IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROE CRUZ RAMIREZ-ESTEVEZ, Appellant.	No. 40226-2-II PART PUBLISHED OPINION

Hunt, J. — Roe Cruz Ramirez-Estevez appeals his jury trial conviction of five counts of first degree child rape. He argues that the trial court erred by (1) admitting as an excited utterance the hearsay testimonies of a school counselor and of the victim's aunt that E.O. told them that Ramirez-Estevez raped her, admitting as a prior consistent statement a digital audio recording of the victim's interview with a detective, and permitting a medical expert to testify that the results of an examination of the victim's genitals were consistent with her medical history; and (2) giving a "to convict" jury instruction violated his constitutional right to be free from multiple punishments from the same act. We affirm.

FACTS

I. Child Rapes

Ramirez-Estevez and E.O.'s mother began living together in an apartment in 2002 or early

2003. In 2005, they moved into a trailer with E.O.'s mother's three children, including E.O., who was "[a]bout eight or nine" at the time. 3 Report of Proceedings (RP) at 414. While they lived in the trailer, Ramirez-Estevez raped E.O. multiple times. Ramirez-Estevez stopped raping E.O. before he moved out of the trailer in November 2007.

Two or three years after the rapes occurred, during the 2008-09 school year, E.O. was a sixth grader at an elementary school. School "intervention specialist" Elizabeth Wilcox received "a parent phone call" that prompted her to ask a bilingual Spanish-speaking teacher to speak with E.O. 2 RP at 333. The teacher asked E.O. "if there was anything that [E.O.] had to say that [E.O.] had inside [her]"; in response, E.O. told the teacher about the rapes. 3 RP at 447. The teacher then brought E.O. to Wilcox's office, at which point E.O. "was crying" and appeared "[v]ery upset," "shaky," and "[v]ery nervous." 2 RP at 334. When Wilcox asked E.O. "what she was so upset about," E.O. replied that "her mom's boyfriend who used to stay with them had raped her" "a couple years ago" when she was nine years old. 2 RP at 336-37. Wilcox advised E.O. to "go home and talk to [her] mom, then call [Wilcox] so [Wilcox would] know that [E.O.] had talked to somebody at home." 2 RP at 341-42. Wilcox also contacted Child Protective Services (CPS).

Sometime after speaking with Wilcox, a "shaking" E.O. approached her aunt, began to cry, said that she was feeling scared, and told her aunt that "when [E.O.] was living with [Ramirez-Estevez] he raped her" "more than once." 2 RP at 373-75. E.O. and her aunt called Wilcox and explained "[t]hat [E.O. and her aunt] had the conversation." 2 RP at 342.

After the Thurston County Sheriff's Office received a CPS referral about a possible sexual assault, a "more formal interview" took place in Wilcox's office with Wilcox, E.O., and Thurston

County Sheriff's Office Detective Eric Kolb. 2 RP at 345. E.O. again was "shaking" and appeared "upset" and "teary eyed," similar to her demeanor in her first meeting with Wilcox. 2 RP at 346. In a tape-recorded interview, E.O. told Kolb that Ramirez-Estevez had lived with E.O. and her family in the trailer when she was eight or nine and that "[Ramirez-Estevez] grabbed [E.O.] and raped [her]." Clerk's Papers (CP) at 167. E.O. described incidents in which Ramirez-Estevez took off her clothes, locked the doors to her mother's bedroom, and put his "lower front private part" that "he uses to go to the bathroom with" inside E.O.'s "lower front private part" and her "butt." CP at 167-68. Sometimes E.O. "push[ed] him off with [her] leg" and "told him to stop," but "he would get back on." CP at 170. Estimating that there were about "5 to 15" of these episodes, E.O. was "positive" that these encounters happened more than 5 times, but less than 20. CP at 172. After the interview, Kolb referred E.O. to a sexual assault clinic.

