IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GERMAINE DESHONNE CARTER, Appellant.	No. 38264-4-II consolidated with
IN RE THE PERSONAL RESTRAINT PETITION OF: GERMAINE DESHONNE CARTER.	No. 39516-9-II PART PUBLISHED OPINION

Worswick, J. — Germaine Carter appeals his convictions for four counts of first degree child rape. He raises trial court evidentiary error, prosecutorial misconduct, and double jeopardy arguments. In a consolidated personal restraint petition (PRP), he also raises additional claims of improper witness vouching and ineffective assistance of counsel. On the double jeopardy issue, we agree and remand with instructions to dismiss three of the four rape convictions. We affirm one rape conviction and deny the PRP.

FACTS

AC, born April 28, 1997, is Carter's daughter. She lived with Carter between 2003 and September 2004. While she lived with her father, he would come into her room at night and rape

her. After it was over, he would tell her to either take a shower and go to bed or to just go to sleep. She did not testify as to specific dates for any of the rapes, stating only that they happened "[m]ost of the nights" at his home, more than 4 times, and between 40 and 50 times. IV Report of Proceedings (RP) at 186.

AC moved out of Carter's home in September 2004. She then lived with her aunt and later with her grandmother. After moving to her grandmother's house, AC met a neighbor named AS, and they quickly became close friends.[1] AC and AS were having a sleepover when AC appeared sad. AS asked AC why she was sad. AC told AS that her dad did something to her. AC would not tell AS exactly what happened. AS then asked AC a series of questions, trying to guess what Carter had done to AC. AC eventually said that her dad had put his private parts inside her.

In May 2007, when AC and AS were riding in a car driven by AC's grandmother, AC told AS that she loved and missed her dad. AS asked AC why she would feel that way about her dad after what he did to her. AC's grandmother overheard this remark and asked AC what her dad did to her. AC would not tell but asked AS to tell. AS told AC's grandmother that Carter had raped AC. AC's grandmother then contacted the Pierce County Sheriff's Office.

On May 23, a child forensic interviewer met with AC. AC said that Carter would " 'stick his wiener up [her] butt.' " Clerk's Papers (CP) at 3. She also said that it would hurt and that when she cried he would tell her to be quiet. She further stated that Carter had threatened her and had told her not to tell anyone. On May 30, detectives interviewed Carter. Carter denied

[1] AS was 12 years old at the time of trial.

anally raping AC but said that he used to " 'pop zits or boils' " on her buttocks. CP at 3.

The State charged Carter with four counts of first degree child rape. RCW 9A.44.073. The trial court held a *Ryan* hearing to determine the admissibility of AC's child hearsay statements to her friend, AS. *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984). The trial court heard testimony from AC, AS, and AC's grandmother. The trial court expressed some concerns about the reliability of AC's statements, but it ultimately found them to be reliable and admitted them into evidence. The trial court also found AS's testimony to be reliable and that AS was a particularly strong witness.

A jury heard the case. Several witnesses testified, including AC, AS, AC's grandmother and aunt, and the child forensic interviewer. In its rebuttal argument, the State argued, in response to Carter's argument that AC did not scream when he raped her, "Do you think that [Carter] would have stood for that, and as he's anally raping her, if she lets out noise, do you think she would still be breathing?" VIII RP at 571. The trial court sustained Carter's objection to this remark. Carter never requested a curative instruction.

The trial court instructed the jury, giving them four nearly identical "to convict" instructions,[2] a unanimity instruction,[3] and an instruction stating, "A separate crime is charged in

---

[2] Aside from the count number, the trial court here gave four identical "to-convict" instructions:

> To convict the defendant of the crime of rape of a child in the first degree, as charged in Count . . . , each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That during the period between the 10th day of December, 2003 and the 10th day of December, 2004, the defendant had sexual intercourse with A.C.;

CP at 68-71.

[3] The trial court here gave the following unanimity instruction:

> There are allegations that the defendant committed acts of rape of a child in

each count."[4] Neither the prosecutor nor Carter requested a jury instruction requiring that the jury find a "separate and distinct act" for each count.

The jury found Carter guilty of all four counts. The trial court denied his motion for a new trial based on the prosecutor's rebuttal argument. Carter appeals.

