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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER ALLRED, Appellant.	No. 49375-6-II UNPUBLISHED OPINION

BJORGEN, J. — Christopher Allred appeals his convictions and sentences for second degree rape, two counts of first degree incest, and second degree incest. He argues that the superior court admitted improper generalized profile evidence. He also raises numerous additional arguments in his statement of additional grounds (SAG).

We hold that Allred's arguments fail and affirm the superior court.

FACTS

Allred and his wife Kari Allred[1] adopted A.A.[2] when she was one. When A.A. was in the second grade, her parents decided to homeschool her. Both parents participated in the

[1] We refer to Christopher Allred by his last name, and to his wife, Kari Allred, by her first name for clarity. We intend no disrespect.

[2] Pursuant to General Order 2011-1, *In Re The Use Of Initials Or Pseudonyms For Child Witnesses In Sex Crime Cases*, we refer to the victim in this case as A.A.

homeschooling, although Allred would typically grade A.A.'s work. Allred began to sexually abuse A.A. in 2011 or 2012, after she turned 16.

In March 2015, A.A. went to a nearby mall, contacted her friend's sister Jessica Davis, and told Davis that she had been sexually abused by Allred. After A.A. told Davis of the abuse, one of them called Kari and both Kari and Allred came to the mall to talk with A.A. Davis then called her pastor, Kalani Culley, for advice on how to handle the unfolding situation, and Culley agreed to meet with the family and Davis. Davis, Kari, Allred, and A.A. went to meet Culley at her church's campus. At that meeting, A.A. again disclosed that Allred had sexually abused her, and Culley called law enforcement to report the allegation. Soon after, Deputy Robin Ternus of the Clark County Sheriff's Office arrived at the church campus and interviewed several people, including A.A. and Allred.

On September 29, 2015, the State charged Allred with second degree rape and two counts of first degree incest.[3] On July 8, 2016, the State filed an amended information charging Allred with second degree incest in addition to the previous charges. On July 18, the superior court heard motions in limine from both parties.

A.A. testified at trial and was cross-examined by defense counsel regarding aspects of her testimony that were different from her prior interviews:

> [Defense (D)]: You told them that your father did sexual things to you, but the story you described is different than what you told today?
> [A.A.]: Yes.
> [D]: And the story you described then is different than you told Detective Hernandez?
> [A.A.]: Yes.

[3] Under RCW 9A.64.020(3)(a), a "descendant" as used in the incest statute "includes stepchildren and adopted children under eighteen years of age."

> [D]: Different than what you told Deputy Ternus?
> [A.A.]: Yes.
> . . . .
> [D]: In fact, the story today is different than anything else you've ever said, isn't it?
> [A.A.]: Yes.
> [D]: Every time you tell the story it changes?
> [A.A.]: (no audible response)
> [D]: Isn't that true?
> [A.A.]: Yes.
> [D]: Through all of those safe meetings you never said, when you were there to talk about being sexually abused, you never said that a grown man had put his penis on your vagina, correct?
> [A.A.]: Yes.

Verbatim Report of Proceedings (VRP) (Vol. 2) at 224-25.

After defense counsel finished cross-examining A.A., the State requested a sidebar. After the jury left the courtroom, the State argued that the defense's challenging of A.A.'s credibility had opened the door to further rebuttal testimony regarding why A.A.'s narrative had changed over time. The court determined that because defense counsel had attacked A.A.'s credibility, it was appropriate for the State to attempt to restore A.A.'s credibility. On redirect, A.A. testified that during her prior interviews she had just answered the questions asked by the different interviewers, and that she was nervous about testifying at trial because Allred had told her that no one would believe her story.

The State also called Detective Monica Hernandez of the Vancouver Police Department to testify about her investigation in this case. At the time of trial, Detective Hernandez had worked for the Children's Justice Center (CJC) for over two years, received training in cases involving child abuse, and had handled nearly 200 cases involving children. The State asked Detective Hernandez to describe the term "delayed disclosure":

> [Prosecution]: What is delayed disclosure?
> [Det. Hernandez]: Delayed disclosure is when a[n] individual comes in and discloses to somebody, and then later discloses more information, feeling more comfortable, circumstances change, being believed by somebody. Typically kids who are told that, "No one's ever going to believe you," or threatened or – there's a number of circumstances that, that come about where kids are – have a delayed disclosure or they – they'll disclose a partial incident and then come out with more.