E.O. met with Laurie Davis, a nurse practitioner at the sexual assault clinic of Providence St. Peter Hospital. Davis conducted a tape-recorded interview with E.O. in which E.O. described sexual encounters with Ramirez-Estevez that had occurred while they lived at the trailer when E.O. was about eight years old. E.O. told Davis about episodes where Ramirez-Estevez removed his clothes and E.O.'s clothes and penetrated her vagina and anus. E.O. explained that these incidents had happened on more than five occasions. Davis also conducted a physical examination and discovered "divots or notches in [E.O.'s] hymen," which were consistent with E.O.'s description of the rapes. 3 RP at 589.

II. Procedure

The State charged Ramirez-Estevez with five counts of first degree child rape under RCW 9A.44.073. During trial, E.O. testified that Ramirez-Estevez "[p]ut his private parts onto my

private parts" when she was "eight or nine" "[m]ore than five times" but less than "20 or 15" times. 3 RP at 449-50, 503. E.O. explained that, while her mother was not home, Ramirez-Estevez "would start to kiss" E.O. and take off her clothes, usually in E.O.'s mother's bedroom and once in the kitchen while E.O. was taking a nap on the kitchen floor. 3 RP at 450. E.O. never told her mother about the encounters because "[she] was scared [she] was gonna get in trouble" and that "they wouldn't believe [her]." 3 RP at 483-84.

Davis, the sexual assault nurse practitioner who had examined E.O., testified that generally notches on a hymen "do[] not always mean sexual abuse" but that E.O.'s notches also were "consistent with [E.O.'s reported] medical history." 3 RP at 593, 595. Ramirez-Estevez objected to this latter part of Davis's testimony, arguing that it was speculative; the trial court overruled this objection.

Wilcox testified briefly about E.O.'s statements that Ramirez-Estevez had raped her. Ramirez-Estevez objected on hearsay grounds, which objection the trial court overruled. E.O.'s aunt also testified briefly about E.O.'s statements that Ramirez-Estevez raped her. Ramirez-Estevez similarly objected on hearsay grounds, which objection the trial court also overruled.

While Detective Kolb was on the witness stand, the State offered into evidence a digital recording of his interview with E.O. Ramirez-Estevez objected, arguing that E.O.'s statements to Kolb were hearsay.[1] Overruling Ramirez-Estevez's objection, the trial court admitted both the transcript and the recording as a prior consistent statement under ER 801(d)(1) because defense

[1] Ramirez-Estevez's counsel objected to admission of the audio recording, proposing that somebody read the transcript, which the parties had stipulated was admissible. The State argued for admission of both the audio recording and the transcript. The trial court admitted both, but, although it allowed the jury to listen to the recording, it did not give them the transcript.

counsel's cross-examination of E.O. and other witnesses opened the door to these issues and gave rise "to at least an inference . . . of [E.O.'s] recent fabrication." 4 RP at 648.

After the State rested, Ramirez-Estevez moved to dismiss all five counts, arguing that "[n]o reasonable jury could find beyond a reasonable doubt that [Ramirez-Estevez] committed five counts of rape of a child in the first degree." 4 RP at 663. The trial court denied Ramirez-Estevez's motion. Ramirez-Estevez, the sole witness for the defense, then took the witness stand and denied having had any sexual contact with E.O. The jury convicted him of all five counts. Ramirez-Estevez appeals.

ANALYSIS

I. Evidentiary Rulings

Ramirez-Estevez argues that three of the trial court's evidentiary rulings constitute reversible error: (1) admission of Wilcox's and E.O.'s aunt's hearsay testimony under the excited utterance exception; (2) admission of the digital audio recording of Kolb's interview with E.O.; (3) and admission of Davis's testimony that E.O.'s hymenal notches were consistent with her reported medical history. These arguments fail.

A. Standard of Review

We review evidentiary rulings for an abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons; an abuse of discretion also occurs when the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).