ANALYSIS

Direct Appeal

Double Jeopardy

Carter contends that the trial court's failure to adequately inform the jury that it had to find a "separate and distinct act" for each of the four identically charged rape counts exposed him to double jeopardy. Appellant's Br. at 14. He did not propose such an instruction to the trial court, nor did he raise the issue below; but because the issue is one of constitutional magnitude, we consider it for the first time on appeal. *State v. Hanson*, 59 Wn. App. 651, 659, 800 P.2d 1124 (1990). We agree that the instructions were inadequate.

The double jeopardy clauses of the United States and Washington State Constitutions protect a defendant from multiple convictions for the same crime. *State v. Tvedt*, 153 Wn.2d 705,

---

> the first degree on multiple occasions. 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 has been proved beyond a reasonable doubt. You need not unanimously agree that the defendant committed all the acts of rape of a child in the first degree.

CP at 72.

[4] The complete instruction given by the trial court is as follows: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP at 37.

710, 107 P.3d 728 (2005). We review jury instructions de novo in the context of the instructions as a whole. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Jury instructions "must make the relevant legal standard manifestly apparent to the average juror." *State v. Borsheim*, 140 Wn. App. 357, 366, 165 P.3d 417 (2007).

Carter cites *State v. Berg*, 147 Wn. App. 923, 198 P.3d 529 (2008), for his proposition. The State counters that Carter's argument fails because the charging documents, evidence presented, jury instructions and closing arguments all made clear that each count required proof of a separate act. The State relies on *State v. Ellis*, 71 Wn. App. 400, 859 P.2d 632 (1993) and *State v. Hayes*, 81 Wn. App. 425, 914 P.2d 788 (1996).[5]

In *Berg*, the defendant was charged with two counts of child molestation. 147 Wn. App. 927-28. The court gave two separate but nearly identical "to convict" instructions,[6] a standard unanimity instruction,[7] and an instruction stating, "A separate crime is charged in each count."[8]

---

[5] All of the cases cited by the parties stem from *State v. Noltie*, 116 Wn.2d 831, 843-43, 809 P.2d 190 (1991), in which our Supreme Court held that in multiple acts cases where several acts are alleged, jury must be unanimous as to which act constitutes the count charged and that they are to find "separate and distinct acts" for each count when the counts are identically charged.

[6] The "to convict" instructions in relevant part were as follows:

> To convict the defendant of the crime of child molestation in the third degree, as charged in count . . . , each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That during a period of time intervening between March 1, 2007 through May 6, 2007, the defendant had sexual contact with A.A.

Berg, 147 Wn. App. at 934.

[7] Aside from the specific factual information, the unanimity instruction language in *Berg* is the same as the instruction in this case.

[8] This instruction in *Berg* is substantially the same as in the case here.

Berg, 147 Wn. App. at 935. The court found a double jeopardy violation because the trial court did not give a "separate and distinct act" instruction or otherwise require that the jury base each conviction of third degree child molestation on a "separate and distinct" underlying event. *Berg*, 147 Wn. App. at 930-32.

In *Ellis*, we held that the ordinary juror would understand that when two counts charge the very same type of crime, each count requires proof of a different act.[9] 71 Wn. App. at 406. But the instructions in *Ellis*, unlike the present case, affirmatively instructed the jury that it was required to unanimously agree that at least one particular act had been proved for each count. 71 Wn. App. at 404-05. The "to-convict" instructions for the molestation charges made it clear that the jury must find the conduct for count II occurred "on a day other than" count I, and the "two convict" instructions for the rape charges gave different dates. *Ellis*, 71 Wn. App. at 402.

In *Hayes*, Division one of this court reiterated our Supreme Court's holding that no double jeopardy violation results when the information, instructions, testimony and argument clearly demonstrate that the State was not seeking to impose multiple punishments for the same