VRP (Vol. 2) at 373. This is the testimony challenged by Allred as improper profile evidence.

Defense counsel requested a sidebar and objected that Detective Hernandez's testimony regarding delayed disclosure was not relevant because it was "just general information about things that they're taught happens." VRP (Vol. 2) at 373-74. The court overruled the objection, reasoning:

> [T]he question was what was delayed disclosure, and [defense counsel], you've brought that up how through cross examination of [A.A.] as time has gone on she's made new and additional [sic], such as today[']s] testimony for new and additional things. This officer, based upon the training outlined, is – was answering that that's not an uncommon scenario, they feel comfortable, they feel believed was her response and they do that.

VRP (Vol. 2) at 374.

During closing arguments, defense counsel argued that A.A. was "a young girl who . . . has a very hard time telling the difference between . . . fiction and truth," and that because "[h]er story has changed every single time . . . that demands an acquittal on all four counts." VRP (Vol. 3) at 471, 491.

The jury found Allred guilty of second degree rape, two counts of first degree incest, and second degree incest. Allred was sentenced to 240 months on the second degree rape conviction, 77 months on each first degree incest conviction, and 60 months on the second degree incest conviction. Allred appeals his convictions and sentences.

ANALYSIS

I. PROFILE TESTIMONY

Allred argues that the superior court erred by permitting testimony from Detective Hernandez regarding delayed disclosure because the testimony amounted to improper generalized profile testimony. We disagree.

A. Error Preservation

As a threshold issue, we must determine whether Allred has preserved his evidentiary challenge for appellate review. Generally, a party may assign evidentiary error on appeal only on a specific ground made at trial. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a).[4]

Allred's objection at trial to Detective Hernandez's testimony was sufficient to preserve his profile testimony challenge for review. Although Allred couched his objection in terms of relevance, his characterization of the challenged testimony as "general information about things that they're taught happens" can be fairly interpreted as an objection to generalized profile testimony about delayed disclosure. VRP (Vol. 2) at 373-74. We hold that Allred has preserved this challenge for review.

B. Profile Testimony

We review the superior court's evidentiary rulings for an abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). A trial court abuses its discretion if its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based on

[4] RAP 2.5(a) states, "The appellate court may refuse to review any claim of error which was not raised in the trial court."

untenable grounds or made for untenable reasons if it rests on facts unsupported by the record or was reached by applying the wrong legal standard. *Id.* A decision is manifestly unreasonable if the court, despite applying the correct legal standard to the supported facts, reaches an outcome that is outside the range of acceptable choices, such that no reasonable person could arrive at that outcome. *Id.*

In Washington, "[t]he trial court must exclude expert testimony involving scientific evidence unless the testimony satisfies both [the] *Frye*[5] [standard] and ER 702." *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013). Under ER 702,

> [i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Our state Supreme Court has held that

> [t]o admit evidence under *Frye*, the trial court must find that the underlying scientific theory and the "techniques, experiments, or studies utilizing that theory" are generally accepted in the relevant scientific community and capable of producing reliable results.

Lakey, 176 Wn.2d at 918 (quoting *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 603, 260 P.3d 857 (2011)). The *Frye* standard complements ER 702 by attempting to screen unreliable testimony from the jury because "[u]nreliable testimony does not assist the trier of fact." *Lakey*, 176 Wn.2d at 918. As explained by the Supreme Court,

> *Frye* and ER 702 work together to regulate expert testimony: *Frye* excludes testimony based on novel scientific methodology until a scientific consensus decides the methodology is reliable; ER 702 excludes testimony where the expert fails to adhere to that reliable methodology.

Lakey, 176 Wn.2d at 918-19.

[5] *Frye v. United States*, 293 F. 1013 (1923).

In *State v. Jones*, 71 Wn. App. 798, 818, 863 P.2d 85 (1993), Division One of our court held that

> when personal experience is used as a basis for generalized statements regarding the behavior of sexually abused children as a class, the testimony crosses over to scientific testimony regarding a profile . . . and therefore should be subject to the standard set forth in *Frye*.

The court further determined that "testimony regarding the behaviors of a class of abused children is not sufficiently established to meet the *Frye* standard or an equivalent test for scientific reliability," and "use of generalized profile testimony . . . to prove the existence of abuse is insufficient under *Frye*." *Jones*, 71 Wn. App. at 819-20. However, "[w]hen the testimony is limited to the witness's observations of a specific group, the *Frye* standard is not applicable," and "such testimony may be used to rebut allegations by the defendant that the victim's behavior is inconsistent with abuse." *Jones*, 71 Wn. App. at 818-19.

