruled the evidence of uncharged incidents admissible.

At trial, the State called Nunez, C.M.C., Wahl, and Corporal John Snodgrass of the Aberdeen Police Department to testify. Nunez testified that C.M.C. had been acting out and getting angry when Guevara disciplined her. On direct-examination, C.M.C. testified that there were five incidents of abuse. On cross-examination, Guevara elicited testimony from C.M.C. about two other incidents of abuse that occurred before the charging period, which she had disclosed to Taylor.

Wahl testified that C.M.C. did not express anger or hostility towards Guevara when C.M.C. talked about the abuse. Further, Wahl testified that reactions to abuse vary and that it is not uncommon for children to be either angry or not angry at a perpetrator. In relevant part, Wahl testified as follows:

> [The State] And did [C.M.C.], did she express any anger or hostility towards Mr. Guevara when talking about what happened?
>
> [Wahl] No.
>
> [The State] And, is that unusual in your experience, that a child won't be angry at a perpetrator?
>
> [Wahl] Right, so, if you are thinking, theoretically if a child is . . . growing up in a home with two adults, father, mother figure, they love these people, these—they protect them. They are their role models. They are going to tell these people right and wrong[,] good and bad. These are things they are mirroring, and they are learning, and so at a young age, if a child is being inappropriately touched, they may not recognize that this is even happening, because this has been a normalized behavior within this family. The grooming process for children frequently looks like accidental touching, sexualized behaviors, things, you know, a parent figure who always loves them, and he gives them more attention, he gives them extra treats, maybe gives them that certain bit of love that they may not find someplace else. So, the grooming process can really look like normal behaviors, and can easily

> be discluded [sic] like it was an accident, or, I didn't mean to, or, they can excuse it away, because that's the goal, is to keep the child silent, break down the child barriers, and be able to re-access the child. You don't want to hurt a child. You want to continue to access the child. So it wouldn't make sense. And when the child has this person in their home whom they believe, and just every now and then they do this other thing that they don't like, the touching part, but the 90 percent of time, he is a loving, engaged, member of the family, at first she doesn't recognize it . . . .
>
> [The State] Would it be uncommon to see a child react with anger if this kind [of] abuse is occurring?
>
> [Wahl] Oh, no. . . .

VRP at 85-87. Guevara did not object.

After the State's presentation of its case in chief and outside the presence of the jury, Guevara made a motion to dismiss, arguing that the State failed to present evidence that Guevara is at least 36 months older than the victim and evidence that he was not married to the victim. The State responded that the circumstantial evidence that Guevara had a seven-year-old son was sufficient to demonstrate that Guevara was more than 36 months older than the victim, and that "[t]hey are clearly not married, because even with waiver, a ten-year-old can't get married as a matter of law in the State of Washington." VRP at 119. The trial court denied the motion.

During closing arguments, the State encouraged the jury to evaluate C.M.C.'s credibility. The State argued:

> In her direct examination, the questions from the State, she described five times that it occurred at south side.[2] And then through cross[-]examination, through defense counsel, she described two more that happened while they lived in housing at Hoquiam. And those were all parts of her different interview. *She had talked about those with Lisa Wahl, and that it wasn[']t anything that she just came to court and said for the first time.*

[2] "South side" refers to a previous family home.

VRP at 134 (emphasis added). Guevara did not object.

Guevara claimed that C.M.C. had a dysfunctional family life, and that she accused Guevara of molestation to avoid being disciplined. Guevara also argued that C.M.C. was unreliable and that her testimony demonstrated that she was confused.

In rebuttal arguments, the State argued:

> Counsel also says it's the State's burden and our responsibility to come and mound on the evidence. I agree it is absolutely the State's burden. And beyond a reasonable doubt is the highest burden in the criminal justice system and it should be, because these are serious allegations. However, the State has no responsibility to mound on the evidence. You are not going to find a worksheet in your instructions that tells you you have to have A, B, C, it' s not a math problem. And you absolutely are entitled to believe this kid beyond a reasonable doubt and convict the defendant, and anything to the contrary is just not correct.
>
> The defense counsel wants to argue that this is a family with issues, children tell stories. And all of those theories have to be supported by the evidence. There was no evidence that [C.M.C.] was telling a story, that she was making anything up. And, in fact, when the defense counsel asked her, isn't it true you are making this up? No. She absolutely said no. *And every person that takes that chair deserves to be believed.*
>
> *The reason why justice is b[l]ind*, it doesn't matter what your gender is, what your age is, what your race is. They deserve to be believed until you have a reason to do otherwise. And in this case, she has given you no reason. *There has been no evidence that tells you she is doing anything other than telling the truth*.