[9] In *Ellis*, the defendant was charged with two counts of first degree child molestation and two counts of first degree child rape. Each of the trial court's "to convict" instructions differed. For the instruction regarding count I, the instruction stated "that to convict on count I, the jury had to find, beyond a reasonable doubt, that between January 1987 and December 1989, Ellis had sexual contact with C.R., that C.R. was less than 12 years old, and that Ellis was more than 36 months older than C.R." *Ellis*, 71 Wn. App. at 401-02. The court set forth the same elements for count II in a separate instruction adding, that count II had to have occurred "on a day other than Count I." *Ellis*, 71 Wn. App. at 402. For count III, the instruction said "that to convict on count III, the jury had to find, beyond a reasonable doubt, that between January 1987 and June 1988, Ellis had sexual intercourse with C.R., that C.R. was less than 12 years old, and that Ellis was more than 24 months older." *Ellis*, 71 Wn. App. at 402. Regarding count IV, the court reiterated the same elements as it had for count III; the dates, however, were between January 1988 and December 1989. *Ellis*, 71 Wn. App. at 401-02.

offense. 81 Wn. App. at 439-40. But the jury instructions in *Hayes* still conveyed that a separate and distinct act must be found for each count when it stated in the "to-convict" instructions that the jury must find on "an occasion separate and distinct from that charged in [the remaining counts], the defendant had sexual intercourse with [K]." 81 Wn. App. at 431 n.9.

The present case is most similar to *Berg* and is distinguishable from *Ellis* and *Hayes*. While the trial court gave a unanimity instruction here, no instruction conveyed the requirement that the jury find a "separate and distinct act" for each count of child rape. And the four "to-convict" instructions, aside from the count number, were exactly the same, including the time period.

Here, Carter's arguments persuade us. The jury instructions did not make the relevant legal standards manifestly apparent to the average juror and exposed Carter to the possibility of multiple convictions for the same criminal act. Thus, we remand with instructions to dismiss three of the four child rape counts.

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.

Child Hearsay Statements

Carter next contends that the trial court erred in admitting unreliable child hearsay and, in doing so, the trial court denied him a fair trial. We disagree, holding the court properly used its discretion in admitting the statements.

We reverse a trial court's admission of child hearsay statements under RCW 9A.44.120

when there is a manifest abuse of discretion. *State v. Woods*, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005). The trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). We review the factual findings supporting the admission for substantial evidence, which is a quantity of evidence in the record sufficient to persuade a fair-minded, rational person that the finding is true. *State v. Halstien*, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993). But we consider an erroneous finding harmless if it does not materially affect the trial court's legal conclusions. *State v. Caldera*, 66 Wn. App. 548, 551, 832 P.2d 139 (1992).

Hearsay statements of a child under age 10, describing actual or attempted sexual contact, are admissible in criminal proceedings in which the child testifies if the trial court determines that "the time, content, and circumstances of the statement[s] provide sufficient indicia of reliability." RCW 9A.44.120. Courts look to the circumstances surrounding the making of the out-of-court statement to determine its reliability. *Ryan*, 103 Wn.2d at 174.

The child hearsay statement's reliability depends on the nine *Ryan* factors: (1) whether there is an apparent motive to lie, (2) the declarant's general character, (3) whether more than one person heard the statements, (4) whether the statements were spontaneous, (5) the timing of the declaration and the relationship between the declarant and the witness, (6) whether the statement contains express assertions about past facts, (7) whether cross-examination could show the declarant's lack of knowledge, (8) whether the possibility that the declarant's recollection is faulty is remote, and (9) whether the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented the defendant's involvement. 103 Wn.2d at 175-

76; *see also State v. Swan*, 114 Wn.2d 613, 647-48, 790 P.2d 610 (1990). The statements must only substantially meet these factors. *Woods*, 154 Wn.2d at 623-24.

Carter asserts that the trial court erred in finding AC's statements reliable. He bases his assertion on the following reasons: (1) AS kept "guessing" what might be bothering AC until AC eventually agreed that she thought her father had raped her; (2) the trial court noted that no one else heard the statements; (3) the trial court could not say the statements were spontaneous because AC was merely agreeing with AS; and (4) the trial court noted that AC's naiveté suggested it was unlikely she was making the accusations up, but it also left her susceptible to suggestion and the court found it was possible AS put words in AC's mouth.

Even though the trial court expressed some concern regarding the reliability of AC's statements to AS, it still analyzed the statements relative to the *Ryan* factors on the record and ultimately found them to be reliable. As the statements substantially met the factors, the trial court did not abuse its discretion here. Thus, Carter's argument fails.