Allred contends that Detective Hernandez "inappropriately included generalized assertions about what typically happens when abused children are told no one will believe them," and that "[t]his testimony regarding sexually abused children as a class was inadmissible." Br. of Appellant at 9. However, Detective Hernandez's testimony did not reference sexually abused children as a class in her explanation of delayed disclosure. Nor did she use such generalized assertions as elements of proof of sexual abuse. Rather, she stated that children who have been told they would not be believed or who have been threatened in some manner, among other circumstances, are more likely to exhibit delayed disclosure. Detective Hernandez's testimony was not generalized profile testimony because her description of delayed disclosure was based

on her observations from her work at the CJC and did not attempt to characterize sexually abused children as a class.

II. SAG

A. Ineffective Assistance of Counsel

In his SAG, Allred argues that he received ineffective assistance of counsel in the ways discussed below.

To establish ineffective assistance of counsel, Allred must demonstrate that: (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness under the circumstances and (2) he was prejudiced as a result of his counsel's performance. *State v. Larios-Lopez*, 156 Wn. App. 257, 262, 233 P.3d 899 (2010). A defendant is prejudiced by counsel's deficient performance if but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We presume that defense counsel's representation was effective, and Allred must demonstrate that there was no legitimate or strategic reason for defense counsel's conduct. *McFarland*, 127 Wn.2d at 335-36. Our Supreme Court has also explained that in evaluating whether counsel's conduct was the product of a legitimate trial strategy or tactic, "'[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable.'" *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)).

1. Failure to Call Witness

Generally, "the decision to call a witness will not support a claim of ineffective assistance of counsel." *State v. Thomas*, 109 Wn.2d 222, 230, 743 P.2d 816 (1987). However, "the

presumption of counsel's competence can be overcome by a showing, among other things, that counsel failed to conduct appropriate investigations." *Thomas*, 109 Wn.2d at 230.

i. Kari Allred

Allred contends that he received ineffective assistance of counsel because defense counsel did not call his wife Kari to testify on his behalf. We disagree.

During the motions in limine hearing, defense counsel asked the court to preclude Kari from testifying that "after she heard [the allegations] she instantly believed them." VRP (Vol. 1) at 53. Kari testified on behalf of the State during trial. Defense counsel's motion to exclude Kari's testimony and the fact that she was called by the State suggests that defense counsel's decision to not call Kari was a strategic decision to avoid potentially damaging testimony by an unfriendly witness. Our Supreme Court has held that "'[w]hen counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)). Therefore, we hold that Allred has not demonstrated ineffective assistance on this ground because he has not demonstrated that his counsel's conduct was deficient.

ii. Character Witnesses

Allred claims that he received ineffective assistance of counsel because defense counsel failed to call character witnesses to testify about Allred's "positive reputation." SAG at 8. We disagree.

Under ER 405(a), "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation." Irrelevant evidence is not admissible. ER 402. Evidence is relevant if it has "any tendency to make the existence of

any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401.

Allred claims that defense counsel knew of several witnesses who would have testified to his positive reputation in his community. Even assuming Allred's character evidence was marginally relevant, he has not presented facts or legal reasoning supporting the absence of a legitimate strategic basis for not calling his character witnesses. Therefore, we hold that Allred has not demonstrated that defense counsel was deficient. This claim of ineffective assistance of counsel fails.

iii. Other Witnesses

Allred also contends that defense counsel was ineffective for failing to call Allred's brother, son, and business partners to testify as witnesses. We disagree.

Allred does not explain what his son and business partners would have stated had they been called as witnesses. Absent information about the contents of the anticipated testimony, Allred cannot show that he was prejudiced by defense counsel's failure to call his son or business partners. Allred does state that his brother would have testified that he has the same medical condition as Allred, but there is no information in our record concerning Allred's brother. Insofar as the argument regarding Allred's son, business partners, and brother relies on facts outside the record on appeal, the argument must be raised in a personal restraint petition (PRP). *McFarland*, 127 Wn.2d at 338 n.5; RAP 16.3. Therefore, we decline to consider this argument.