VRP at 144-145 (emphasis added). Guevara did not object.

The jury was instructed that if it found Guevara guilty of first degree child molestation, then it must determine whether the defendant used his position of trust to facilitate the offense. The jury found Guevara guilty of one count of first degree child molestation and found that he used his position of trust to facilitate the offense.

The trial court sentenced Guevara to an exceptional sentence of 84 months to life. The trial court also imposed legal financial obligations (LFOs); Guevera did not object to the imposition of LFOs. Guevara appeals.

## ANALYSIS

### A. SUFFICIENCY OF THE EVIDENCE

Guevara argues that the State failed to prove every element of his offense because it did not present any evidence that Guevara was not married to or at least 36 months older than C.M.C. Therefore, he argues, his conviction should be reversed and dismissed with prejudice. We disagree.

In determining "whether the evidence was sufficient to support a conviction, we view the evidence in the light most favorable to the State and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *State v. Johnson*, 173 Wn.2d 895, 898, 270 P.3d 591 (2012). "A challenge to the sufficiency of the evidence admits the truth of the State's evidence." *Id.* at 900. Circumstantial evidence is not any less reliable or probative than direct evidence in reviewing the sufficiency of the evidence supporting a jury verdict. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here, Guevara was charged with first degree child molestation. RCW 9A.44.083 provides that a person is guilty of first degree child molestation when he "has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim."

The evidence presented at trial was sufficient to allow the jury to find that Guevara and C.M.C. were not married. Wahl testified that C.M.C. reported that she had been molested by "the father figure in her home" and that she was scared that her younger brother would grow up without his father. VRP at 80. Further, C.M.C. testified that Guevara had a child with her mother. And, Nunez testified that Guevara acted "as a father," the "male role model" in the home, and that she, Guevara, and her children did things as a family. VRP at 20. A reasonable fact finder could infer that C.M.C. was not married to "the father figure in her home." VRP at 80.

The evidence presented at trial was also sufficient to allow the jury to find that Guevara was at least 36 months older than C.M.C. C.M.C.'s mother testified that she met Guevara roughly four years prior at a party, and then they began living together, and subsequently had a child together. C.M.C. testified that she was 10 years old when she was molested. C.M.C. also testified that Guevara drove her to a store. Further, although Guevara did not testify, he was seen by the jury, allowing them to observe his physical appearance. Thus, a reasonable fact finder could infer that Guevara was at least 16 years old, the minimum legal age for driving in Washington State. And 16 years old is at least 36 months older than 10 years old. Therefore, Guevara's insufficiency of the evidence claim fails.

B. PROSECUTORIAL MISCONDUCT

Guevara argues that the State committed prosecutorial misconduct during closing and rebuttal arguments by improperly shifting the burden to Guevara and by arguing facts not in evidence. Guevara did not object to any of the alleged misconduct. We hold that Guevara's prosecutorial misconduct challenge fails.

1. Legal Principles

To prevail on a claim of prosecutorial misconduct, Guevara must show that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Once a defendant has demonstrated that the prosecutor's conduct was improper, we evaluate the defendant's claim of prejudice under two different standards of review, depending on whether the defendant objected to the misconduct at trial. *Id.* at 760.

If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Id.* at 760-61. When there is no objection, we apply a heightened standard requiring the defendant to show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'" *Id.* at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). When reviewing a prosecutor's misconduct that was not objected to, we "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." *Emery*, 174 Wn.2d at 762.

When analyzing prejudice, we do not look at the comment in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007). Also, we presume the jury follows the trial court's instructions. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010). The defendant establishes prejudice when the misconduct had a substantial likelihood of affecting the verdict. *Emery*, 174 Wn.2d at 760.

"In closing argument, a prosecutor is afforded wide latitude to draw and express reasonable inferences from the evidence." *State v. Reed*, 168 Wn. App. 553, 577, 278 P.3d 203, *review denied*, 176 Wn.2d 1009 (2012). In rebuttal, a prosecutor generally is permitted to make arguments that were "invited or provoked by defense counsel and are in reply to his or her acts and statements." *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). And "[t]he mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense." *State v. Jackson*, 150 Wn. App. 877, 885, 209 P.3d 553 (2009).