Carter also asserts that the trial court erred in using AS's strong testimony at the *Ryan* hearing as a basis to find AC's statements to be reliable.[10] He misconstrues the record in making

---

[10] Carter's assertion relates to the trial court's following statement:

> But I have to say this about [AS]: I haven't seen a witness of that age that was as strong a witness in—I don't know if I've ever seen one that strong. She's a powerful witness. There's just no other way about it. She appeared to be speaking without deception, very straightforward, articulate, bright. There wasn't anything at all under the totality of circumstances that suggested she was making it up. And the way she said it just had a logical flow to it, such that it seemed to describe how you would expect a reticent nine-year-old who is—has undergone something like this to react in relation to someone who's a friend who's trying to get her to disclose.
>
> The overall circumstances just strongly suggest reliability on both girls' parts. I think, on balance, while there are certainly some concerns, that they are

this argument. The trial court still weighed the *Ryan* factors and made the requisite reliability finding as to AC's statements. Thus, this argument fails.

---

concerns that need to be dealt with in the totality of presenting this case and are not such that suggest that the statements are unreliable to the extent they ought to be admitted. I am going to rule that the statements are admissible.

I RP at 96-97.

Prosecutorial Misconduct

Carter further contends that the State committed misconduct when the prosecutor said that Carter would have killed AC had she screamed. We disagree. In order to prevail on these claims, Carter must show both improper conduct and resulting prejudice. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). A prosecutor's comments are prejudicial when they are substantially likely to affect the jury's verdict. *McKenzie*, 157 Wn.2d at 52. When determining the prejudicial effect of the conduct, we look to the context of the entire argument, the issues of the case, the evidence, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

We do not reverse when the trial court could have corrected a prosecutor's improper remark by a curative instruction the defense counsel failed to request. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If defense counsel fails to object to improper remarks by the prosecutor, he has waived the error on appeal "unless the remark is deemed to be so flagrant and ill intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Hoffman*, 116 Wn.2d at 93. Where, as here, a claim of prosecutorial misconduct is raised in a motion for a new trial below, we examine the trial court's decision for an abuse of discretion. *McKenzie*, 157 Wn.2d at 52.

Carter's contention stems from the following remarks made by the State in its rebuttal argument:

> [STATE:] The defense makes a big deal about screaming, about how [AC's] screams would have been heard by other people in the house. Well, here's one thing that we do know: [AC] said that it was hurting, and at one point, she said that she didn't say that she was screaming. I'm sure she wanted to scream, and she may have thought that she was making more noise than she was, and she

> might have screamed at one point. What do you think [Carter] did if she would make any noise? You know how concerned he was about anybody finding out about this. *Do you think that he would have stood for that, and as he's anally raping her, if she lets out noise, do you think she would still be breathing?* She was scared.
>
> [DEFENSE COUNSEL]: Your Honor, I have to object to that comment that she would still be breathing.
>
> THE COURT: Sustained.
>
> [DEFENSE COUNSEL]: It's uncalled for.

VIII RP at 571 (emphasis added). In denying Carter's motion for a new trial, the trial court noted that (1) the State placed very little emphasis on the statement; (2) in the context of the case, the statement most likely did not sway the jury; and (3) the trial court sustained defense counsel's objection at the time.

Several reasons support the trial court's decision to deny Carter's motion for a new trial. First, he never requested a curative instruction, nor has he shown that such an instruction would have failed to cure the misconduct. Second, he has failed to show a substantial likelihood that the argument influenced the jury. And third, the trial court instructed the jury that counsel's arguments are not evidence; the jury is presumed to follow the court's instructions. *See State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). In light of this, the trial court did not abuse its discretion here. Thus, Carter's argument fails.

Personal Restraint Petition

Carter also raises additional claims pro se in a PRP. A personal restraint petitioner has the burden of proving constitutional error that results in actual prejudice or nonconstitutional error that results in a miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Regardless whether the petitioner bases his challenge on constitutional or

nonconstitutional error, he must state facts on which the claim of unlawful restraint is based and the evidence available to support the factual allegations; he cannot rely solely on conclusory allegations. RAP 16.7(a)(2); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988); *see also Cook*, 114 Wn.2d at 813-14. Also, "a petitioner must show that more likely than not he was prejudiced by the error. Bare allegations unsupported by citation of authority, references to the record, or persuasive reasoning cannot sustain this burden of proof." *State v. Brune*, 45 Wn. App. 354, 363, 725 P.2d 454 (1986).