2. Failure To Use Medical History

Allred argues that defense counsel was ineffective for failing to utilize Allred's medical

history or medical experts as part of the defense. Allred explains in his SAG that he has been diagnosed with Multiple Sclerosis, which can cause erectile dysfunction and loss of libido, and that a medical expert would have presented evidence that Allred is affected by these and other symptoms. Allred states also that defense counsel had his medical history going back to 2006. However, this factual information is not part of our record on appeal, and thus we cannot consider it in determining deficiency. If Allred wants to make an argument that relies on facts outside the record on appeal, the argument must be raised in a PRP. *McFarland*, 127 Wn.2d at 338 n.5; RAP 16.3. Therefore, we decline to consider this argument.

3. Testimony Regarding Home and School Life

Allred argues that defense counsel was ineffective for failing to further discuss A.A.'s home and school life during trial. Allred agrees that defense counsel did discuss A.A.'s home and school life, but maintains that it should have been discussed further. However, because we presume that defense counsel's representation was effective, whether or not a "strategy ultimately proved unsuccessful is immaterial," to a determination of whether defense counsel's actions were reasonable. *Grier*, 171 Wn.2d at 43. Defense counsel discussed A.A.'s home and school life in closing argument and argued that her circumstances at home gave her a motive to fabricate claims against Allred to avoid being homeless. Allred has not shown how counsel's decision not to discuss A.A.'s home and school life to a greater extent was deficient.

4. Failure To Impeach A.A.

Allred asserts that defense counsel was ineffective for failing to impeach A.A. Although Allred recounts several facts that he claims defense counsel should have used to impeach A.A., those facts are not part of the record on appeal. If Allred wants to make an argument that relies

on facts outside the record on appeal, the argument must be raised in a PRP. *McFarland*, 127 Wn.2d at 338 n.5; RAP 16.3. Therefore, we decline to consider this argument.

5. Explanation of Why Allred Did Not Testify

Allred claims that defense counsel was ineffective for failing to properly explain why Allred did not testify at trial. At trial, the jury was instructed that "Allred is not required to testify. You may not use the fact that . . . he has not testified to infer guilt or to prejudice him in any way." Clerk's Papers (CP) at 61. In the absence of evidence to the contrary, we presume the jury followed the court's instructions. *State v. Montgomery*, 163 Wn.2d 577, 596, 183 P.3d 267 (2008). Therefore, even assuming that defense counsel was deficient, Allred has not demonstrated that he was prejudiced by defense counsel's failure to explain why he did not testify at trial. As such, we hold that Allred's argument fails.

6. Failure To Raise Prosecutorial Misconduct

Allred contends that defense counsel was ineffective for failing to raise the issue of prosecutorial misconduct. We disagree.

i. Complete Police Report

Allred maintains that the prosecution did not disclose to the defense a "complete report" that was compiled during the police investigation of Allred and that not all members of law enforcement had access to the "complete report." SAG at 16-17. Allred states that this complete report contained an overview of Allred's medical health care history. Allred also states, however, that defense counsel had his medical history going back to 2006. Information as to the subject matter or content of this report is not part of our record on appeal. Because this argument

relies on facts outside the record on appeal, Allred must raise this argument in a PRP. *McFarland*, 127 Wn.2d at 338 n.5; RAP 16.3. Therefore we decline to consider it.

ii. Deputy Ternus

Allred claims that defense counsel was ineffective because he failed to question Deputy Ternus about the fact that Deputy Ternus thought that A.A. was lying. Allred claims that Deputy Ternus told both him and Kari that he did not believe A.A.'s narrative and that he initially believed Allred was innocent. Allred's argument suggests that the State committed misconduct by suppressing or withholding evidence of the fact that Deputy Ternus believed that Allred was innocent during their investigation of the alleged incident. There are no facts in our record regarding Deputy Ternus' personal opinions as to the veracity of any participant in this case. If Allred wants to make an argument that relies on facts outside the record on appeal, the argument must be raised in a PRP. *McFarland*, 127 Wn.2d at 338 n.5; RAP 16.3. Therefore, we decline to consider this argument.

iii. Lack of Arrest

Allred argues that defense counsel was ineffective for failing to point out that Allred was never arrested as part of this case. However, the fact that Allred was not arrested does not appear relevant to any of the charges at issue in this case. Irrelevant evidence is not admissible. ER 402. Therefore, we hold that Allred has not demonstrated that defense counsel was deficient for failing to raise Allred's lack of arrest at trial.

iv. Ineffectiveness Under *Cronic*[6]

Allred contends that he received ineffective assistance under the standards identified in *United States v. Cronic*. We disagree.