2. Burden Shifting

Guevara argues that the State improperly shifted the burden of proof during the State's closing and rebuttal closing arguments. Br. of Appellant at 11. Specifically, Guevara asserts that the State's arguments constituted prosecutorial misconduct because they implied that Guevara had the burden to produce evidence that C.M.C. was lying. Br. of Appellant at 12-13.

Guevara argues that the prosecutor made the "same improper argument" as the prosecutor in *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997), and therefore reversal is required. But in *Fleming*, the prosecutor argued that in order for the jury to return a verdict of not guilty:

> [B]ased on the unequivocal testimony of [the victim] as to what occurred to her back in her bedroom that night, *you would have to find either that [the victim] has lied about what occurred in that bedroom or that she was confused; essentially that she fantasized what occurred back in that bedroom.*

*Fleming*, 83 Wn. App. at 213. The court held that "it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." *Fleming*, 83 Wn. App. at 213. The court emphasized that the jury "was *required* to

acquit *unless* it had an abiding conviction in the truth of her testimony." *Fleming*, 83 Wn. App. at 213.

*Fleming* is distinguishable. Here, the prosecutor did not argue that the jury must find C.M.C. was lying in order to acquit. Rather, the prosecutor argued that the evidence demonstrates that C.M.C. was credible and that the jury should believe her testimony. And the prosecutor argued that the jury only needed an abiding belief in Guevara's guilt to convict, which could be supported by believing C.M.C.'s testimony.

Also, the prosecutor emphasized that the State had the burden to prove the charge beyond a reasonable doubt and asked the jury to weigh C.M.C.'s credibility. Further, in response to defense counsel's argument that C.M.C.'s testimony was not credible, the prosecutor argued that, based on the evidence, the jury should find C.M.C. credible. *See Russell*, 125 Wn.2d at 86 (holding a prosecutor can respond to defense counsel's arguments during rebuttal). We hold that the prosecutor did not improperly shift the burden of proof to Guevara.

3. Facts Not in Evidence

Guevara argues that the State twice commented on facts not in evidence during closing arguments, which constituted prosecutorial misconduct. We disagree.

First, Guevara assigns error to the following portion of the prosecutor's closing argument, where the prosecutor discusses C.M.C.'s testimony:

> In her direct examination, the questions from the State, she described five times that it occurred at south side. And then through cross[-]examination, through defense counsel, she described two more that happened while they lived in housing at Hoquiam. And those were all parts of her different interview. *She had talked about those with Lisa Wahl, and that it wasn[']t anything that she just came to court and said for the first time.*

VRP at 134 (emphasis added). Guevara did not object.

Guevara argues that the prosecutor's argument referenced information outside of the record to bolster C.M.C.'s credibility. Guevara's argument fails.

Although the prosecutor argued that C.M.C. had previously reported the two additional incidents to Wahl, the record contains evidence that C.M.C. testified to having reported the two additional incidents to Taylor. Thus, the evidence supported the prosecutor's statement that C.M.C. had reported the two incidents outside of the charging period. Also, Wahl testified that C.M.C. reported that the molestation "happened time and again over a period of time." VRP at 80. Therefore, the prosecutor's argument—"that it wasn[']t anything that she just came to court and said for the first time"—was supported by the evidence. VRP at 134. We hold that there was no misconduct.

Even if the prosecutor's argument that C.M.S. told Wahl about the two additional incidents was improper because C.M.S. actually told Taylor, Guevara still must show that no curative instruction would have obviated any prejudicial effect.[3] *Emery*, 174 Wn.2d at 761. Here, an instruction to disregard the prosecutor's reference to Wahl's testimony likely could have cured any resulting prejudice. Further, the jury was properly instructed that the lawyer's arguments are not evidence, and we presume that the jury follows instructions. *State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998). Because Guevara has not demonstrated that any inaccurate comment could not have been cured with an instruction, his claim of prosecutorial misconduct fails.

[3] While Guevara argues that the prosecutor's argument was prejudicial, he does not argue that a curative instruction would not have obviated the prejudicial effect.