B. Wilcox's and E.O.'s Aunt's Conversations with E.O.

Over Ramirez-Estevez's objections, the trial court admitted as ER 803(a)(2) excited utterances testimonies from Wilcox and E.O.'s aunt that E.O. had told them that Ramirez-Estevez had raped her. Ramirez-Estevez argues that these testimonies were hearsay, not excited utterances, because E.O. made the statements to them two to three years after the rapes occurred, not spontaneously while under the influence of the rapes. We agree with Ramirez-Estevez that Wilcox's and E.O.'s aunt's testimonies recounted E.O.'s inadmissible hearsay, not excited utterances.[2] But we also agree with the State that admission of these hearsay statements was

[2] Wilcox testified about the bilingual teacher's conversation with E.O. in Wilcox's office:

> [The State]: Okay. And did you at any time during this ask [E.O.] any specific questions?
> [Wilcox]: I asked her what she was so upset about.
> [The State]: Okay. And I take it that was probably one of the first questions that you asked after she came in to your office?
> [Wilcox]: Yes.
> [The State]: Okay. And what did she say about that?
> [Ramirez-Estevez]: Objection. Hearsay.
> [The State]: Offered as an excited utterance, Your Honor.
> [Trial court]: Overruled. Go ahead.
> [Wilcox]: She had said that her mom's boyfriend who used to stay with them had raped her.

2 RP at 336-37. Later during trial, E.O.'s aunt testified about her conversation with E.O.:

> [The State]: What was her voice like when she was talking to you?
> . . . .
> [E.O.'s aunt]: It was a voice like crying, like scared.
> . . . .
> [The State]: And what did she tell you at that time?
> [Ramirez-Estevez]: Hearsay.
> [Trial court]: Overruled. Go ahead.
> [E.O.'s aunt]: That when she was living with [Ramirez-Estevez] he raped her.
> . . . .
> [The State]: Did you ask her more questions?
> [E.O.'s aunt]: Yes.

2 RP at 371-75.

harmless error.[3]

1. Not "excited utterances"

ER 803(a) provides that "excited utterances" are exceptions to the rule otherwise excluding hearsay statements:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (2) *Excited Utterance*. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The State argues that the trial court properly admitted the challenged testimonies under the excited utterance exception to the hearsay rule because Wilcox's and E.O.'s aunt's questioning of E.O. had triggered the stress of excitement caused by recalling the two-year-old rapes. We disagree.

We acknowledge that (1) "'the startling event or condition . . . need not be the "principal act" underlying the case,'" *State v. Young*, 160 Wn.2d 799, 810, 161 P.3d 967 (2007) (quoting *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992)); (2) "[t]he passage of time alone . . . is not dispositive" to whether the statements are excited utterances, *State v. Strauss*, 119 Wn.2d 401, 416-17, 832 P.3d 78 (1992); and (3) a subsequent "startling event may trigger associations with an original trauma, recreating the stress earlier produced and causing the person to exclaim spontaneously," *Chapin*, 118 Wn.2d at 686-87, in which case, "it is the later event, *not* the

[3] The State also asserts, in the alternative, that Wilcox's and E.O.'s aunt's hearsay testimonies were admissible to provide "context" under the "res gestae" exception to the hearsay rule. Ramirez-Estevez responds that there is no such thing as a "'Res Gestae hearsay exception.'" Reply Br. of Appellant at 1. Because we hold that any error in admitting these statements was harmless, we do not address the State's assertion of a "res gestae hearsay exception" to the hearsay rule.

original trauma, that satisfies the first element of the excited utterance exception." *Young*, 160 Wn.2d at 810. In our view, however, the Supreme Court did not intend to stretch the excited utterance exception to circumstances like those here, where the victim was recounting the traumatic events more than two years later; at this much later point, the reliability of an excited utterance close in time to the underlying traumatic event is no longer a predominant reliability factor, and there has been considerable time for other factors to have intervened.[4]

It is uncontroverted (1) that recalling the rapes was highly stressful and upsetting when E.O. spoke with Wilcox and E.O.'s aunt years after the rapes occurred, and (2) that E.O.'s understandably excited emotions appeared to have been the result of reliving and relating these past traumatic events to these apparently trusted adults. But E.O.'s recollection and recounting of the rapes happened nearly two years after the rapes occurred.[5] Because of this prolonged delay, E.O.'s statements did not constitute the type of excited utterances made under the stress of the event that are admissible under ER 803(a)(2).[6]

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[4] *See Chapin*, 118 Wn.2d at 688 ("[A]s the time between the event and the statement lengthens, the opportunity for reflective thought arises and the danger of fabrication increases. The longer the time interval, the greater the need for proof that the declarant did not actually engage in reflective thought.").