Witnesses Vouching for Victim's Credibility

Carter contends that the child forensic interviewer and AC's aunt both impermissibly vouched for AC's credibility during their testimony. Witnesses may not give an opinion of another witness's credibility. *State v. Carlson*, 80 Wn. App. 116, 123, 906 P.2d 999 (1995). Carter did not raise this argument below. Generally, a defendant waives any issues not raised in the trial court. RAP 2.5(a); *see State v. Smith*, 155 Wn.2d 496, 501, 120 P.3d 559 (2005). But a defendant can raise alleged manifest constitutional errors for the first time on appeal. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). Carter, however, has failed to demonstrate manifest constitutional error. *See State v. Kirkman*, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007) (defendant must identify a constitutional error and show that the error actually affected the defendant's rights at trial). Carter's argument fails.

Ineffective Assistance of Counsel

Carter also contends that he received ineffective assistance of counsel. He argues that his attorney failed to (1) call an expert witness, (2) call exculpatory witnesses, and (3) object to

vouching testimony.

The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. An appellant claiming ineffective assistance of counsel must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel's deficient performance, the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). We start with a strong presumption of counsel's effectiveness. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Additionally, legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996).

Carter first asserts that his defense counsel provided ineffective assistance for failing to call an expert witness to discuss how AC developed an impetigo infection.[11] Generally, whether to call a witness is a matter of legitimate trial tactics. *State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995). And the failure to provide expert witness testimony is only deficient when the expert was necessary to explain something lay witnesses could not. *State v. Thomas*, 109 Wn.2d 222, 231-32, 743 P.2d 816 (1987). There was ample testimony in the record regarding the details of AC's impetigo infection. Moreover, Carter has failed to adequately demonstrate how expert testimony would have benefited his defense; nor has he shown how his counsel's

[11] The discussion of AC's impetigo infection arose during the child forensic interviewer's testimony.

failure to call an expert constituted deficient performance and resulting prejudice. Thus, his argument fails.

Carter also asserts that his defense counsel was ineffective for failing to call several witnesses that either lived in or were aware of the living situation in Carter's home. Carter included declarations from three individuals, all of whom declared in some form or another that they did not believe that Carter abused AC. Here, the attorney's decision not to call a witness is a legitimate trial tactic and falls outside the bounds of an ineffective assistance of counsel claim. *Maurice*, 79 Wn. App. at 552. Carter has failed to show how the failure to present this testimony constituted deficient performance and resulting prejudice. Thus, this argument also fails.

Finally, Carter asserts that his defense counsel was ineffective for failing to object to vouching testimony by the child forensic interviewer and AC's aunt. With regard to the child forensic interviewer, Carter refers us to the following exchange on direct examination:

> [STATE:] Based on your interview with [AC] and what you talked about with her grandma before you started and any other background information that you had going into this, were you aware of any motive that [AC] had lied about what occurred?
>
> [WITNESS:] No, no.

V RP at 253.

Although the failure to object to improper testimony critical to the State's case may constitute ineffective assistance of counsel, Carter has failed to demonstrate how the State's question solicited improper testimony. *See Hendrickson*, 138 Wn. App. 827, 831-33, 158 P.3d 1257 (2007), *aff'd*, 165 Wn.2d 474, 198 P.3d 1029, *cert. denied*, 129 S. Ct. 2873 (2009). The State simply asked whether the witness was aware of any motive that would have caused AC to

lie about what had occurred. *See Kirkman*, 159 Wn.2d at 929-30 (physician's expert testimony that he found nothing on the physical examination of child rape victim "that would make me doubt what she'd said" was not a clear comment on victim's credibility). Even if Carter could make the requisite showing, he has not demonstrated how his counsel's failure to object prejudiced him.

And with regard to AC's aunt's testimony, Carter refers us to an exchange between his own counsel and the witness. As the State argues, a party cannot set up an error at trial and then complain about it on appeal. *See In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 94, 66 P.3d 606 (2003). All of Carter's ineffective assistance of counsel claims fail.

We affirm one conviction, reverse the remaining three convictions with instructions to dismiss, and deny the PRP.

_____
Worswick, J.

We concur:

_____
Armstrong, J.

_____
Penoyar, C.J.