Second, Guevara assigns error to the following portion of the prosecutor's closing argument:

> And one of the things that you are told to look at when accepting the victim's credibility, is kind of, what is her stake in the outcome of this case. Did she have an axe to grind? No. And, in fact, she put off disclosing because she knew how hard it was for her to grow up without a dad in her life. She didn't want to lose this father figure, and she didn't want her little brother and the defendant's son, who she considered to be a brother, to lose their father. And so she just kind of let it go, *and it began to escalate.* Those time periods between got shorter, and then the last incident she described, the defendant actually tried to put his hands down the back of her pajama pants.

VRP at 128 (emphasis added). Guevara argues that the prosecutor referenced facts not in evidence "by claiming that Mr. Guevara had escalated his attempts against C.M.C." because C.M.C. did not testify about the sequence of events.[4] Br. of Appellant at 18. Guevara's claim is not supported by the record.

On direct-examination, the State asked C.M.C. about "the first time that it happened," and then "when did it happen again," and "[w]hen is the next time you can remember it happening." VRP at 35, 38, 39. When describing the last three incidents, C.M.C. testified that she was in her bedroom; two of those incidents, including the last time, involved Guevara touching her bottom, and one incident involved Guevara touching her vaginal area. C.M.C. also testified that Guevara tried to put his hand underneath her clothes "when [she] was in the room, the same time that he put his hand on my bottom." VRP at 45. A reasonable inference from the record is that the State

[4] Guevara also argues that the prosecutor misrepresented the facts by arguing that Guevara tried to put his hands down "the *front* of C.M.C.'s pajama pants" when C.M.C. testified that he tried to put his hands down the back of her pants. Br. of Appellant at 18, 19. Guevara's claim is belied by the record. The record demonstrates that the prosecutor argued that Guevara tried to put his hands down the back of C.M.C.'s pants.

asked about the incidents sequentially and that Guevara attempted to put his hands underneath C.M.C.'s clothing during one of the later incidents.

The prosecutor neither misstated the evidence nor introduced extraneous evidence during closing argument. The prosecutor is allowed wide latitude in closing arguments to make reasonable inferences from the record. *Reed*, 168 Wn. App. at 577. C.M.C. testified that most of the alleged incidents involved Guevara touching on the outside of her clothing. She also testified that Guevara attempted to touch her underneath her clothing during one of the later incidents in her bedroom. That Guevara's behavior escalated from touching over C.M.C.'s clothing to touching underneath her clothing is a reasonable inference from the evidence in the record. Accordingly, Guevara's argument of prosecutorial misconduct fails.

4. Cumulative Error

Guevara argues that the cumulative effect of prosecutorial misconduct requires reversal. Guevara's argument fails.

Under the cumulative error doctrine, we will reverse a trial court verdict when it appears reasonably probable that the cumulative effect of errors materially affected the outcome, even when no one error alone mandates reversal. *Russell*, 125 Wn.2d at 94. Here, Guevara has not identified any instances of prosecutorial misconduct. Therefore, his argument that the cumulative error requires reversal fails.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Guevara argues that he received ineffective assistance of counsel when trial counsel (1) failed to object to profile evidence about the "grooming process," (2) elicited additional allegations against Guevara beyond what the State sought to introduce, and (3) failed to object to the three

instances of prosecutorial misconduct discussed above. Br. of Appellant at 22. We reject all three challenges.

1. Legal Principles

We review ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this presumption, a defendant bears the burden of establishing the absence of any legitimate trial tactic explaining counsel's performance. *Id.* "If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). . To establish prejudice, the defendant must show that but for counsel's performance, the outcome would have been different. *State v. McLean*, 178 Wn. App. 236, 248, 313 P.3d 1181 (2013), 179 Wn.2d 1026 (2014).

2. Grooming Evidence

Guevara argues that defense counsel should have objected during Wahl's testimony about "grooming" behavior because Wahl's testimony was "inadmissible profile evidence," Br. of Appellant at 22, and the State relied on the evidence to argue in closing that Guevara's behavior was part of the "grooming" process. Br. of Appellant at 22. We disagree.

Generally, "profile testimony that does nothing more than identify a person as a member of a group more likely to commit the charged crime is inadmissible." *State v. Braham*, 67 Wn. App. 930, 936, 841 P.2d 785 (1992). In other words, testimony implying guilt based on the characteristics of known offenders is inadmissible because it invites the jury to conclude that because of a defendant's relationship to the victim, he is statistically more likely to have committed the crime. *Braham*, 67 Wn. App. at 936.