[5] In contrast, almost every case the State cites involved questioning of the victims occurred minutes, hours, or days after the principal act—not years later, as here. *See*, *e.g.*, *State v. Williams*, 137 Wn. App. 736, 741-42, 154 P.3d 322 (2007) (subsequent questioning occurred less than a couple hours after principal event); *State v. Hubbard*, 37 Wn. App. 137, 145, 679 P.2d 391 (1984) (subsequent questioning occurred "immediately after" principal act), *rev'd on other grounds*, 103 Wn.2d 570 (1985); *State v. Canida*, 4 Wn. App. 275, 276, 480 P.2d 800 (1971) ("same afternoon"); *Johnston v .Ohls*, 76 Wn.2d 398, 405-06, 457 P.2d 194 (1969) ("within an hour").

[6] The only case that even remotely compares to the facts here is *United States v. Napier*, 518 F.2d 316, 317-19 (9th Cir.) (holding that a victim's exclamation, made in response to seeing her assailant's picture in the newspaper nearly eight weeks after the initial assault, was an excited utterance), *cert. denied*, 423 U.S. 895 (1975). The two-year delay here, however, eclipses the

2. Harmless error

The State argues that any error was harmless in light of E.O.'s credible testimony about the multiple rapes and other uncontroverted evidence covering the substance of these challenged testimonies, such as Davis's testimony that E.O.'s hymenal notches were consistent with E.O.'s description of the rapes. Ramirez-Estevez counters that, because there was no "extensive medical evidence" to corroborate E.O.'s allegations, Wilcox's and E.O.'s aunt's testimonies recounting E.O.'s hearsay statements were not harmless.

Improper admission of evidence may be harmless error. *State v. Bashaw*, 169 Wn.2d 133, 143, 234 P.3d 195 (2010). "[A]dmission of testimony that is otherwise excludable is not prejudicial error where similar testimony was admitted earlier without objection." *Ashley v. Hall*, 138 Wn.2d 151, 159, 978 P.2d 1055 (1999); *see also State v. Dixon*, 37 Wn. App. 867, 874-75, 684 P.2d 725 (1984) (erroneous admission of written statement as excited utterance was harmless error where trial judge heard essentially same details in victim's testimony).

The jury heard E.O.'s detailed testimony about Ramirez-Estevez's multiple rapes and observed her demeanor on the witness stand, including during cross-examination by Ramirez-Estevez's trial counsel. Being subject to such cross-examination itself diminished, if not extinguished, the type of prejudice that sometimes results from admission of hearsay where the declarant is not subject to cross-examination at trial. In this way, E.O.'s live testimony in front of the jury eclipsed her earlier consistent recounting of the events to Wilcox and E.O.'s aunt and more than sufficiently supported the jury's verdict. In addition, although not conclusive, Davis's testimony also supported E.O.'s in-court testimony that Ramirez-Estevez had raped her multiple

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eight-week delay in *Napier*.

times.

Furthermore, we defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). In addition to listening to and watching E.O. on the witness stand, the jury also observed Ramirez-Estevez's demeanor as he denied having raped her. We do not second guess the jury, which obviously believed E.O. and not Ramirez-Estevez. Based on the record before us, we cannot say that "'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" *Bashaw*, 169 Wn.2d at 143 (internal quotation marks omitted) (quoting *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)). Accordingly, we hold that admission of E.O.'s hearsay statements to Wilcox and E.O.'s aunt was harmless error. We affirm.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

C. Audio Recording of Kolb's Interview with E.O.

Ramirez-Estevez next contends that Kolb interviewed E.O. after she had a reason to lie and, therefore, the recording of this interview was inadmissible hearsay, not a prior consistent statement admissible under ER 801(d)(1)(ii). We agree with the State that Ramirez-Estevez "opened the door" to this evidence, which, in the alternative, the trial court did not err in admitting as a prior consistent statement under ER 801(d)(1)(ii).