[6] 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

In *Cronic*, the United States Supreme Court held that an effectively complete denial of counsel is presumptively prejudicial for purposes of an ineffective assistance claim. 466 U.S. at 659. Examples include:

> (1) [W]here a defendant "is denied counsel at a critical stage of his trial"; (2) where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; (3) where the circumstances are such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial"; and (4) where "counsel labors under an actual conflict of interest."

In re Pers. Restraint of Davis, 152 Wn.2d 647, 674, 101 P.3d 1 (2004) (footnotes omitted) (quoting *Visciotti v. Woodford*, 288 F.3d 1097, 1106 (9th Cir. 2002)).

Allred maintains that he has received presumptively prejudicial ineffective assistance of counsel because defense counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. However, review of the record demonstrates that defense counsel developed a trial strategy, cross-examined the State's witnesses, and sought to undermine A.A.'s credibility during closing argument. Therefore, we hold that Allred has not received presumptively prejudicial ineffective assistance of counsel because he has not shown that defense counsel entirely failed to meaningfully challenge the State's case.

B. Right To Counsel

1. Arrest

Allred argues that he was arrested when Deputy Ternus interviewed him at the church grounds and therefore he was entitled to public counsel at that time. We disagree.

Our Supreme Court has explained that "'[a]n arrest takes place when a duly authorized officer of the law manifests an intent to take a person into custody and actually seizes or detains

such person.'" *State v. Patton*, 167 Wn.2d 379, 387, 219 P.3d 651 (2009) (quoting 12 ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE: CRIMINAL PRACTICE & PROCEDURE § 3104, at 741 (3d ed. 2004)). Whether a person has been arrested is determined by an objective analysis of all the surrounding circumstances. *Id*. In other words, "[t]he inquiry is whether a reasonable person under the circumstances would consider himself or herself under arrest." *State v. Ortega*, 177 Wn.2d 116, 128, 297 P.3d 57 (2013). Our Supreme Court has also noted that the reading of *Miranda*[7] rights alone does not transform an encounter with law enforcement into an arrest. *State v. Rivard*, 131 Wn.2d 63, 76, 929 P.2d 413 (1997).

At the CrR 3.5 suppression hearing, Deputy Ternus testified about his interview with Allred at the church grounds. Deputy Ternus stated that Allred agreed to speak with him, he read Allred his *Miranda* rights, he did not place Allred under arrest or in handcuffs, and that Allred did not make any requests for an attorney or to leave. Allred argues that he was under arrest because he "did not feel that he was free to leave." SAG at 20. However, we use an objective analysis to determine whether a person is under arrest. *Patton*, 167 Wn.2d at 387. Deputy Ternus' testimony, just summarized, did not manifest an intent to take Allred into custody during the interview at the church grounds, and therefore a reasonable person in Allred's position would not have considered himself under arrest. Consequently, Allred's argument fails.

2. Additional Statements by Deputy Ternus

Allred contends that Deputy Ternus attempted to dissuade him from requesting an attorney and that he told Allred he could not have an attorney until he was formally arrested. He also asserts that Deputy Ternus threatened to arrest him for interfering with a police investigation if Allred did not give him information within a particular timeframe. Allred's argument relies on

[7] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

statements regarding evidence of which are not included in the record on appeal. If Allred wants to make an argument that relies on facts outside the record on appeal, the argument must be raised in a PRP. *McFarland*, 127 Wn.2d at 338 n.5; RAP 16.3. Therefore, we decline to consider this argument.

C. Prosecutorial Misconduct

To establish a claim of prosecutorial misconduct, Allred must demonstrate that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). To establish prejudice, there must be a substantial likelihood that the misconduct affected the jury verdict. *In re Glasmann*, 175 Wn.2d at 704. Because Allred did not object to the alleged misconduct during trial, his arguments are waived unless he can establish that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *In re Glasmann*, 175 Wn.2d at 704.

1. Withholding of Complete Police Report

Allred argues that the prosecution committed misconduct when Deputy Ternus failed to make his complete police report available to other law enforcement personnel. For reasons set out above, this argument relies on facts outside the record on appeal and must be raised in a PRP. *McFarland*, 127 Wn.2d at 338 n.5; RAP 16.3. Therefore, we decline to consider this argument.