Guevara relies on *Braham* to support his argument that defense counsel was ineffective for failing to object to Wahl's testimony. *Braham*, however, is inapplicable here. In *Braham*, the court addressed the admissibility of the evidence based on the defendant's evidentiary challenges. Here, Guevara raises the challenge as ineffective assistance of counsel.[5]

[5] Moreover, in *Braham*, "the prosecutor exhorted the jury to infer guilt based on [the expert's] testimony," arguing that the elements of grooming are substantial circumstantial evidence supporting the fact that the defendant abused the victim. *Id.* at 937. Here, the prosecutor's reference to Wahl's testimony did not encourage the jury to infer guilt based on Wahl's "grooming" testimony. Rather, the prosecutor referenced Wahl's testimony to support its argument that C.M.C.'s disclosure of the abuse and C.M.C.'s subsequent behavior is consistent typical behaviors and reactions to sexual abuse.

Here, the prosecutor asked about typical behaviors and reactions to sexual abuse, which may be admissible.[6] *State v. Stevens*, 58 Wn. App. 478, 496, 794 P.2d 38, *review denied*, 115 Wn.2d 1025 (1990). Wahl's testimony did not respond to the question asked, was brief, and was interrupted by the State. Thus, defense counsel may not have objected to avoid drawing attention to the testimony. Not objecting to avoid drawing further attention to the testimony is a legitimate trial tactic. *State v. Gladden*, 116 Wn. App. 561, 568, 66 P.3d 1095 (2003).

Guevara has failed to demonstrate that defense counsel's performance was deficient by not objecting to Wahl's testimony. And because Guevara fails to demonstrate deficient performance, his claim of ineffective assistance of counsel fails.

3. Eliciting additional allegations of molestation from C.M.C.

Guevara argues that trial counsel was ineffective by eliciting testimony regarding additional instances of molestation outside of the charging period. We disagree.

During cross-examination and recross-examination of C.M.C., defense counsel asked C.M.C. about her statement to Taylor, the forensic investigator, and her testimony during the State's direct examination. The record demonstrates that defense counsel sought to impeach C.M.C.'s testimony by referencing inconsistent testimony. Impeaching the credibility of the complaining witness is a legitimate trial tactic. Therefore, Guevara's argument of ineffective assistance of counsel fails because he does not demonstrate that counsel's performance was deficient.

[6] The State asked Wahl whether it is unusual for a child to not be angry at a perpetrator. When Wahl's answer included the "grooming" testimony, the State interrupted Wahl and repeated the question about children's reactions to abuse. VRP at 86-87.

4. Failure to Object to Prosecutorial Misconduct

Guevara argues that trial counsel was deficient by not objecting when "the prosecutor committed numerous instances of misconduct." Br. of Appellant at 28. Specifically, Guevara argues that his trial counsel should have objected when the prosecutor (1) made arguments "shifting the burden onto Mr. Guevara," and (2) bolstered C.M.C.'s testimony with facts not in evidence, and "otherwise [testified] to un-admitted evidence." Br. of Appellant at 27. We disagree.

First, Guevara's claim regarding defense counsel's failure to object in response to the alleged burden shifting fails because he does not demonstrate that defense counsel's performance was deficient. As discussed above, we hold that the prosecutor did not improperly shift the burden during closing arguments. Where the prosecutor's arguments were not improper, defense counsel is not deficient for failing to object. *See State v. Larios-Lopez*, 156 Wn. App. 257, 262, 233 P.3d 899 2010) ("Because we have already determined that the prosecutor's arguments were not improper, Larios-Lopez does not show that his counsel's performance was deficient in failing to object to them.")

Second, Guevara's claim that defense counsel rendered deficient performance by failing to object when the prosecutor referenced facts not in evidence also fails because he does not demonstrate that counsel's performance was deficient. Although the prosecutor argued that C.M.C. had previously reported the two additional incidents to Wahl, C.M.C. testified that she had reported the two additional incidents to Taylor. Thus, the record supported the prosecutor's statement that C.M.C. had reported the two incidents outside of the charging period. Moreover, the prosecutor's argument that Guevara's behavior "escalated" was a reasonable inference from

the evidence. Therefore, because the record supported the prosecutor's arguments, it was a reasonable trial tactic to not object to not further emphasize the arguments.