1. "Opening the door"

The record shows that, *before* the digital audio recording of the interview was in evidence,

Ramirez-Estevez "opened the door" to Kolb's recorded interview with E.O. when Ramirez-Estevez cross-examined E.O. extensively about her recorded statements to Kolb. *See, e.g., State v. Berg*, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). In fact, sometimes Ramirez-Estevez's cross-examination questions quoted verbatim from the recorded interview; for example, Ramirez-Estevez asked E.O. the following question about her interview with Kolb:

> [Ramirez-Estevez]: Do you remember talking to Detective Kolb when he did a tape-recorded statement?
> [E.O.]: Yes.
> [Ramirez-Estevez]: And do you remember whether he asked you how many times it occurred?
> [E.O.]: Yes.
> . . . .
> [Ramirez-Estevez]: And he asked you—he asked you the question, how many times did that happen? Do you remember that?
> [E.O.]: Yes.
> [Ramirez-Estevez]: And you said I'm not sure, right?
> [E.O.]: Yes.
> [Ramirez-Estevez]: And he said okay. Was it more—I'm gonna throw a number out there, okay? Umm, was it more than five times? And you said yes, right?[7]
> [E.O.]: Yes.

3 RP at 501-02.

Ramirez-Estevez questioned E.O. further about what she had said to Kolb during the interview, continuing to quote directly from the recorded interview transcript.[8] Ramirez-Estevez also questioned E.O. about a wide range of topics from her interview with Kolb, such as: what she had told Kolb about how long Ramirez-Estevez had lived with her; whether E.O. had told

[7] This last question was a direct quote from Kolb's interview with E.O.

[8] *See, e.g.*, 3 RP at 528 ("[Ramirez-Estevez]: And do you remember Detective Kolb asked you 'Typically when this was going on, [E.O.], how long would it last for?' Do you remember that question?").

Kolb that Ramirez-Estevez raped her only vaginally or also anally; and how many times she had told Kolb the rapes occurred. These topics permeated the recorded interview between E.O. and Kolb.

It is well established that, when a party opens up a subject of inquiry on cross-examination, he contemplates that the rules will permit redirect examination "within the scope of the examination in which the subject matter was first introduced." *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). The scope of the other party's inquiry is not limited precisely to the content of the opening inquiry because "'[t]o close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.'" *Berg*, 147 Wn. App. at 939 (alteration in original) (quoting *Gefeller*, 76 Wn.2d at 455). On cross-examination, Ramirez-Estevez elicited testimony both similar in substance to and verbatim from E.O.'s recorded interview with Kolb. In so doing, he essentially invited the State to offer the remainder of the interview on redirect, regardless of his other hearsay-based objections. We hold that the trial court did not abuse its discretion in admitting the taped interview under these circumstances.

2. Prior consistent statements

Our holding the recorded Kolb-E.O. interview admissible because Ramirez-Estevez "opened the door" is sufficient to resolve Ramirez-Estevez's hearsay challenge. Nevertheless, in the alternative, we also affirm the trial court's admitting the digital audio recording of E.O.'s interview with Kolb as a non-hearsay prior consistent statement under ER 801(d)(1)(ii). This rule provides that an out-of-court statement is not hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is . . . (ii) consistent with the

> declarant's testimony and is *offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.*

ER 801(d)(1) (emphasis added). Despite the usual inadmissibility of prior consistent statements, Division Three of our court has noted, "The fact that the witness told the same story before is relevant to the witness's credibility; it rebuts the alleged fabrication under pressure." *State v. Perez*, 137 Wn. App. 97, 107, 151 P.3d 249 (2007).