2. Credibility

Allred claims that the prosecution committed misconduct by proceeding with this case because it knew that A.A. was lying. Allred asserts that the plea deal offered by the State and the prosecuting attorney's comment during closing argument that "[i]f . . . [A.A.] lied at any time during her testimony, it was because no one would believe . . . the truth," show that the State

knew that A.A. was lying. SAG at 23-24. However, neither the proposed plea agreement nor the alleged comment by the prosecuting attorney during closing are part of the record on appeal. If Allred wants to make an argument that relies on facts outside the record on appeal, the argument must be raised in a PRP. *McFarland*, 127 Wn.2d at 338 n.5; RAP 16.3. Therefore, we decline to consider this argument.

3. Perjury

Allred contends that the prosecution committed misconduct by using perjured testimony as part of its case. Although Allred claims that the prosecution used perjured statements, he does not identify what statements allegedly constitute perjury. We do not consider conclusory arguments unsupported by citation to authority or rational argument. *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012). Therefore, because Allred does not explain or identify which statements were perjured, we decline to consider this argument.

4. Vouching/Inflaming the Jury

Allred asserts that the prosecuting attorney vouched for A.A. during closing argument when he stated, "If . . . [A.A.] lied at any time during her testimony, it was because no one would believe . . . the truth." SAG at 23-24. Allred also argues that the prosecution's statement was a misstatement of the evidence and calculated to inflame the passions of and mislead the jury. However, review of the record indicates that the prosecutor did not say this to the jury during closing argument. Therefore, we hold that this argument fails.

5. Opening Statement

Allred argues that the prosecution committed misconduct during its opening statement by stating that "Allred forcefully held [A.A.] down, covered her mouth, and raped her, as she screamed and tried to fight back." SAG at 25.

The record on appeal does not contain the opening statements given in this case. However, both the prosecution and defense counsel acknowledged in closing argument that a similar statement was made. Defense counsel remarked during closing that the prosecutor

> said that he would prove rape in the second degree when [sic] he would show that [Allred] held [A.A.] down, covered her mouth and forcibly penetrated her with his finger. She did not testify to that.

VRP (Vol. 3) at 472-73. During rebuttal closing, the prosecutor responded,

> [Defense counsel] pointed out that in opening I described the evidence, what it would be for the rape two and didn't live up to that. He's correct. But the only difference is there was not testimony about [Allred] covering [A.A.]'s mouth as she tried to scream.

VRP (Vol. 3) at 493. The jury was instructed that the "lawyers' statements are not evidence," and that "[t]he evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses." CP at 55-56. Even assuming that the prosecution's comments about A.A.'s anticipated testimony were improper, Allred has not demonstrated that he was prejudiced because both the prosecution and defense counsel clarified for the jury which aspects of the opening statement were not supported by the evidence, and the jury was properly instructed. Therefore, we hold that this argument fails.

D. ER 403

Allred argues that the superior court should have excluded some of the State's witnesses because their testimony was designed to confuse and manipulate the jury. Under ER 403, a trial court may exclude otherwise relevant evidence if

> its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Allred does not identify which witnesses or what testimony he believes is confusing or manipulative. We do not consider conclusory arguments unsupported by citation to authority or

rational argument. *Mason*, 170 Wn. App. at 384. Therefore, we decline to consider this argument.

E. False Accusations/Testimony

1. Motive To Fabricate

Allred claims that A.A. is a liar and that she had ample motive to fabricate claims against him. We do not review credibility determinations on appeal. *State v. Robinson*, 189 Wn. App. 877, 896, 359 P.3d 874 (2015). Therefore, to the extent this argument invites us to review the credibility of A.A., we hold that this argument fails.

2. Witness Tampering/Coaching

Allred contends that during trial, the prosecutor told defense counsel that he had seen one of the State's witnesses, Vonda Rizzo, "prepping [A.A.] for the stand." SAG at 31-32. Nothing in the record before us indicates that Rizzo improperly communicated with A.A. regarding her trial testimony. If Allred wants to make an argument that relies on facts outside the record on appeal, the argument must be raised in a PRP. *McFarland*, 127 Wn.2d at 338 n.5; RAP 16.3. Therefore, we decline to consider this argument.