Guevara fails to demonstrate that his counsel's performance was deficient for failing to object to alleged instances of prosecutorial misconduct. Accordingly, his claims that received ineffective assistance fail.

D. AGGRAVATING CIRCUMSTANCES INHERENT IN CRIME

Guevara argues that the trial court violated his right to a jury trial "by entering an exceptional sentence based on a jury finding" of an aggravating circumstance that "considered factors inherent in the crime."[7] Br. of Appellant at 30 (capitalization omitted). Guevara specifically argues that the jury verdict was invalid because the jury was allowed to consider C.M.C.'s age in determining whether he abused a position of trust and that her age is an inherent factor in first degree child molestation. We disagree.

Aggravating circumstances must truly distinguish the crime from others of the same category. *State v. Tili*, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003). An exceptional sentence cannot be based on factors that were taken into account by the legislature in setting the presumptive range for an offense. *State v. Chadderton*, 119 Wn.2d 390, 396, 832 P.2d 481 (1992). But to "prohibit consideration of the age of the victim in a particular case in sentencing would be to assume that all victims of this offense were equally vulnerable regardless of their age, an unrealistic proposition." *State v. Fisher*, 108 Wn.2d 419, 424, 739 P.2d 683 (1987) ("The victim's particular vulnerability due to extreme youth is not a factor which necessarily would have been considered in setting the

[7] Guevara does not challenge the sufficiency of the evidence supporting the jury's finding that he abused a position of trust.

presumptive sentencing range for indecent liberties . . . While the Legislature might have reasoned that victims less than 14 years old were more vulnerable in general than those 14 or older, it could not have considered the particular vulnerabilities of specific individuals."); *accord State v. Berube*, 150 Wn.2d 498, 513, 79 P.3d 1144 (2003).

Here, the trial court instructed the jury that if it found Guevara guilty of first degree child molestation, then it must determine whether he "used his position of trust to facilitate the commission of the crime." CP at 24. Jury instruction 12 provides:

> A defendant uses a position of trust to facilitate a crime when the defendant gains access to the victim of the offense because of the trust relationship.
>
> In determining whether there was a position of trust, you should consider the length of the relationship between the defendant and the victim, the nature of the defendant's relationship to the victim, and the vulnerability of the victim because of age or other circumstance.
>
> There need not be a personal relationship of trust between the defendant and the victim. It is sufficient if a relationship of trust existed between the defendant and someone who entrusted the victim to the defendant's care.

CP at 24.

Guevara argues that the "effect of the instruction was that the jury could have answered 'yes' to the special interrogatory based only on facts that went directly to an element of the crime itself." Br. of Appellant at 32. But, the instruction does not provide for a finding of a position of trust based on age alone. Rather, the instruction provides that one factor the jury should consider in determining whether the defendant used a position of trust is whether the victim was vulnerable and allows the jury to consider the victim's age, and other circumstances, in determining whether she was vulnerable. Finding that the victim is of a certain age to meet the statutory requirements of a crime is not the same as determining whether the victim was vulnerable based on age or other

circumstances. And, in order to find the defendant used a position of trust to facilitate the crime, the jury also needed to consider the length of the relationship between the defendant and the victim and the nature of the defendant's relationship to the victim. Thus, the aggravating circumstance of using a position of trust to facilitate the crime is not dependent only on the victim's age. Accordingly, Guevara's challenge fails.

E. LEGAL FINANCIAL OBLIGATIONS

Guevara argues that the trial court erred by failing to make an individualized inquiry before imposing legal financial obligations. Guevara did not object to the imposition of LFOs.

RCW 10.01.160(3) requires the record to reflect that the sentencing judge "made an individualized inquiry into the defendant's current and future ability to pay" before the court imposes discretionary LFOs. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Guevara does not distinguish between mandatory and discretionary legal financial obligations. This is an important distinction because the trial court does not consider a defendant's ability to pay when imposing mandatory LFOs. *State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013).

The State concedes this issue to the extent it relates to discretionary LFOs and asked that, in the interests of judicial economy, the discretionary LFOs be stricken rather than remand the matter for resentencing. We accept the State's concession and remand for the trial court to strike Guevara's discretionary LFOs.

We affirm Guevara's convictions, but remand for the trial court to strike Guevara's discretionary LFOs.

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, J.

We concur:

Worswick, J.

Johanson, C.J.