Conceding that the content of E.O.'s interview with Kolb is consistent with her trial testimony, Ramirez-Estevez contends that it was inadmissible because (1) his cross-examination of E.O. "never raised any claim that the victim was outright lying about the rape"; (2) his cross-examination of E.O. "called into question" only "her credibility" about the frequency and location of the rapes; and (3) the only function that the recording served was the improper "bolstering the credibility of E.O.'s testimony." Br. of Appellant at 24-26. Alternatively, Ramirez-Estevez contends that the trial court erred in admitting E.O.'s interview with Kolb because (1) ER 801(d)(1)(ii) applies only to statements made "*before* the witness's motive to fabricate arose";[9] (2) E.O.'s first meeting with Wilcox triggered the CPS and police investigations and, therefore, gave rise to E.O.'s "motive to lie"; and (3) Kolb's interview of E.O. took place after this alleged triggering of E.O.'s "motive to lie."

a. Alleged fabrication

Ramirez-Estevez contends that Kolb's interview with E.O. was inadmissible because it "bolster[ed] the credibility of [her] testimony." Br. of Appellant at 26. We find unpersuasive Ramirez-Estevez's assertion that he limited his questioning of E.O.'s credibility to the frequency

[9] *State v. Thomas*, 150 Wn.2d 821, 865, 83 P.3d 970 (2004).

and locations of the rapes, *without* suggesting that she was "outright lying" about the rapes. The "rationale for admissibility" of evidence under ER 801(d)(1)(ii) "is that the evidence 'counteracts a suggestion that the witness changed his story' and thus is relevant to the credibility of the witness's trial testimony." *State v. Smith*, 82 Wn. App. 327, 332, 917 P.2d 1108 (1996) (quoting *State v. Harper*, 35 Wn. App. 855, 858, 670 P.2d 296 (1983), *review denied*, 100 Wn.2d 1035 (1984)), *review denied*, 130 Wn.2d 1023 (1997). The standard for admission of a prior consistent statement under ER 801(d)(1)(ii) is whether the "examination 'raise[s] an inference sufficient to allow counsel to argue the witness had a reason to fabricate her story later.'" *State v. Makela*, 66 Wn. App. 164, 168, 831 P.2d 1109 (alteration in original) (quoting *State v. Bargas*, 52 Wn. App. 700, 702-03, 763 P.2d 470 (1988), *review denied*, 112 Wn.2d 1005 (1989)), *review denied*, 120 Wn.2d 1014 (1992).

Ramirez-Estevez's cross-examination of E.O. met this standard: While E.O. was on the witness stand, Ramirez-Estevez accused, "It looks like you're kind of guessing now," and asked, "Are you just trying to answer, to answer the question the way you think the person wants you to answer?" 3 RP at 491, 500. Ramirez-Estevez further cross-examined E.O. about whether she had known the definition of "rape" when she told her friends about Ramirez-Estevez's alleged rapes or whether she had found out only when Kolb told her. Ramirez-Estevez also questioned E.O. about her prior allegedly *inconsistent* statements to Kolb about how long some of the rapes had lasted, what she had been wearing, and whether Ramirez-Estevez had raped her only anally or both vaginally and anally.

Moreover, from the time of his counsel's opening statement through his testimony on the witness stand, and concluding with his closing argument, Ramirez-Estevez's defense was an

absolute denial: He claimed that he never raped E.O. and that she was lying about the accusations against him. His defense themes thus underscore that his cross-examination of E.O. was an "express or implied charge against the declarant of recent fabrication." ER 801(d)(1)(ii).

b. Motive to lie

We next address whether Kolb's interview with E.O. "predate[d] [a] reason to lie." *Perez*, 137 Wn. App. at 107. If E.O. "foresaw the legal consequences of h[er] statements," then this fact would weigh against her having made the statement before the motive to lie arose. *State v. Epton*, 10 Wn. App. 373, 377, 518 P.2d 229, *review denied*, 83 Wn.2d 1011 (1974); *see also State v. Bray*, 23 Wn. App. 117, 125-26, 594 P.2d 1363 (1979). Here, the record shows that E.O. might have anticipated some legal consequences of her interview with Kolb. When Kolb arrived, he told E.O. that he "was a detective with the sheriff's office." 4 RP at 629. "[E.O.] was very shocked to see [him]" and appeared to "kn[ow] what she had to talk about." 4 RP at 629.

Ramirez-Estevez also contended that E.O. had a motive to lie—to shift the focus away from her poor grades in school and to gain attention. But

> [t]he mere assertion that motives to lie may have existed at the time of the prior statement is insufficient to prevent their admission. The trial court must decide, as a threshold matter, whether the proffered motive evidence rises to the level necessary to exclude the prior consistent statement.