3. A.A.'s Relationship With Joseph Culley[8]

Allred argues that Joseph Culley, pastor Culley's[9] son, fabricated parts of his testimony regarding his relationship with A.A. He also claims that Joseph and A.A. had sex and that this information should have been admissible at trial. There is no information in the record that suggests that Joseph and A.A. had a sexual relationship. Furthermore, Allred relies on statements made by Kari during an interview prior to trial to support his claim that Joseph

[8] In the verbatim report of proceedings, Joseph is referred to at times as "Steven Culley."

[9] We refer to Joseph Culley by his first name for clarity. No disrespect is intended.

fabricated aspects of his testimony. If Allred wants to make an argument that relies on facts outside the record on appeal, the argument must be raised in a PRP. *McFarland*, 127 Wn.2d at 338 n.5; RAP 16.3. Therefore, we decline to consider this argument.

F. Jury Bias

Allred argues that the jury was biased against him. For support, Allred relies on uncited statistical studies, the jury questionnaires, and interviews with the jurors after trial. None of this evidence is included in the record on appeal. If Allred wants to make an argument that relies on facts outside the record on appeal, the argument must be raised in a PRP. *McFarland*, 127 Wn.2d at 338 n.5; RAP 16.3. Therefore, we decline to consider this argument.

G. Cumulative Error

Allred argues that cumulative errors entitle him to a new trial. Under the cumulative error doctrine, "a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair." *State v. Emery*, 174 Wn.2d 741, 766, 278 P.3d 653 (2012). The doctrine does not apply where the errors are few and have little to no effect on the trial outcome. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Even if we assume that defense counsel was deficient for not explaining why Allred did not testify at trial and the prosecution's statements regarding A.A.'s anticipated testimony were improper, Allred has not demonstrated that he was prejudiced by any of his alleged errors on appeal. Therefore, we hold that the doctrine of cumulative error does not apply in this case.

H. Competency of A.A. To Testify

For the first time on appeal, Allred challenges the competency of A.A. to testify as a child witness. Allred argues that because aspects of the case were handled by the CJC, A.A. must be a child and therefore incompetent to testify at trial. Division One of our court has held

that a witness' competency generally cannot be challenged for the first time on appeal, except in cases involving unavailable declarant witnesses and hearsay statements. *State v. C.M.B.*, 130 Wn. App. 841, 847-48, 125 P.3d 211 (2005). In this case, A.A. testified at trial and was available for cross examination. Therefore, we hold that this argument fails.

I. Challenge To the Length of Sentences

Allred contends that the sentences he received on his convictions are excessively long. Allred does not challenge the calculation of his offender score or the seriousness level associated with his convictions. Allred's judgment and sentence reflects that the superior court properly determined the standard range sentence for all of Allred's convictions based on the RCW 9.94A.510 sentencing grid.[10] Allred's sentences for each count fell within the standard ranges. Under RCW 9.94A.585(1), "[a] sentence within the standard range . . . for an offense shall not be appealed." Therefore, we hold that this argument fails.

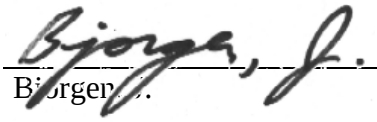
CONCLUSION

We affirm the superior court.

A majority of the panel having determined that this opinion will not be printed in the

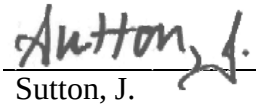
[10] The only deviation from the standard sentencing grid was with regard to second degree incest. With an offender score of 9 and a seriousness level of 5, the presumptive standard range sentence for this offense would have been 72 to 96 months. However, because second degree incest is a class C felony, and class C felonies may be punished up to a maximum of 5 years, the superior court lowered the standard range sentence for the second degree incest felony to 5 years. RCW 9A.20.021(1)(c).

Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Bjorgen, J.

I concur:



Sutton, J.

JOHANSON, J. (concurring) — I agree with the majority that we should affirm, but I disagree that the alleged error in admission of profile testimony was preserved. Generally, a party may assign evidentiary error on appeal only on a specific ground made at trial. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a).

Christopher Allred's objection at trial to Detective Monica Hernandez's testimony was insufficient to preserve his profile testimony challenge for review. Allred couched his objection in terms of relevance, and his characterization of the challenged testimony as "general information about things that they're taught happens." 2 Report of Proceedings at 374. This cannot be fairly interpreted as an objection to profile testimony about delayed disclosure. Therefore, I would hold that Allred has failed to preserve his evidentiary challenge for appellate review and I would decline to review this alleged error.

Johanson, J.

JOHANSON, J.