Makela, 66 Wn. App. at 173. For example, in *State v. Ellison*, 36 Wn. App. 564, 569, 676 P.2d 531, *review denied*, 101 Wn.2d 1010 (1984), Division One of our court held that a trial court erred by admitting a defendant's prior consistent statement to police that inculpated his co-defendant because the first defendant had made the statement after the State offered him a plea bargain.

Here, the trial court ruled that Ramirez-Estevez's proffered evidence of E.O.'s alleged motive to lie was insufficient to exclude Kolb's interview with E.O. Unlike the circumstances in *Ellison*, Ramirez-Estevez's allegation was based almost entirely on speculation. Accordingly, we

hold that the trial court did not abuse its discretion when it admitted the digital audio recording of E.O.'s interview with Kolb as a prior consistent statement under ER 801(d)(1)(ii) to rebut Ramirez-Estevez's charges of E.O.'s fabrication and motive to lie.

D. Davis's Medical Testimony

Ramirez-Estevez mischaracterizes the record in asserting that the trial court erred by permitting Davis to give her opinion that E.O. had been sexually assaulted. Davis did not opine that E.O. had been sexually abused. Davis testified only that notches on a hymen "do[] not always mean sexual abuse" and that E.O.'s notches were "consistent with [E.O.'s] medical history," namely, the story that E.O. told Davis. 3 RP at 593, 595. Davis did not comment on Ramirez-Estevez's guilt or on E.O.'s credibility. Expert testimony that does not touch on either of these subjects is generally admissible. *See State v. Kirkman*, 159 Wn.2d 918, 929-30, 155 P.3d 125 (2007).[10] We review the trial court's admission of evidence under ER 702 for an abuse of discretion. *Phillippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). We hold that the trial court did not abuse its discretion in admitting Davis's testimony.

II. "To Convict" Jury Instructions

Ramirez-Estevez also argues that the "to convict" jury instructions violated his constitutional rights under the Fifth Amendment of the United States Constitution and article I, section 9 of our state constitution to be free from multiple punishments for the same act.

[10] *See also State v. King*, 131 Wn. App. 789, 800, 130 P.3d 376 (2006), *review denied*, 160 Wn.2d 1019 (2007); *State v. Stevens*, 58 Wn. App. 478, 496-98, 794 P.2d 38, *review denied*, 115 Wn.2d 1025 (1990).

Because he failed to object to these instructions below[11] and fails to demonstrate a "manifest error affecting a constitutional right,"[12] we do not further consider this argument. RAP 2.5(a)(3).

We affirm.

HUNT, J.

We concur:

PENOYAR, C.J.

WORSWICK, J.

[11]Accepting Ramirez-Estevez's sole objection to the trial court's proposed "to convict" instructions, the trial court removed the "or acts" language from the following instruction:

> To convict the defendant on any count of rape of a child in the first degree, one particular act of rape of a child in the first degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act *or acts* have been proved.

4 RP at 689 (emphasis added to denote language deleted at Ramirez-Estevez's request).

[12] The record shows that the trial court's instructions and the State's presentation of evidence and argument went to great lengths to avoid the risk that the jury might convict Ramirez-Estevez multiple times for the same act. *See, e.g.*, *State v. Ellis*, 71 Wn. App. 400, 401-03, 859 P.2d 632 (1993) (nearly identical jury instructions and material from closing argument deemed constitutionally sufficient). Thus, despite Ramirez-Estevez's characterization of a constitutional error, he does not show that it was "manifest." As Division Three of our court has explained,

> If the claimed error is of constitutional magnitude, we determine whether the error is manifest. "Manifest in RAP 2.5(a)(3) requires a showing of actual prejudice." To demonstrate actual prejudice there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest."

State v. Nunez, 160 Wn. App. 150, 158, 248 P.3d 103 (internal quotation marks omitted; alteration in original) (quoting *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)), *review granted*, 172 Wn.2d 1004 (2011).